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TITLE: UNANIMOUS-CONSENT AGREEMENT
APPOINTMENT OF CONFEREES ON S. 21

SPEAKER: MR. MITCHELL

TEXT:

[*S13985]

Mr. MITCHELL. Mr. President, as if in legislative session, I ask unanimous consent that the Senate turn to the message from the House on S. 21, the **California** desert bill; that the Senate request a conference with the House on the disagreeing votes of the two Houses, and that the Chair be authorized to appoint conferees.

The PRESIDING OFFICER. Is there objection?

Mr. WALLOP. Mr. President, reserving the right to object, and I shall not, but at a later time today, I will make a statement about this legislation. The statement will go to the effect that I have no objection-and I think the Senator from **California** realizes-to the protection of the desert, though I feel that it is now. But I have an equal feeling and obligation to the National Park System and Park Service which in effect are being taxed beyond their capacity by the endless addition of new parks and new demands on them. So with the understanding, Mr. President, that at some moment during the day [*S13986] in connection with this I may make that statement, I will not delay it now.

There being no objection, the Presiding Officer (Mr. Wellstone) appointed Mr. Bumpers , Mr. Johnston , and Mr. Wallop conferees on the part of the Senate.

Mr. MITCHELL. I thank my colleague.

Mr. THURMOND. Mr. President, I rise today in opposition to the nomination of Judge Sarokin to serve on the U.S. Court of Appeals for the Third Circuit.

Judge Sarokin was appointed to the district court 15 years ago by President Carter and since that time he has earned the reputation as a liberal judicial activist. In 1992, the New Jersey Law Journal observed that Judge Sarokin is considered the most liberal member of the Federal bench in New Jersey and further that Judge Sarokin may be the most reversed Federal judge in New Jersey when it comes to major cases. Additionally, the Almanac of the Federal Judiciary stated that ''Sarokin is the most liberal judge on the District of New Jersey bench, according to a majority of civil attorneys.'' Also, the third circuit, the very court to which he has been nominated, has criticized Judge Sarokin for ''judicial usurpation of power'', for ignoring ''fundamental concepts of due process'', for destroying the appearance of judicial impartiality, and for ''superimposing his own view of what the law should be in the face of the Supreme Court's contrary precedent.''

Mr. President, these comments and a thorough review of Judge Sarokin's opinions have caused me great concern that he may be elevated to such an important court as the U.S. Court of Appeals for the Third Circuit. I questioned Judge Sarokin extensively during his nomination hearing before the Senate Judiciary Committee and his responses did little to mitigate my concerns based on his record before us.

For example, I questioned Judge Sarokin on his opinion in the case of Kreimer versus Bureau of Police for the Town of Morristown where he was reversed by the third circuit. In that case, Kreimer was a homeless man who frequented the public library in Morristown. According to the library staff, Kreimer often exhibited offensive and disruptive behavior, including following library patrons, talking loudly to himself and others. Also, according to the library staff, Kreimer's odor was so offensive that it prevented library patrons from using certain areas of the library and prohibited library employees from performing their jobs. In 1989, the library enacted a written policy prohibiting certain behavior in the library and authorizing the library director to expel persons who violated them. After he was expelled from the library at least five times for violating these rules, Kreimer sued the library and others in Judge Sarokin's court. In granting summary judgments in favor of Kreimer, Judge Sarokin ruled that the library policy was facially unconstitutional.

Judge Sarokin found that the library is a traditional public forum. Under Supreme Court precedent, the category of traditional public forums covers public places, such as streets, sidewalks, and parks, that have, by long tradition, been devoted to assembly and debate. Of course, under the Supreme Court's precedent, regulations affecting speech in a ''traditional public forum'' are accorded a strict standard of review.

As I stated earlier, Judge Sarokin found that a public library is a ''traditional public forum'', yet he cited no precedent in support of that ruling. I do not believe that his ruling was faithful to existing precedent.

Mr. President, I would just point out that the third circuit found Judge Sarokin's ruling to be clearly wrong. As the third circuit observed and I quote, ''Obviously, a library patron cannot be permitted to engage in most traditional First Amendment activities in the library, such as giving speeches or engaging in any other conduct that would disrupt the quiet and peaceful library environment.'' End quote. Also, I note that the third circuit disagreed with Judge Sarokin that a library is a full-fledged designated public forum. Under Supreme Court precedent, a full-fledged designated public forum is a public place that has been designated by the government as devoted to assembly and debate. Clearly under this precedent, the third circuit got it right, a library is not a place of open assembly and debate.

Additionally, Judge Sarokin also ruled that the library policy was unconstitutional overbroad and he relied heavily on a misreading of a 1966 Supreme Court ruling in Brown versus Louisiana. Judge Sarokin defended his opinion on a position taken only by a plurality of the Supreme Court in the Brown decision. Again, the third circuit did not see it his way and found that the library policy was not substantially overbroad.

Additionally, Judge Sarokin ruled that the library policy was unconstitutionally vague. In fact, he stated that paragraph ;one of the library policy was ''hopelessly vague.'' Mr. President, the following is paragraph one of the library policy which Judge Sarokin found unconstitutional and ''hopelessly vague'':

''Patrons shall be engaged in activities associated with the use of a public library while in the building. Patrons not engaged in reading, studying, or using library materials shall be required to leave the building.''

Frankly, Mr. President, that paragraph seems clear to me and certainly not muddled enough to

be unconstitutionally vague as Judge Sarokin found it. In fact, the third circuit had no difficulty concluding that paragraph one and the other paragraphs of the library policy were sufficiently clear.

Judge Sarokin also concluded that the library policy violated the equal protection clause. According to his analysis, just as a poll tax for voting draws an improper line based on wealth, so does the library's hygiene rule, since it has a disparate impact on those poor patrons who do not have regular access to shower and laundry facilities. The third circuit, noting that the homeless do not constitute a suspect class, rejected his analysis and held that the library policy did not violate equal protection.

Mr. President, I have spent a significant amount of time on this case because it appears to be a good example of Judge Sarokin's approach to judging, one of judicial activism. The third circuit made clear that in each of his rulings on the issues I have just discussed, he was patently wrong. It strikes me that Judge Sarokin's ruling in this case distorts precedent.

I find this ruling as one in furtherance of an ideology which, whether intended or not, restricts a community from enforcing even minimal standards essential to the public good. This concerns me as to how Judge Sarokin would approach a community's ability to govern itself. I would just note that my concerns are heightened by his opinions in cases like E-Bru, Inc. versus Graves-in which Judge Sarokin spoke for the right of those who want to open adult book stores in communities that do not want them-and Knoedler versus Roxbury Township-in which Judge Sarokin ruled facially invalid an ordinance prohibiting the sale of drug paraphernalia.

Mr. President, I would now like to turn to Judge Sarokin's 1984 opinion in United States versus Rodriguez. In this case, Mr. Rodriguez was arrested on theft-related charges. At FBI headquarters, he was handed a form in Spanish advising him of his rights and stating that by his signature he agreed to waive them. Mr. Rodriguez read the form, but rather than signing his own name, he signed a false name. He then answered certain questions asked of him by an FBI agent.

Despite Judge Sarokin's express finding that Rodriguez read the form and was aware of his rights before he spoke with the FBI agent, Judge Sarokin granted his motion to suppress evidence of his statements to the FBI agent.

Judge Sarokin offered two primary reasons in support of his conclusion. First, he cited the fact that Rodriguez signed a false name to the waiver form. In Judge Sarokin's view, and I quote, ''it does not strain logic to find the use of a name other than one's own to be wholly inconsistent with a voluntary waiver of rights: defendant might well have believed that by using a false name he was not committing himself to anything.'' End quote. In short, Judge Sarokin's ruling adopts a per se rule that anytime a defendant signs a false name, he cannot be deemed to have voluntarily waived his rights, no [*S13987] matter how compelling other evidence is concerning voluntariness.

Mr. President, there is no precedent of which I am aware that compels his result. In his opinion, Judge Sarokin cited United States versus Chapman which held that a false signature is not relevant to the issue of the voluntariness of the confession. This is contrary to Judge Sarokin's ruling that the use of a false name is inconsistent with a voluntary waiver of rights.

The defendant's appearance before the magistrate was the second factor on which Judge Sarokin relied in finding his statements to the FBI agent involuntary. Mr. Rodriguez was asked by the magistrate whether he wanted a lawyer and he stated that he did. It was Judge Sarokin's opinion that this ''certainly gives rise to an inference of nonvoluntariness with respect to the earlier waiver.''

Mr. President, I see no logical inconsistency between the fact that Rodriguez told the magistrate

that he wanted a lawyer for assistance at trial and a conclusion that earlier he voluntarily agreed to speak with an FBI agent in the absence of counsel. It appears to me that Judge Sarokin made quite a stretch here for excluding the evidence in his case.

Mr. President, I have mentioned several cases where Judge Sarokin's activist approach to judging causes concern. My colleagues have gone into other opinions by Judge Sarokin which leave doubt to his service as an impartial jurist should he be elevated to the U.S. Court of Appeals for the Third Circuit.

I accord the President considerable deference in his constitutional responsibility to nominate individuals to the federal judiciary. In fact, we are fast approaching 100 Federal judges nominated by President Clinton which I have supported. However, in this instance, I cannot in good faith support the elevation of Judge Sarokin to the U.S. Court of Appeals for the Third Circuit. Although a pleasant and engaging individual, Judge Sarokin's record is one of judicial activism where time and time again he followed his own agenda rather than adhering to binding judicial precedent from the Supreme Court and the third circuit. It is for these reasons that I will vote against the nomination of Judge H. Lee Sarokin to serve on the U.S. Court of Appeals for the Third Circuit.

Mr. President, I ask unanimous consent that the letters I now submit be printed in the Congressional Record.

There being no objection, the letters were ordered to be printed in the Record, as follows:

Congress of the United States,

Washington, DC, Aug. 5, 1994.

Hon. Strom Thurmond,

Russell Senate Office Building,

Washington, DC. Dear Senator Thurmond: As you appraise the nomination of Judge H. Lee Sarokin of the U.S. District Court in New Jersey to the Third Circuit Court of Appeals, we urge you to carefully consider his record and reject his nomination.

Judge Sarokin has a lengthy record of freeing criminals at the expense of their victims. His nomination by President Clinton to a higher federal court is opposed by the National Sheriffs' Association, the Law Enforcement Alliance of America, the Fraternal Order of Police, Organized Victims of Violent Crime, the U.S. Business and Industrial Council, and the League of American Families.

In one of his more infamous trials-Landano v. Rafferty-Judge Sarokin gave freedom without redemption to James Landano, who shot several times at close range and killed a Newark, NJ police officer. Landano was convicted to life imprisonment by the New Jersey Superior Court; however, due to Judge Sarokin's personal judicial activism, Landano has been freely roaming the streets. In this particular case, Judge Sarokin's rulings to free Landano have been so egregious that the U.S. Court of Appeals was forced to reverse his decisions four times.

In the Landano case, Judge Sarokin attempted to project his authority over the State's highest court and to extend Landano's opportunities for release. Additionally, he ordered the FBI to turn over federal documents to Landano for use in his defense, despite the fact that the FBI felt that this would jeopardize the safety of federal informants. In the final reversal, rejecting Sarokin's permission to release Landano on bail, the Third Circuit intimated that Judge Sarokin's personal bias was an obstacle to justice in this case: ''(the U.S. District Court for NJ) has already determined that (Landano) may be innocent of the charges for which he was convicted.''

Crime has become so prevalent in our neighborhoods that Americans have nearly become desensitized to it. And much of the blame lies with judges like H. Lee Sarokin who have neglected the rights of Americans to be safe in their communities. As Representatives from the State over which Judge Sarokin presently presides, we can attest to the fact that New Jerseyans are becoming fed up with this elitist attitude from the bench.

Just last week in Hamilton Township, an average middle-class suburb of Trenton, a seven-year old girl was brutally raped and murdered by a man living in her neighborhood. The killer had been twice convicted of violent sex-crimes against children and had been released from jail after serving only three-fifths of his sentence. Residents of Hamilton joined a nationwide ''night out'' on Tuesday to show criminals, like the one who confessed to killing little Megan Kanka, that they will no longer tolerate such deviant behavior. We believe that it is critical for members of our judicial system to keep criminals in jail. Judge Sarokin's inclination for early release of criminals runs contrary to community sentiment and therefore should not be rewarded.

Enclosed are materials from Coalitions for America and the Free Congress Foundation, as well as a Wall Street Journal editorial from August 3, 1994, summarizing Judge Sarokin's record. We hope that you will take these facts into consideration when voting on Judge Sarokin's nomination.

We appreciate your attention to this matter.

Sincerely,

Law Enforcement Alliance

of America,

July 26, 1994.

Hon. Orrin G. Hatch,

U.S. Senate,

Washington, DC. Dear Senator Hatch: The recent nomination of U.S. District Judge H. Lee Sarokin to the United States Court of Appeals for the Third Circuit by President Clinton is the latest example of the liberalization of our criminal justice system that began 30 years ago.

Judge Sarokin has repeatedly made use of his judicial position to promote social and personal issues and causes. He has also made it plain that he will continue to do so if confirmed to the United States Court of Appeals.

Crime is the number one concern of the American public. People are demanding real criminal justice reform-life imprisonment for repeat offenders, greater involvement for victims in the judicial process, the building of more prisons to take violent criminals off our streets.

Confirming Judge Sarokin will place another roadblock in the path of justice. Judge Sarokin, in the West Virginia Law Review, stated that he was opposed to both pre-trial detention of violent criminals and mandatory minimum sentencing guidelines. He also stated that admission of evidence guidelines should be stricter to protect criminals' rights.

Clearly, criminals will have a friend on the bench of the United States Court of Appeals if Judge Sarokin is confirmed.

The 40,000+ law enforcement officers, victims of crime and concerned citizens of the Law

Enforcement Alliance of America ask you to not confirm Judge Sarokin to the United States Court of Appeals. Justice will not be served in America as long as the rights of criminals are placed above the rights of law-abiding citizens.

Sincerely,

James J. Fotis,

Executive Director.

Fraternal Order of Police,

National Legislative Committee,

Lindenwold NJ, August 5, 1994.

Re nomination of H. Lee Sarokin to the U.S. Court of Appeals. U.S. Senate,

Washington, DC. To the Members of the U.S. Senate: On behalf of the 250,000 member National Fraternal Order of Police and, in particular, the members of the Fraternal Order of Police in the State of New Jersey, I am informing you that we are in total opposition to the appointment of Judge Sarokin to the U.S. Court of Appeals for the Third Circuit.

In at least one case, he has shown a propensity to be more of an advocate of social and personal causes than a judge. In a case involving the murder of a Newark, New Jersey police officer Judge Sarokin made it his mission to set a convicted person free.

Briefly stated, in 1976, Vincent Landano was convicted and sentenced to life in prison for the murder of a police officer during an armed robbery. Ignoring his oath of office and even after at least four reversals by the U.S. Court of Appeals for the Third Circuit and the U.S. Supreme Court, Judge Sarokin ordered Landano's release in June of 1989.

We, in the F.O.P., find this action appalling and adamately request that Judge Sarokin's nomination be denied. Our legal counsel in Washington is currently researching other cases that Judge Sarokin was involved [*S13988] in and hope to be able to bring more information to you as it becomes available.

Respectfully,

Robert J. Robbins, New Jersey National Trustee.

League of American Families,

Ringwood, NJ, August 4, 1994.

Senators Hatch and Dole,

U.S. Senate,

Washington, DC. Gentlemen: The Senate is considering the nomination of H. Lee Sarokin to the U.S. Court of Appeals for the Third Circuit. I strongly urge you to oppose this nomination for two reasons. First, as evidenced by his removal from the tobacco liability case by the U.S. Court of Appeals, he lacks the basic judicial temperament to be a judge. All Americans should demand judges who will be fair and impartial. Judge Sarokin has proven-even to the satisfaction of the liberal New York Times-that he lacks these qualities. His excuse at his hearing yesterday that, well, he is just ''irrepressible'' at times, is ridiculous.

Second, Judge Sarokin injects into his cases personal views that will have a devastating effect on American families. You have received information about his views on criminal justice issues. His opposition to pre-trial detention of criminal defendants would, in particular, put families and children especially at risk.

In E-Bru v. Graves, 566 F.Supp. 1476, a case dealing with the town of Paterson's prohibition on an adult bookstore opening, Judge Sarokin delivered the kind of lecture that characterizes many of his decisions. He made the outrageous statement that ''the harmful effect'' of pornography ''has never been clearly established.''

Since you voted last year to condemn the Justice Department's attempt to weaken the child pornography laws, you must know that this statement is simply false. New books have been published just in the last few years cataloging the harms of pornography. In addition, however, why does Judge Sarokin find this question significant at all? The Supreme Court has ruled that a community's ability to control pornography does not depend on scientific specifics. This is another example of his imposing his own personal standards in place of what the law requires.

Judge Sarokin testified at his hearing on August 3 that he would object to an adult bookstore opening near his home. Apparently, he is perfectly willing to impose on others an evil that he does not have to endure himself. America has enough judges who are so ignorant of the real-world impact of their decisions. Please do not add Judge Sarokin to that list by elevating him to the U.S. Court of Appeals.

Very truly yours, John T. Tomicki, J.D.

County of Cumberland,

Office of the Sheriff,

Bridgeton, NJ, July 21, 1994.

President William Clinton,

The White House,

Washington, DC. Dear President: As a Sheriff from New Jersey with over thirty-five years experience in the Law Enforcement, I find it incredible that you would consider nominating H. Lee Sarokin to the U.S. Court of Appeals.

I don't know who advised you on this but they were either asleep at the switch or they really don't give a damn about Law Enforcement. Judge Sarokin's crusade in behalf of cop-killer Landano is legendary in New Jersey.

As a Democrat, I'm astounded that you would make such a nomination. As a Law Enforcement Officer, I'm disappointed, disillusioned, and damned mad.

Please reconsider this nomination of this notorious cop-hating Judge.

Thanking you, I am

Very truly yours,

James A Forcinito,

Sheriff, Cumberland County.

Mr. THURMOND. Mr. President, these several letters are in opposition to Judge Sarokin.

The first letter I received was from five Members of the U.S. House of Representatives-all from New Jersey where Judge Sarokin currently sits-in opposition to Judge Sarokin's nomination. These Congressmen state unequivocally their opposition to Judge Sarokin and state that he has ''a lengthy record of freeing criminals at the expense of their victims.''

Another letter comes from Mr. James Fotis, executive director of the Law Enforcement Alliance of America (LEAA) in opposition to this nomination. In his letter speaking on behalf of the LEAA, Mr. Fotis stated that ''Judge Sarokin has repeatedly made use of his judicial position to promote social and personal issues and causes.'' He further stated that ''confirming Judge Sarokin will place another roadblock in the path of justice.''

The 250,000 member National Fraternal Order of Police sent a letter to the U.S. Senate expressing their ''total opposition'' to Judge Sarokin's nomination.

Still another letter comes from the League of American Families strongly urging opposition to Judge Sarokin's nomination. The League of American Families believes that Judge Sarokin lacks the judicial temperament and the ability to be a fair and impartial jurist on the U.S. Court of Appeals for the Third Circuit.

Finally, I have submitted a letter from the sheriff of Cumberland County in New Jersey to President Clinton in opposition to Judge Sarokin. This Democrat sheriff with over 35 years of experience in law enforcement stated to the President that he was astounded, disappointed, and disillusioned over this nomination,

Mr. President, these letters come from people who know Judge Sarokin's record and they speak loud and clear concerning his nomination to the Circuit Court.

I yield the floor.

Mr. LAUTENBERG addressed the Chair.

The PRESIDING OFFICER. The Senator from New Jersey (Mr. Lautenberg) is recognized.

Mr. LAUTENBERG. Mr. President, I rise to express my support for the confirmation of Judge H. Lee Sarokin to the Third Circuit Court of Appeals. My senior colleague, Senator Bradley , recommended Judge Sarokin to the President for this position, and I support him in that recommendation.

Judge Sarokin is a native of my home State of New Jersey. He has had a distinguished career as a trial lawyer and a district court judge. He has received the unanimous, well-qualified backing of the American Bar Association.

Throughout his career, Judge Sarokin has demonstrated that he is a man of deep insight and keen intellect and is held in the highest esteem by colleagues, as well as numerous attorneys who have appeared before him in the court. I have spoken to a lot of those people, and their judgment is almost unanimously supportive. Without question at all, he has the talent and temperament to discharge the duties of his office with distinction and with fairness.

Both Democrats and Republicans have expressed their support for Judge Sarokin's nomination. As a matter of fact, Senator Specter , a distinguished Republican Senator and former prosecutor from Pennsylvania, has supported Judge Sarokin's nomination and voted in his favor in the Judiciary Committee. Judge Sarokin has also been endorsed by four former U.S. attorneys in New Jersey, including Michael Chernoff, now Republican counsel to the Whitewater hearings. He

has been supported also by the noted conservative Yale law professor, George Priest, who describes Sarokin as among the very first rank of Federal judges.

But, Mr. President, despite Judge Sarokin's impressive background and sound credentials, we are going to hear some opposition to his confirmation and questions about his fitness to serve on the Third Circuit Court of Appeals. I think that is because Judge Sarokin has not shirked from hard decisions, whether they affect the tobacco industry, the first amendment, or about other controversial issues.

His decisions were based on deeply thought out legal principles and objective judicial analysis, even though they might not have passed a popularity litmus test at the moment. In fact, Judge Sarokin was criticized by tobacco companies for lacking objectivity, and yet, despite his strong criticism of the industry, he actually ruled in their favor more often than not in pretrial motions.

Judge Sarokin has also been criticized for a decision that he made in the famous case of James Landano. Landano was convicted in 1978 of shooting a police officer during an armed robbery. He is now free because of new evidence suggesting that he might be innocent. The murder of a police officer is a heinous crime, and it ought to be punished swiftly, severely, and certainly. Police officers put their lives on the line for us each and every day, and I would not support confirmation of a judge who willy-nilly lets a cop killer go free.

But before we get lost in the debate on the Landano case, we should remember the facts as we heard them from the distinguished chairman of the Judiciary Committee earlier this day. It is worth repetition. Landano filed a habeas corpus petition with Judge Sarokin [*S13989] in 1987 after the chief witness against him recanted and said that his testimony at the trial was fabricated. When this occurred, Judge Sarokin, harboring serious doubts about Landano's guilt, still did not grant the petition, because a State judge before him had already rejected the petition. Landano stayed in prison for 2 more years. And then in 1989 Landano brought forth additional evidence pointing to his innocence. At this point, because of the new evidence, it was appropriate for the district court to review the case again. And Judge Sarokin, this time, granted the habeas corpus request.

In the literature from conservative organizations that oppose Judge Sarokin's nomination, they would have you believe that Judge Sarokin is personally responsible for the fact that James Landano is out of jail. It simply is not the case. It was a New Jersey State court, a court within our State, an appeals court, that ultimately decided that there was enough new evidence to raise serious doubt about Landano's guilt, and it was a New Jersey State court that decided to grant him a new trial. Even at this moment, prosecutors have not yet made a decision that there is sufficient evidence to present a new case against him.

Federal judges are constantly besieged with habeas corpus petitions, and during his 15 years on the Federal bench, Judge Sarokin has reviewed between 500 and 1,000 of these requests. ;In all that time, he has granted just 5 of those appeals. That is far less than 1 percent.

Of course, we want Federal judges who are going to pursue the law and lock up the bad guys, but we also want judges who are fair. And sometimes the circumstances that we read about present a different view than those who are in the courtroom hearing the case or judging the case. We want judges who can take a step backward and make sure that in our eagerness to fight crime, and all of us are bent on that mission today, that we are not locking up innocent men and women.

Five times in 15 years, Judge Sarokin has seen something disturbing in a conviction and has granted a habeas corpus petition. That certainly does not make him soft on crime.

So as we listen to this debate, let us remember that Judge Sarokin's occasional statement has not affected the substance of his decisions and that he is by no means soft on crime or criminals.

Mr. President, Judge Sarokin has not allowed his personal views to affect his judicial decisions. And we should not allow our personal or political views to affect our judgment on his fitness for the job.

Judge Sarokin's decisions have been consistently upheld by the Third Circuit Court of Appeals, the court to which he is now being nominated. Less than 3 percent of his written opinions have been reversed or vacated, and at least two of those reversals were ultimately reversed again themselves by our Supreme Court.

In a New York Times editorial last month, the minority leader said that Republicans have not tried to thwart President Clinton's Cabinet and judicial nominees because he believes that a President should have a fairly free hand in choosing those nominees.

I believe that is why we saw in the vote just taken such strong support, 85 votes for cloture, and a conclusion to this matter.

We should not allow partisan bickering to stall Judge Sarokin's confirmation to the third circuit.

I want to say to my colleagues on the other side, obviously by the vote taken this does not register as a general partisan accusation. A lot of them voted for cloture. I would be interested in hearing the comments.

But he is a thoughtful, fair-minded jurist with a deep commitment to justice, the law, the public it serves, and our most cherished liberties.

I am confident that he will be a distinguished addition to that court, and I urge my colleagues on both sides of the aisle to confirm this nomination for this well-qualified judge without further delay.

I yield the floor.

The PRESIDING OFFICER (Mr. Graham). The Senator from Utah is recognized.

Mr. HATCH. Mr. President, I rise today to speak in opposition to President Clinton's nomination of H. Lee Sarokin to the U.S. Court of Appeals for the Third Circuit. I do so with regret because I believe Judge Sarokin to be well-intentioned and capable. But I do so with the firm conviction that his record establishes that he will pursue his own ideological agenda instead of applying the law.

Before turning to Judge Sarokin's record, let me place this nomination in broader context. By the time his term ends in 1997, President Clinton may well have appointed well over 200 lower-court Federal judges. In many or most of the cases that come before them, these judges will effectively be the final decisionmakers. In short, they have enormous power. This is particularly true of Federal appellate judges. Because the Supreme Court is able to review so few cases, Federal appellate judges function in effect as the Supreme Court-the Court of last resort-in the cases that they decide.

Nowhere, in my view, is it more important how judges exercise their enormous power than in the criminal field. No matter how much Government leaders talk about crime, no matter how many tough measures we enact, no matter how much money liberal Democrats force taxpayers to spend on social program boondoggles that are marketed as preventing crime, if we have judges who are activist on behalf of criminals and who undermine public order, then everyone's anticrime efforts are wasted.

Let me be clear about this. Because the conference report on the crime bill contained billions of

dollars in pork that were not in the original Senate bill, and because important tough-on-crime provisions in that original bill were taken out by the Democrat-controlled conference, I opposed the final crime bill. At the same time, largely as a result of Republican amendments, the final crime bill did contain a number of good provisions that I support. But if even these provisions are watered down or overridden by soft-on-crime judges, then the whole crime bill effort will have been an utter waste by any measure.

Unfortunately, it is clear that President Clinton does not have the battle against crime as a priority-or even as a consideration-in his selection of lower court judges. Even worse, he has in fact, appointed some judges who are demonstrably soft on crime-Rosemary Barkett is just one notable example-and he has appointed a number of others whose records raise serious questions.

Let me now turn to Judge Sarokin and his record. In the 15 years since he was appointed to the Federal district court in New Jersey by Jimmy Carter, Judge Sarokin has earned a nationwide reputation as a stridently liberal judicial activist. On a broad range of telltale issues-such as crime, quotas, reverse discrimination, pornography, and minimal community standards of decency and behavior-Judge Sarokin has pursued his own political agenda instead of following the law. In so doing, he has ignored, defied, and even stampeded binding Supreme Court and third circuit precedent, and he has flaunted his own biases and sentiments on the sleeve of his judicial robe.

These are not just my views, nor just the views of outside critics. The third circuit itself has, for example, lambasted Judge Sarokin for ''judicial usurpation of power,'' for ignoring ''fundamental concepts of due process,'' for destroying the appearance of judicial impartiality, and for ''superimpos(ing his) own view of what the law should be in the face of the Supreme Court's contrary precedent.'' The New Jersey Law Journal (9/14/92) has reported that Judge Sarokin ''may be the most reversed Federal judge in New Jersey when it comes to major cases.''

Law enforcement and victims rights organizations that have announced their opposition to Judge Sarokin's nomination include the Fraternal Order of Police, the Law Enforcement Alliance of America, the New Jersey State Police Survivors of the Triangle, Organized Victims of Violent Crime, the League of American Families, Citizens for Law and Order, Citizens Against Violent Crime, and Voices for Victims, Inc.

Now I just do not understand why, at a time when the President says that he is finally getting serious about crime, he is appointing to a top judgeship [*S13990] someone whose soft-on-crime views are so strongly opposed by many police and crime victims. Indeed, it is particularly notable that groups like the Fraternal Order of Police, which joined with President Clinton in supporting the crime bill, oppose Judge Sarokin's nomination.

A careful examination of Judge Sarokin's record highlights the concerns that these law enforcement and victim rights organizations have raised about Judge Sarokin's liberal judicial activism. These concerns are aggravated by Judge Sarokin's own testimony at his confirmation hearing.

Judge Sarokin has described himself as a ''flaming liberal'' as a judge. (Speech to Federalist Society, May 16, 1994.) On this point there should be no disagreement. Take, for example, ;Judge Sarokin's views on pretrial detention of dangerous criminal suspects. Judge Sarokin argues that pretrial detention is ''in direct contradiction of the presumption of innocence.'' (90 West Va. L. Rev. 1003, 1005 (1988).) Let me repeat that: Judge Sarokin argues that pretrial detention is ''in direct contradiction of the presumption of innocence.'' With all due respect to Judge Sarokin, this position is dead wrong. The presumption of innocence establishes that the burden of proof at trial lies with the Government. It does not require that society turn a blind eye to the fact that certain arrested criminal suspects would pose a grave threat to society if they were released. A completely separate set of procedural guarantees-including, for example, the

requirement of probable cause to arrest and detain a suspect-affords the necessary constitutional protections against unlawful detention.

Judge Sarokin's position that dangerous criminal suspects should not be subject to pretrial detention would, if taken seriously, have tragic consequences for society. Repeat violent criminals would be unleashed to prey on innocent law-abiding citizens. Witnesses to the crime for which the criminal suspect had been arrested would be subjected to brutal intimidation. The liberal revolving door for criminals would spin even faster.

Judge Sarokin has likewise argued that the rules governing disclosure of information in criminal cases need to be loosened up in favor of the criminal defendants, in order to provide more information sooner. As Judge Sarokin recognizes, the balance struck by the existing rules is designed to protect against the serious problem of witness intimidation and witness tampering. But in Judge Sarokin's view, ''the assumption of such improper conduct undermines the presumption of innocence accorded to the accused.'' (43 Rutgers L. Rev. 1089 (1991).) Here again, Judge Sarokin distorts the presumption of innocence-an important but narrow rule that sets forth who has the burden of proof at trial-into a wholesale obligation to bend all rules in favor of the criminal defendant. Under Judge Sarokin's logic, one might as well say that criminal defendants should not be subjected to trial since trial is inconsistent with the presumption of innocence. The sorry fact is that witness intimidation and tampering are severe problems. The existing rules structure pretrial disclosure of information in a way that minimizes these problems at the same time that they preserve the defendant's right to a fair trial. There is no reason to change these rules to benefit criminal suspects and to harm innocent citizens.

If my disagreement with Judge Sarokin on these and other matters were simply a matter of differing policy views, I might not be so troubled by his nomination, since judges should not engage in policymaking. But the fact of the matter is that Judge Sarokin has worked to smuggle his soft-on-crime views into his criminal opinions. For example, in granting a defendant a hearing to review his continuing pretrial detention, Judge Sarokin expressed, and relied on, his view that pretrial detention conflicted with the presumption of innocence. (United States v. Mendoza, No. 87-5 (D.N.J. 1987) (''The concept that those presumed to be innocent can be held in custody on the assumption that they will commit further crimes if released poses grave concerns in a free society'').) In yet another case, the third circuit reversed Judge Sarokin on the ground that he had no authority to order the release on bail of an undocumented alien. (In re Ghalamsiah, 806 F.2d 68 (3d Cir. 1986), reversing No. 86-767 (D.N.J. 1986).)

Similarly, in his opinions Judge Sarokin has stated and implemented his view that ''the discovery obligations of the government in criminal matters should be construed as broadly as possible'' and has expressed his ''amazement'' that existing rules are not broader than they are. (United States v. Khater, No. 84-148 (D.N.J. 1985).)

Judge Sarokin has a clear record of implementing his liberal ideological agenda in the guise of judicial opinions. Judge Sarokin is perhaps most notorious for his precedent-defying opinion in the case of Kreimer v. Bureau of Police for the Town of Morristown (765 F. Supp. 181 (D.N.J. 1991), rev'd, 958 F.2d 1242 (3d Cir. 1992)). Kreimer was a homeless man who lived outdoors in Morristown, NJ. According to various news accounts, Kreimer was homeless because he had squandered a $ 340,000 inheritance, turned down job offers, and refused to live in a shelter. In any event, Kreimer frequently occupied the public library in Morristown. According to library staff, Kreimer often engaged in offensive and disruptive behavior, including staring at and following library patrons and talking loudly to himself and others. Also, according to library staff, Kreimer's body odor was so offensive that it prevented others from using certain areas of the library and kept library employees from performing their jobs. A logbook instituted to catalog disciplinary problems faced by the library described incidents such as ''Kreimer's odor prevents staff member from completing copying task,'' ''Kreimer spent 90 minutes-twice-staring at reference librarians, ''Kreimer was belligerent and hostile toward (the library director), and ''Patron (was) followed by Kreimer after leaving Library.''

In 1989, the library enacted a written policy prohibiting certain behavior in the library and authorizing the library director to expel persons who violated them. After he was expelled from the library at least five times for violating these rules, Kreimer sued the library and others in Federal district court, alleging that the library's policy violated the first amendment and the due process and equal protection clauses of the 14th Amendment.

In a remarkable ruling, Judge Sarokin granted summary judgment in favor of Kreimer. Judge Sarokin's ideological bias is manifested in his grandiose assertion that ''(i)f we wish to shield our eyes and noses from the homeless, we should revoke their condition, not their library cards.'' This rhetoric is, of course, a red herring: The library was not revoking the library cards of the homeless, nor was it singling them out. It was instead simply requiring that all patrons comport with minimal standards of behavior and decency.

Judge Sarokin proceeded to concoct a number of specious arguments that the library policy was unconstitutional. Judge Sarokin ruled that the library policy violated the first amendment. He ruled that it was unconstitutionally overbroad. He ruled that it was unconstitutionally vague. He ruled that it violated substantive due process. He ruled that it violated equal protection. And he ruled that it violated the New Jersey Constitution.

One problem with these six separate rulings by Judge Sarokin is that all of them are clearly, conspicuously, and extravagantly wrong. Not surprisingly, the third circuit, in a thorough opinion, unanimously reversed each of Judge Sarokin's six rulings. In order to understand how baseless and lawless Judge Sarokin's opinion was, it is useful to examine some of the many flaws in his rulings.

Judge Sarokin's first ruling was that the library policy was not a reasonable time-place-and-manner regulation and therefore violated the first amendment. This ruling hinged in part on Judge Sarokin's assertion that a public library is a traditional public forum, like the public streets, sidewalks, and parks. Notably, Judge Sarokin did not cite any precedent in support of this assertion. Nor could he, for the assertion is untenable under Supreme Court precedent. Judge Sarokin's assertion that the library is a full-fledged designated public forum was also without any support in precedent. Remarkably, Judge Sarokin did not even explore the alternative that the library was a limited-purpose [*S13991] public forum, as the third circuit ruled it was.

Judge Sarokin's second ruling-that the library policy was unconstitutionally overbroad-misstated the holding of the Supreme Court case on which it purported to rely. Judge Sarokin took the position, both in his opinion and in his hearing testimony, that the Supreme Court had held that the protesters in a 1966 case called Brown v. Louisiana (383 United States 131 (1966)) had engaged in a ''constitutionally protected protest.'' In fact, Judge Sarokin mistakenly attributed to the Supreme Court a position taken by only a three-Justice plurality, as Justice Brennan's opinion concurring in the judgment in the Brown v. Louisiana case makes clear. The distinction between a holding of the Supreme Court and a position taken by a plurality is elemental. Yet Judge Sarokin ignored this distinction in making his mistaken ruling. In the remainder of his overbreadth analysis, he then engaged in the sort of hyperimaginative hypothesizing that would doom every statute.

Judge Sarokin's third ruling-that the library policy was unconstitutionally vague-was also defective in many respects, as the third circuit ruled. Among other things, Judge Sarokin applied the vagueness standard applicable to criminal statutes even though the library policy was civil in nature. In addition, the library policy listed specific behavior that was proscribed, and its hygiene provisions rested on an objective test of reasonableness. It is difficult to see how any policy could ever survive Judge Sarokin's approach. Indeed, this approach, if applied consistently, might well deprive society of the power to set any rules of behavior.

Judge Sarokin's fourth and fifth rulings employ two of the standard tools of the liberal judicial

activist: so-called substantive due process and the equal protection clause. Under well-established Supreme Court precedent, courts must give very broad deference to rules unless those rules impinge on a fundamental right or affect a suspect class. Judge Sarokin's ruling ignored this precedent. Remarkably, Judge Sarokin asserted that the library policy imposed ''a reader-based restriction, analogous to prohibited speaker-based restrictions,'' even though he acknowledged that ''the restriction is not because of the reader's views.'' Judge Sarokin's creation of a suspect class defined by poor hygiene or homelessness had no basis in equal protection precedent. His use of disparate impact analysis also defied the Supreme Court's decision in Washington versus Davis, which makes clear that discriminatory intent-along a recognized suspect line-is necessary to trigger strict scrutiny. Judge Sarokin's disparate impact approach would enable judges to impose pervasive quotas throughout society. More generally, Judge Sarokin's freewheeling use of substantive due process and equal protection poses the threat of judicial nullification of whatever laws or rules displease him or disserve his liberal agenda.

Finally, Judge Sarokin's sixth ruling-that the library policy violated the State constitution-was without precedent in State law and illustrates the dangers of activist judges using State constitutions as a weapon to override the political process.

In sum, Judge Sarokin's opinion in the Kreimer case is liberal judicial activism at its worst. Each of Judge Sarokin's rulings noted above is not just wrong, but patently wrong. Judge Sarokin does not simply misread precedent. He defies it and distorts it in furtherance of an ideology that prevents a community from enforcing even minimal standards essential to the public good. By effectively giving Richard Kreimer a right to disrupt and disturb a library, Judge Sarokin deprives the mass of citizens of the right to use a library in peace.

As the Wall Street Journal noted in a fine editorial (6/12/91), the conduct that Judge Sarokin protects when engaged in by a homeless man would never be tolerated if done by anyone else:

When a college professor or business executive looks at a woman in a way she considers disturbing, he nowadays may be subject to reprimands, departmental hearings, threats to his job and status, and accusations of sexual harassment. Mr. Kreimer, on the other hand, has been treated as a hero, embraced by the politically correct who have apparently decided that harassing women is acceptable so long as the harasser is homeless.

I am also troubled by the fact that Judge Sarokin painted a very misleading picture of Kreimer at his hearing. Here is what Judge Sarokin had to say about this case:

There were two issues that were presented to me. * * * The first one was whether or not there was a constitutional right of access to the library under the first amendment. I said that there was, and the third circuit agreed. * * * (T)he only issue with which the third circuit disagreed was whether or not the regulations were vague and overbroad. They did not disagree about the first amendment analysis.'' (46:1-5,19-22)

Judge Sarokin's summary of Kreimer is mistaken or distorted in several critical respects. First, as I have discussed, there were at least six separate legal claims decided by Judge Sarokin. The third circuit reversed Judge Sarokin on every claim. In short, Judge Sarokin was 0-for-6, not 1-for-2. Second, the question whether the first amendment was implicated at all by the library policy was a minor-and easy-part of the determination ;whether the policy was a reasonable time-place-and-manner regulation. Judge Sarokin properly devoted only about a half page of his 17-page opinion to this issue, yet he incorrectly stated at his hearing that this was one of two major issues in the case.

Third, the real question on the basic first amendment analysis was what standard of review applies. Judge Sarokin held, without any basis in precedent, that a library is both a traditional public forum and a full-fledged designated public forum and that all the provisions of the library

policy were therefore subject to a high level of scrutiny. These holdings are strikingly groundless, and were repudiated by the third circuit. In short, the third circuit did ''disagree about the First Amendment analysis''-and it did so vigorously.

Fourth, it is especially worrisome that Judge Sarokin did not even recall that he had relied on unprecedented uses of substantive due process and equal protection to strike down the library policy. Is a judge who wields these weapons so carelessly and thoughtlessly fit for elevation to the third circuit? These two constitutional provisions, if misused, are among the most powerful available to a judge who seeks to substitute his own views for those of the legislative branch.

The White House's defense of Judge Sarokin's ruling in this case is as false and feeble and slick as its defense of the pork-laden crime bill. The White House claims that the third circuit ''agreed with Judge Sarokin that the strictest scrutiny would apply to the library's hygiene regulation.'' One problem with this claim is that it is not true: The standard applied by the third circuit to the hygiene regulation is distinct from, and far more permissive than, the standard of strict scrutiny for race-based classifications under the equal protection clause. Another problem with the White House's claim is that it is deceptive: The White House deliberately obscures the fact that the third circuit subjected most of the provisions of the library policy to a very deferential reasonableness test. In short, the White House's effort to present Kreimer as a ''close'' case upon which reasonable minds could differ is absurd.

Judge Sarokin's opinion in the Kreimer case is just one example of a slew of opinions by liberal activist judges that deprive communities of the ability to regulate themselves and to maintain minimal standards of decency and public order. All too often, when communities attempt to combat such scourges as drug dealing, prostitution, and pornography, liberal activist judges concoct excuses to cripple these efforts. The link between these liberal activist rulings and this Nation's growing crime problem is, in my view, beyond fair dispute. In short, if we have activist judges like Judge Sarokin who are eager to override community standards, our crime problem will only get worse. Another case that illustrates Judge Sarokin's soft-on-crime liberal activism is the 1984 case of United States v. Rodriguez (Crim No. 84-18 (D.N.J. 1984)). In that case, Judge Sarokin found that the defendant, Rodriguez, had read a form advising him of his Miranda rights, had signed the part of the form waiving those rights, and was aware of those rights before he spoke with an FBI agent. Judge Sarokin nonetheless granted [*S13992] Rodriguez' motion to suppress evidence of his statements to the FBI agent. In concluding that Rodriguez did not waive his Miranda rights and that his statement should therefore be deemed involuntary, Judge Sarokin relied heavily upon the fact that Rodriguez did not sign his own name to the waiver form, but instead signed the false name Lazaro Santana. According to Judge Sarokin, ''it does not strain logic to find the use of a name other than one's own to be wholly inconsistent with a voluntary waiver of rights: Defendant might well have believed that by using a false name he was not committing himself to anything.'' It does indeed strain logic to conclude that signing an alias is wholly inconsistent with a voluntary waiver: the far more natural conclusion is that Rodriguez, use of the alias may simply have been an effort to conceal his identity. But what is even more remarkable is that Judge Sarokin's ruling was directly contrary to controlling third circuit precedent, as Judge Sarokin himself recognized.

At his hearing, Judge Sarokin claimed that the third circuit had held only that the use of a false name is ''certainly not dispositive'' but could well be relevant. (91:15) Such a claim is contrary to the reading of that precedent made by Judge Sarokin himself in Rodriguez. It also finds no support in the third circuit case. But as a result of Judge Sarokin's liberal judicial activism, critical evidence against a criminal suspect was suppressed.

Mr. President, we do not need more judges who will handcuff the police in the war on crime. We do not need more judges who will create hypertechnical rules that free the guilty. We do not need more judges who will ignore existing precedent and twist laws to favor criminals. Liberal judicial activism has taken that approach for the past 30 years, and the results have been all too predictable: Soaring rates of murder, rape, and other violent crimes, and communities riddled

with drugs and at the mercy of gangs of thugs. Enough is enough.

Numerous other cases also illustrate Judge Sarokin's propensity to pursue his own agenda and to defy precedent. The case of Haines versus Liggett Group-which involved a personal injury action against cigarette manufacturers-is an all-too-telling example. (140 F.R.D. 681 (D.N.J. 1992), writ granted, 975 F.2d 81 (3d Cir. 1992).) In this case, the plaintiff Haines sought discovery of certain documents that the defendant cigarette companies said were protected by the attorney-client privilege. Haines argued that even if the documents were within the scope of the attorney-client privilege, the crime-fraud exception applied and annulled the privilege. A magistrate judge determined that the documents were privileged and that the crime-fraud exception did not apply.

Haines appealed the magistrate judge's order to Judge Sarokin. Judge Sarokin ordered the parties to supplement the record with materials from the record in a similar case, Cipollone, in which he was the trial judge. He then issued a ruling that the crime-fraud exception did apply and that Haines was entitled to discovery of the documents at issue.

Three aspects of Judge Sarokin's opinion merit special attention:

First: Judge Sarokin opened his opinion on this discovery dispute with this inflammatory prologue:

In light of the current controversy surrounding breast implants, one wonders when all industries will recognize their obligation to voluntarily disclose risks from the use of their products. All too often in the choice between the physical health of consumers and the financial well-being of business, concealment is chosen over disclosure, sales over safety, and money over morality. Who are these persons who knowingly and secretly decide to put the buying public at risk solely for the purpose of making profits and who believe that illness and death of consumers is an appropriate cost of their prosperity!

As the following facts disclose, despite some rising pretenders, the tobacco industry may be the king of concealment and disinformation.

Second: Judge Sarokin held that the magistrate judge's ruling could not survive under even the clearly erroneous standard of review-a standard of review that is supposed to be very deferential and that, not incidentally, is the standard of review that court of appeals judges are generally obligated to apply to trial court factual findings. In reversing the magistrate judge's ruling, Judge Sarokin relied not only on the supplemental evidence that he ordered from the Cipollone trial but also on his ''own familiarity with the evidence adduced at the Cipollone trial discussed in the directed verdict Opinion'' in that case. (140 F.R.D., at 694.) Judge Sarokin stated that having heard the trial evidence in Cipollone, he was ''in the unique position of being able to evaluate the full scope of evidence supporting plaintiff's crime/fraud contention in the instant case.'' (Id., at 694 n. 12.)

Third: In a stated effort to show ''some of the most damaging evidence'' on this crime-fraud exception, Judge Sarokin quoted extensively from those documents as to which privilege had been found to exist by the magistrate judge. (140 F.R.D., at 695.)

In a remarkably impressive opinion, the third circuit unanimously granted an extraordinary writ vacating Judge Sarokin's order and removing him from the case. The third circuit emphasized that a writ was an extreme remedy to be used ''only in extraordinary situations'' and that ''only exceptional circumstances amounting to a judicial usurpation of power will justify the invocation of this extraordinary remedy.'' (975 F.2d, at 88 (internal quotes omitted and emphasis added).) But the third circuit found that Judge Sarokin's ruling was in fact a judicial usurpation of power. Among other things, the third circuit ruled that in reviewing the magistrate judge's order under the clearly erroneous standard, Judge Sarokin was not permitted to receive further evidence. (975 F.2d, at 91.) As it observed, our ''common law tradition (does not) permit a reviewing court

((in this case, the district court)) to consider evidence which was not before the tribunal of the first instance.'' (Id., at 92.) Because Judge Sarokin considered and relied on portions of the Cipollone record that were not in the record before the magistrate judge, his order could not stand. (Id. at 93.)

The third circuit also sharply scolded Judge Sarokin for disclosing the contents of the documents as to which privilege had been claimed. In its words:

This, too, must be said. Because of the sensitivity surrounding the attorney-client privilege, care must be taken that, following any determination that an exception applies, the matters covered by the exception be kept under seal or appropriate court-imposed procedures until all avenues of appeal are exhausted. Regrettably this protection was not extended by the district court in these proceedings. Matters deemed to be excepted were spread forth in its opinion and released to the general public. In the present posture of this case, by virtue of our decision today, an unfortunate situation exists that matters still under the cloak of privilege have already been divulged. We should not again encounter a casualty of this sort. (975 F.2d, at 97.)

Finally, in what the third circuit described as ''a most agonizing aspect of this case,'' it then removed Judge Sarokin from the case on the ground that the prologue to his opinion on this preliminary discovery issue destroyed any appearance of impartiality. The court noted that the prologue stated ''accusations'' on the ''ultimate issue to be determined by a jury'' in the case: whether defendants ''conspired to withhold information concerning the dangers of tobacco use from the general public.'' It further noted that Judge Sarokin's inflammatory remarks were reported prominently in the press throughout the nation. (975 F.2d, at 97-98.)

The third circuit's observations that Judge Sarokin's ruling amounted to a judicial usurpation of power, was contrary to our common law tradition, ignored fundamental concepts of due process, eviscerated the defendants' rights of appeal, and destroyed any appearance of impartiality scratched only the surface of Judge Sarokin's betrayal of the role of a judge in this litigation. Consider, for example, some of the many other respects in which Judge Sarokin's prologue was grossly inappropriate: What do his blanket assertions about the values of businessmen say about his ability to preside fairly in any dispute between an individual and a business? To whom is he referring as the other rising pretenders to the throne of concealment and disinformation?

Incidentally, at his confirmation hearing, Judge Sarokin ultimately made only a modest concession: [*S13993] ''I concede that the language was strong and maybe unduly strong; and if I could take it back, I probably would.'' (60:11-13) The fact of the matter is that Judge Sarokin could have taken it back: these were carefully composed written comments, not off-the-cuff oral remarks.

Judge Sarokin also stated that ''I was also hoping that I could discourage the tobacco companies from continuing to conceal the risks of smoking and deny that they existed.'' (110:20-23) This statement vindicates the third circuit's concern that Judge Sarokin was broadcasting his opinion on the ultimate issue to be decided by the jury. It also shows that Judge Sarokin was pursuing an agenda rather than simply deciding the legal issue before him.

Similarly, Judge Sarokin's reliance in Haines on his familiarity with the evidence in another case, Cipollone, is a flat admission of predisposition and bias. Judge Sarokin was, in his words, ''unique(ly) position(ed)'' to decide the issue only in the sense that he had already made up his mind.

Perhaps the most troubling aspect of this whole case is the manner in which Judge Sarokin responded to the third circuit's order removing him from the case. In referring to this removal in a written opinion, Judge Sarokin flamboyantly declared: ''I fear for the independence of the judiciary if a powerful litigant can cause the removal of a judge for speaking the truth based upon the evidence, in forceful language that addresses the precise issues presented for

determination.'' In short, Judge Sarokin not only voiced his disagreement with the ruling of the higher court. He also cast aspersions on the independence and integrity of the third circuit judges by charging that a powerful litigant had caused them to rule as they did.

Equally remarkably, unchastened by his well-earned scolding, Judge Sarokin personally accepted ''the C. Everett Koop Award for significant achievement toward creating a smokefree society.'' This award, from an organization called the New Jersey Group Against Smoking Pollution was given for the very comments that led to the third circuit's order removing him from the cigarette case. It is disturbing enough as an ethical matter that a judge would accept an award for an opinion in a particular case. It is beyond the pale that he would accept an award for a case in which he had already been found to have destroyed the appearance of impartiality, especially when the award is given for the very act that destroyed the appearance of impartiality.

It is true that in removing him from Haines, the third circuit stated that Judge Sarokin ''is well known and respected for magnificent abilities and outstanding jurisprudential and judicial temperament.'' But in context, this can only be understood as sugarcoating a bitter pill.

Yet another case that illustrates Judge Sarokin's willful implementation of his own agenda is Blum v. Witco Chemical Corp. (702 F. Supp. 493 (D.N.J. 1988), rev'd, 829 F.2d 367 (3d Cir. 1987).) This case involved an award of attorney's fees in an age discrimination suit. In his opinion, Judge Sarokin first criticized and sarcastically attacked the governing Supreme Court precedent and the third circuit opinion construing that precedent. For example, he stated:

The Supreme Court has sent a Christmas gift to this court delivered via the Third Circuit Court of Appeals. It is called ''How To Make an Attorney Fee Multiplier.'' However, the instructions are so confusing and inconsistent that this court has been unable to put the gift together. (702 F. Supp., at 494-496 (citation omitted).)

Significantly, Judge Sarokin purported to be ''duty bound to apply the (Supreme Court and third circuit precedent) to the facts of this case.'' (702 F. Supp., at 497.) But the third circuit, in unanimously reversing his ruling, found that Judge Sarokin had simply defied this precedent. In the Third Circuit's words, Judge Sarokin, ''without concealing its disapproval of both ;the Supreme Court's decision and ours, proceeded in accordance with (his) own views.'' (888 F.2d, at 977 (citation omitted).) The third circuit cited ''at least four respects'' in which Judge Sarokin had deviated from precedent, (id., at 981-983) and it scolded Judge Sarokin for ''superimpos(ing his) own view of what the law should be in the face of the Supreme Court's contrary precedent.'' (888 F.2d, at 983-984.) In short, the third circuit recognized that Judge Sarokin defiantly refused to follow precedent even while professing to follow it.

One final case that warrants careful attention is Vulcan Pioneers v. New Jersey Dep't of Civil Service, (588 F. Supp. 716 (D.N.J. 1984), vacated, 588 F. Supp. 732 (D.N.J. 1984)). This case is of particular interest because it illustrates Judge Sarokin's sympathies for unconstitutional race-based quotas.

This case concerned a 1980 consent decree that some New Jersey cities entered into regarding the hiring and promotion of firefighters. The decree set numerical hiring goals, or quotas, for racial and ethnic minorities. A few years later, Newark, faced with a fiscal crisis, threatened to lay off firefighters. Both nonminority and minority firefighters went back to court to protect their respective interests. The union sought to have seniority honored, as required by State law. The minority firefighters sought to have the seniority system disregarded in favor of affirmative action quotas.

In May 1984, when a ruling by the Supreme Court in Firefighters versus Stotts on this very issue was known to be imminent, Judge Sarokin modified the consent decree to require layoffs on a proportional basis rather than according to seniority. Thus, more senior nonminority firefighters were to be laid off in favor of less senior minority firefighters.

In an especially bizarre twist, Judge Sarokin ruled that his order denying whites their seniority rights constituted an unconstitutional taking and that the Federal Government-which vigorously opposed Judge Sarokin's modification of the consent decree-should nonetheless be required to provide compensation for the taking.

Shortly thereafter, the Supreme Court, in the Stotts case, effectively reversed Judge Sarokin's decision regarding the layoffs. In his original opinion, Judge Sarokin had expressed sympathy for the nonminority firefighters who would have lost their jobs under his ruling: ''Though not themselves the perpetrators of the wrongs inflicted upon minorities over the years, these senior firefighters are being singled out to suffer the consequences.'' In vacating his own ruling in June 1984, Judge Sarokin changed his tone and attacked the nonminority firefighters:

The non-minority firefighters and the unions who represent them resisted layoffs in this matter on the ground that they were blameless and innocent of any wrongdoing. But, in reality, they know better. If they have not directly caused the discrimination to occur, many certainly have condoned it by their acquiescence, their indifference, their attitudes and prejudices, and even their humor. (588 F.Supp. at 734.)

In short, once he was unable to pursue his own quota agenda, Judge Sarokin lashed out at those nonminority firefighters whom he thought should have had to lose their jobs.

Mr. President, considerations of time do not permit me to explore in detail all the other matters that cause me grave concern over this nomination. So let me conclude with the observation that Judge Sarokin has shown, time and time again, that he will pursue his own liberal ideological agenda on the bench in lieu of applying the law. If he is elevated to the federal court of appeals, Judge Sarokin would have even greater freedom and opportunity to implement his own ideological biases. And so I say to my colleagues, if you truly respect the fundamental distinction between judging and policymaking, if you truly care about handcuffing criminals rather than the police, if you truly want judges who follow precedent and apply the law, you should vote against the confirmation of Judge Sarokin.

Mr. President, I reserve the remainder of my time.

The PRESIDING OFFICER. The Senator from Delaware.

Mr. BIDEN. Mr. President, I have great respect for my friend from Utah but I must tell you, I used to have a teacher in high school who, when we would stand up and say something in defense of a position we used to have to defend-he would put forward a proposition and the question was put before the class: Defend or reject the proposition. [*S13994] Some would stand up and debate form and debate style and make some conclusory statements, unsubstantiated by the facts. And he used to look down and say, ''Poppycock.'' I never used to know what poppycock meant literally. I knew it meant you did not like whatever someone said, but you had to sustain your point.

I was reminded of that because there is a lot of poppycock today. I thought we were refighting the crime bill. The Republicans tried to exercise their gridlock and filibustered for a total of 2 years in earnest. They tried the last time to defeat the crime bill. They told the public how awful this crime bill was. We passed the crime bill, the toughest crime bill. Even a Wall Street Journal poll says the American people support what we passed, including the prevention provisions.

Here we are again. We have now this new deal that somehow the Republicans tried to make the crime bill tougher. I say poppycock, they did not make anything tougher. I wrote that bill. I wrote into the bill the death penalty, the enhanced penalties for the commission of certain crimes. They added nothing. They added nothing except gridlock. They added nothing except saying no. And now this crime bill, which I guess they like parts of now because it is playing

differently out there, somehow they made some contribution to it.

Six or seven Republicans did make a contribution. They voted for the crime bill. It passed because of their help. I guess that makes it bipartisan.

We have a new definition of bipartisan. If you can get three Republicans to raise their hands and say they are for something, it is now bipartisan.

Look what we are going through here. We just went through this exercise in gridlock. We were forced to go to a cloture vote on this. I ask the clerk-72 Members voted for cloture? What the devil did we have the cloture vote for? The reason we had the cloture vote is they wanted to stall. They wanted to stall, stall, stall, stall, stall. My friend from Michigan said the GOP should be renamed the ''Gridlock Only Party'' instead of the ''Grand Old Party.'' This is gridlock only.

Why do we have to negotiate this thing for days to get this to the floor-and I will say for the Record , my friend from Utah tried to get a time agreement so we could do this. No, we are forced to go to a cloture vote, eating up more time. Why? So we do not get to other things on the agenda we should deal with. Here we are now relitigating the crime bill with the debate on this judge.

Pretrial detention was mentioned. I am having my staff check to be precise about this, but I am 90 percent certain that that is a bill that I drafted in 1984, the Bail Reform Act of 1984. It never occurred before. The Democrats put that bill in place back in 1984.

Mr. President, we have done so much good stuff on crime, I have forgotten what we have done-what, when, the time. So we have pretrial detention. That came out of my subcommittee because what I found was more and more of these drug dealers were posting bail. The Presiding Officer knows this better than anyone. Down in Florida, you arrest somebody, the judge would post a million dollars bail, they would post their bail and leave because they had $ 5 or $ 7 or $ 10 million from a drug deal they did. That is why we put in pretrial detention, and it has worked. The Democrats did that.

Now I am told, OK, we have a judge here: ''Isn't he a terrible guy? Yeah, he's brilliant; yeah, he's this, he's a terrible guy,'' because he made a speech and it was recorded in the West Virginia Law Review, I think it was, speaking to a bunch of Law Review editors, and he stated the obvious. Pretrial detention is, in fact, on its face-and I am the guy who proposed it, OK-it is on its face a contradiction to the presumption that someone is innocent, if you just look at it in layman's terms, because usually we say, OK, you are accused. What we are going to do, as long as we think you are going to show up for trial, what we do is we let you go free until you have a trial, and they decide at the trial whether you are guilty or innocent. The presumption is you are innocent, though.

We did this unusual procedure, relatively speaking, because we found that people, even though we still had the presumption of innocence, that they, in fact, were skipping town after posting an awful lot of bail because it did not matter to them because they were probably guilty, is why they did not come back. So we accommodated that.

That cannot be done anymore. If a judge finds they are a danger to the community, and a few other things, he can say, ''We are going to keep you in jail until your trial,'' because, again, the Democrats passed the Speedy Trial Act Amendments Act, which I did author with the help of a staffer named Mark Gitvenstein in 1979, saying you have to take someone within 60 days-90 under certain exceptions, another 30 days-because we found these are the people out there committing the crimes, people out on bail.

So now we are told that we have a judge, appointed by this awfully liberal President and this liberal panoply of judges we have now voted for under this liberal environment. And we say this

judge made a critical comment or an observation-not even a critical comment-about pretrial detention. What he was doing, he was talking to a bunch of Law Review editors basically saying, ''Look, the mood out there is ugly and we have a serious problem with crime and what we have to keep our eye on here is we do not give up civil liberties, the thing that ultimately protects us as citizens, in order to get at the bad guy.''

That was the thrust of what he was saying, and he stated the obvious about pretrial detention. But let me tell you, in over 100 cases, this judge affirmed keeping someone in jail without bail before trial. Over 100 times. Where is this wacko liberal judge who is against pretrial detention, that you would think, listening to my Republican friends, they invented? Like all of a sudden now they somehow are for the crime bill. This is absurd.

Let us talk about these liberal judges my friend from Utah keeps talking about. Let me just state the record. You all draw your own conclusions. We have had two Supreme Court Justices. Unlike previous Presidents, this President did not pick people based on an ideological litmus test, and he said he was going to pick moderate, mainstream judges. He did. He has only had two chances to pick Supreme Court Justices, and who did he pick? Justice Breyer and Justice Ginsburg. Every single person in the academic world writing about them is talking about them forming the moderate middle with Kennedy, O'Connor and I think probably the best Justice that we, in my view, have ever confirmed since I have been here, Justice Souter, a Republican Justice.

If this President were as these guys paint him, why did he not send us left-wingers, like President Reagan and Bush sent us right-wingers most of the time? Why did he not do that? And if they were so bad, why did they not vote against them?

Mr. President, Republicans overwhelmingly voted for these two wacko liberal judges. The vote counts for these two Supreme Court Justices were 96-3 for Justice Ginsburg, and 87-9 for Justice Breyer.

We have confirmed out of the committee 72 Federal judges. Again, I thank my Republican colleagues-and I mean this sincerely-on the committee. Under the leadership of Senator Hatch , they have not engaged, in that committee, in gridlock. They have let these people come up and be voted on, this liberal cadre of judges which, out of 72 judges, 70 passed with unanimous consent.

I may be mistaken-I see my friend from Montana on the floor, he is a conservative Republican. I see other people come on the floor. I do not remember them saying, ''By the way, these liberal judges you Democrats are putting through, stop them.'' To the best of my knowledge-and I will stand corrected and I may be wrong, I may be a judge or two off-twice we have been asked to vote on a judge on this floor and there has been objection. One was Rosemary Barkett, a distinguished justice from the State of Florida, and the second one was this one.

Maybe there has been a couple of others that never got out of committee. There have been some that did not get out of committee. Once they got to the floor, if you listen to my friend, you would think-if you are sitting in the gallery or watching on TV-they would have been pushing through a bunch of [*S13995] really liberal judges out there and that this has been a real fight and this has been tough.

Look at the Supreme Court of the United States of America and the two judges that a Democratic President and a Democratically controlled Senate with the overwhelming support of Republicans voted for. Are they the liberals he is talking about? Are they in this panoply of liberal activists that he is talking about? Or maybe it is-I think we confirmed-I will ask my staff who does nominations to give me an exact number. But I think we have confirmed roughly 70 Federal court judges so far. I want to be precise. I believe we confirmed 70 so far. We have not confirmed them on the floor of the U.S. Senate. They are passed-72 judges we have passed so far out of the U.S. Senate to take their seats on the bench. Where are the liberals among them?

Where are these activists among them?

I do not quarrel with the fact that my friend from Utah or any of my Republican friends argued against Rosemary Barkett, or argued against this judge. But to turn that into what sounded like the speech that somehow there is this overwhelming liberal bias in putting these criminal-loving judges on the bench is preposterous, or, as my high school teacher would say, ''poppycock.''

Let us look at the two judges that have been the focus of opposition, legitimate by the way. I do not argue with the right of any Senator or group to stand up and say that judge is too conservative, that judge is too liberal, that judge is not honest, too honest, whatever they want to say. They have a right to do so. Rosemary Barkett, I have been hearing some of the political advertising that has been going on around this country and arguments against her, and this is incredible. It is absolutely incredible. As a matter of fact, I am told Senator Hatch -I was off the floor-in his opening statement mentions Rosemary Barkett as a soft-on-crime judge. I will come back to that because I want to speak to that. But that is preposterous as well. But, at least we are in the ball park because they have been involved in some controversial decisions, both Barkett and Sarokin.

I want the record to show, and I challenge anyone here to come on the floor-any Republican or any Democrat to come on the floor -and sustain the argument that this President has sent up and we have confirmed a bunch of liberal ''1960'' judges who are soft on crime. I challenge anyone. I hope everyone back in their office is listening. I ask every Republican Senator to come to the floor and make that case. I want to hear it. I am fascinated by it because, if it is true, why did they let go by consent-which is the same in this place as unanimously passing-the vast majority of these judges? I guess because they are soft on crime, or they are procriminal. Is that the reason?

So, No. 1, I hope we will stop this malarkey about judges generally in this administration.

Let us get specific about these two judges. One of the things is that we are told-and a couple of cases are taken, I would argue, slightly out of context although I would argue not intentionally by people who have spoken thus far about how bad this judge is because they give a fact pattern in a case that actually occurred and let this person go. First of all, let us make it clear. This judge did not let anybody go. He has ordered a retrial in the case that we keep hearing about, a case involving a fellow who was convicted in the lower court of killing a cop. He ordered a retrial. Let us get that part straight.

Again, I have seen a couple of ads where people actually ran ads in this political campaign period. So letting free these people saying you have to have a new trial is not letting you go free. At least I do not think it is. I do not think any legal scholar would say it is. No one with any shred of intelligence would say it is. But some without the intelligence, some without any insight, some engaged in pure demagoguery would say it is. No one on the floor has said that to the best of my knowledge. I am commenting on the universe of what I am hearing out there and some of ads.

But let us focus on this case. If you take a single case and say you draw a conclusion from that case, like with Rosemary Barkett, they say she is against the death penalty. She voted for the death penalty well over a hundred times. She voted for the death penalty as a supreme court justice in Florida over a hundred times. But she is against the death penalty.

Now we are hearing this guy is soft on crime because of a case they cite involving a guy named Landano. I would suspect that there is no one in this Chamber who would argue, for example, that who do you think the most-if we were to sit down and say, OK, let all of us in the Chamber pick out who we think is the most well-known conservative judge in all of America is. I will make you a bet. No, I can prove it. But I will make you a bet if you gave everybody 5 minutes and told them to write down on a piece of paper, every Member of this body, who they thought the most

conservative judge or jurist in America is, I will bet you anything that you would get the name Scalia written on a piece of paper more than any other name.

I doubt whether anybody would suggest that Justice Scalia is a liberal. As a matter of fact, he is the most brilliant conservative Justice and jurist probably in the country. He is anything but soft on crime.

Let us reverse roles here. Let us assume Scalia was up for reconfirmation and I wanted to make the case because we know it is damaging if you say any judge is soft on crime, and I went through the following case with you. Let me make sure I have the facts exactly right. I stood on the floor and turned to my friend from Iowa who is standing on the floor and others and said, you know, can you believe what this judge did, this procriminal judge, this prodefendant, anticop judge named Scalia did?

Let me tell my friend what he did. In 1987, when he sat on the Supreme Court of the United States in a case which was originally a Florida case, Justice Scalia wrote an opinion for the Court. Justice Scalia wrote that he should reverse the death sentence of a man who was convicted of strangling his 13-year-old stepniece. These are the facts; strangled his 13-year-old stepniece. The defendant confessed that he had killed his stepniece. And do you know why he killed her? He said he killed her because she threatened to tell her parents that he had intercourse with her. So he raped her. These are the facts. She was 13 years old. He raped her. She threatened to tell her mom and dad and he killed her. And then he admitted that he killed her and told the reason why he killed her. ;And guess what? That ''radical, liberal'' Judge Scalia insisted that the case of that person who was sentenced to death be sent back. He insisted that the State of Florida erred and they should reconsider and hear additional evidence as to whether or not that person should get the death penalty. I can see the gallery sort of nodding-my God, how could he do that? He must be a cop hater. He must be a wacko liberal. Obviously, that is why he did that.

Well, obviously, Justice Scalia is no liberal. Obviously, Justice Scalia is a pantheon of conservative intellects serving on the Court-and he is-who is anything but prodefendant. But guess what? He is a judge. He is required to follow the law and the Constitution. And out of all the cases, he wrote, for a unanimous Court, that this guy, who raped and then murdered his niece when she threatened to tell her parents, should have his case heard again. Maybe we should start a petition to impeach him. My conservative friends might vote for that. Let us impeach the judge for doing this.

Mr. HATCH. Will the Senator yield on that point?

Mr. BIDEN. Yes.

Mr. HATCH. Is it not true that he later repudiated that?

Mr. BIDEN. I do not know whether he later repudiated it. But is there a denial he wrote that?

Mr. HATCH. No, not at all. He has later repudiated that. Our argument is that he has not applied existing precedent. He made precedent out of old cloth.

Mr. BIDEN. I will get to that. We have no disagreement as to what Scalia did. My friend said that is what all of them did, and he is dead right. He made the right decision under the Constitution and law and existing precedence. The point I am making is that you can stand up here and take the hundreds of cases that any judge has decided and [*S13996] find a gruesome fact pattern-in fact, patterns-that in fact would make it look like this judge must be, for example, against pretrial detention. There is one paragraph out of a law review article, even though over 100 times he has held people without bail pending trial. There are a total of 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 sentences.

Mr. BRADLEY. Will the Senator yield at that point?

Mr. BIDEN. Yes.

Mr. BRADLEY. It should be re-emphasized that not only was this a comment, there is nothing in or around these sentences you point to that says in any way whatsoever that Judge Sarokin opposes pretrial detention. There is no sentence stated anywhere that he opposes pretrial detention. To the contrary, since he has been a sitting judge, he has ordered pretrial detention in over 100 cases.

So I think the Record should reflect what the facts are.

Mr. BIDEN. The Senator has made the point more clearly. He was commenting, as I read the article, on the overall environment and why these young law review editors should, in fact, focus on the Constitution and not forget the underlying basic principles in the Constitution.

But, again, I want to make it clear for the record that Justice Scalia is a fine and honorable Justice. Justice Scalia is not a liberal; he is not prodefendant; Justice Scalia is not someone who probably was appalled by the facts in the case I read. But he applied the law, as Judge Sarokin did, as he saw it and believed it to be. But you can make anybody look like they are foolish by citing these cases, by picking out a handful of cases. The fact of the matter is that in the case of Landano, the one they keep referring to about why he is soft on crime, on February 25, 1994, the appellate division of the State of New Jersey overturned the New Jersey trial court ruling and agreed with Judge Sarokin on virtually every count, finding that the prosecutor withheld exculpatory evidence in granting Landano a new trial.

The New Jersey appellate court found independently what Judge Sarokin found. Let me cite the grounds upon which they ordered a new trial, and they did not set anybody free.

First, the State suppressed evidence that Joseph Pascutti, the only eyewitness to the shooting, rejected Landano's photograph because the perpetrator had curlier hair than Landano. In other words, the prosecutor had that evidence. The chief witness against, the only eyewitness against Landano-I do not care whether he is guilty or innocent-but the only eyewitness initially, when the cops gave them the photograph of Landano, said, ''No, that is not him. The other guy's hair was a lot curlier.'' They had that. Under our rules that exist for fair trials in America, the prosecution is supposed to share that evidence because, remember, the prosecution's job is not to convict, it is to do justice. That is why we have that rule. That is why we have the rule. That was the first thing the appellate court said in New Jersey. It stated this evidence, and they did not tell it during the trial so that they would have all the facts. They did not tell the jury they had that.

The second thing was that the State-the prosecutor-suppressed evidence that his chief witness, Roller, an alleged accomplice, committed two armed robberies similar to the one for which they convicted Landano and that the State suppressed further evidence that the witness and his closest associate had committed an earlier armed robbery in Jersey City in 1975, in which the gun used to kill officer Snowe had been fired. That evidence, again, under our rules, generally speaking, to do justice, they were supposed to let the jury know that and let the defendant know that, and they did not.

The third reason why the New Jersey court-not Sarokin, the New Jersey court-agreed with Sarokin independently was that the State further suppressed evidence that its principal identification witness, the proprietor of the check-cashing shop, Jacob Roth, was under investigation for having ties with organized crime and was suspected of having engaged in loan sharking and money laundering. That can provide motive, among other things. And, further, on the very day that the witnesses' earlier tentative identification of Landano became positive, he was questioned about his involvement in illegal activities. So you have this guy Roth, who is

under investigation. The day that he identifies Landano is the day that he is being questioned for further illegal activities ;and potential ties with organized crime.

Why is that important for a jury to know? The jury can weigh that evidence. But it may be they figured, oh, wait a minute. If we know that, maybe Roth made a deal. Maybe Roth is trying to get himself out of difficulty.

I do not know that to be the truth. No one knows that is the truth. But the jury is entitled to know that.

The fourth thing that the New Jersey appellate court found was another witness, a waitress who had seen the co-defendant and his companion the day before and the morning of the robbery and killing, also rejected Landano's photograph because the individual that she met was younger than Landano. The State had that evidence, too.

Now, under our system, just like Judge Scalia had to send back that case I talked about where a guy admits to raping and murdering his niece because she was going to tell her mom and dad about being raped, this judge said, hey, wait a minute, under our system, you are not allowed to do that, prosecution. Go back and give this guy a fair trial under what we have 100 years of precedent for.

That is what happened here. But to listen to my friends, you would think we have a guy out there saying:

You know, these guys who kill cops, I cannot blame them really. They were raised in an environment where police were not nice to them. And you know what further happens is they probably did not get the right formula when they were kids and they were in a position where that affected their psyche and they were raised in a circumstance in a community that has an antagonism toward police. So I can understand and empathize with someone who would go kill a cop.

That is what they make it sound like, this sort of psychobabble that comes from the far left.

Well, the problem is I am not, and Senator Bradley , the President, the judge, are not on the far left. Republicans would like to get us there.

But back to the thing I said this morning, I say to my friend, who is a graduate of Harvard Law School, in school we used to talk about red herrings. When there is a fact thrown in that has nothing to do with anything that has to do with the case, it is to throw you off, that is a red herring. That has nothing to do with this. Or it is a straw man. We are setting up a straw man here to knock down with his liberal psychobabble they talk about.

That is not this judge, again, anymore than Scalia is the judge-if I took that one case and that was the only thing you knew about Justice Scalia, what would my colleagues in here think? If I gave you nothing but that, you knew nothing at all about Scalia except that case, you would say: ''Oh, my God.'' You would not say you know he is an honest jurist required to follow the law and precedents. He did that. We would all stand up here because we do not want to offend anybody and we would say: ''Oh, my God, he is one of those wacko liberals, lover of cop killers, lover of people who rape 13-year-old nieces.''

It is ridiculous. It is beneath this place. It should be beneath this institution. But, my lord, I keep hearing it and hearing it and hearing it.

I am talking too long, and I do not want to delay this. I have two of my colleagues here to speak, and I will have plenty of time to rebut their assertions, although maybe I will agree with their assertions. They are all enlightened people, and redemption is all part of the process. Now

that they know some of the facts, they may change their views. For the Record , I am being facetious.

Pretrial detention. In a speech to law students that Senator Hatch referred to, Judge Sarokin talked about pretrial detention-keeping accused persons in jail before they have been charged. In this academic speech, Judge Sarokin said that this type of detention before trial was in some conflict with the presumption of innocence.

But you have to look at what Judge Sarokin has done as a judge. As a judge, he has detained hundreds of defendants before trial, applying the law [*S13997] as passed by Congress, without flinching.

So whatever Judge Sarokin may have said in an academic speech is not relevant to our task today. Our task today is to look at his record as a judge, and that record shows he is entirely willing to detain defendants before trial, as the law requires.

I also will at a later time, in response, speak in more detail to what I think is an emerging pattern here, at least as we get closer to an election, of characterizing the actions of judges in what I think are a distorted fashion.

I am not suggesting everyone who votes against Judge Sarokin is engaging in misrepresentation. There is reason enough if you want to vote against Judge Sarokin. The Constitution says to give advice and consent. It does not set out how you give it. It does not say it has to be reasonable. It does not say it has to be based on anything at all other than what you think your particular inclination or whim is at the time. It does not set out in any detail the circumstance under which you can exercise or withhold that consent. So, that is everyone's right.

The only thing I am asking for here is I am asking to put in focus, No. 1, where all of the judges, if you take them all as a whole, who have been sent up by this President fit in the political spectrum. You will not find any conservative or liberal act of omission, who is an expert on the Court, who will say that this is a new left-wing coterie of judges that has been put in place by this President and this Senate. It simply does not even approach reality.

No. 2, as to the assertion that you have this overwhelming liberal machine that is running through this place and putting all these judges on the bench, I again cite for you that we have had 72 judges confirmed. I do not know of any of those judges who did not either have a majority of all the Republicans, or all of the Republicans through unanimous consent before them, and of the two Supreme Court Justices no one is accused of being liberal.

As a matter of fact, if my friend, the Presiding Officer, will recall, those who opposed them and spoke against them were liberals. It was Howard Metzenbaum who did not like Breyer-not personally did not like him-but his concern that Breyer was too liberal. Most of the questions about Breyer, the new Supreme Court Justice, were from the left and not the right, from the center and not the right.

So I hope we will stop this malarkey about procrime/anticrime judges and justices, and the like. Maybe as we refine further the criminal justice system, maybe from this point on we will actually have Republican participation and willingness to pass something as we go down in terms of and start to deal with our whole effort to deal with drugs in society and our antidrug legislation.

Other than Barkett and possibly this nominee, a majority of Republicans, to the best of my knowledge, voted for every one of the other justices. Again, I will stand to be corrected on that if that is not true.

So if that is the case, either we have a majority of Republicans who are liberals or these judges are not, and they are mainstream, moderate judges by and large.

But as I said, there is much more to say on this. I see my friend from New Hampshire is here. I will be delighted to yield the floor to him or anyone else who seeks recognition.

The PRESIDING OFFICER (Mr. Breaux). The Senator from New Hampshire is recognized.

Mr. SMITH. Mr. President, I rise in opposition to the confirmation of President Clinton's nomination of H. Lee Sarokin to be a circuit judge of the U.S. Court of Appeals for the Third Circuit.

Mr. President, true to his political strategy-and I think it is a political strategy-of portraying himself as a ''New Democrat,'' Bill Clinton has done an awful lot of talking on crime and about how we need to be tough on crime in this country. I certainly agree with him that we do need to be tough on crime.

But as the old proverb tells us, ''actions speak louder than words.'' And President Clinton's act of nominating Judge Sarokin to the U.S. Court of Appeals, the level of the Federal judiciary just below the Supreme Court, speaks volumes, I believe, as to how the President really stands on the issue of crime.

Frankly, Mr. President, Judge Sarokin's views on criminal law issues make him better suited, I think, to a seat on the board of directors of the American Civil Liberties Union than a seat on the U.S. Court of Appeals.

Now, some would say this is harsh. But I want to point out that in this country today there is a great wave, almost, I would say, a tidal wave of support for dramatic efforts in this country to put away criminals, especially violent ones, make them serve their sentences and keep them from preying on the rest of us in society. In order to do that, you have to nominate and ultimately appoint and confirm tough judges. That is the secret.

Ask anybody. Ask any law enforcement official about how they feel about the sentences that judges give out and then on top of that the situation when they get out on the street not too many years after they have been sentenced.

We see in the State of Virginia Governor Allen's no parole; overwhelming support in the State. This is a wave that is going across this country.

But the President is not caught up in that wave, I regret to say. He is in rhetoric, I would agree, but in the actions, in the nominees that he is sending to the judiciary, unfortunately, it does not back up the President's rhetoric.

As the recently enacted crime bill demonstrated, those who control the White House-and both Houses of Congress, I might add-believe passionately in what I believe to be the fundamentally misguided notion that a lack of sufficient government spending on social programs causes crime. It is as if to say, if we do not spend hundreds of millions and billions of dollars on all of these social programs, if we do not do that, we are not doing our part to stop crime.

Now, we have been spending hundreds of millions of dollars and billions of dollars on social programs and we still have crime. Not only do we have crime, we have more crime than we had when we started spending the money on these social programs.

Speaking at a conference in Washington in May of this year, Judge Sarokin made it clear that he is an enthusiastic proponent of what I believe to be an erroneous point of view.

''If we truly want to deal with crime and make our streets pleasant and safe,'' Judge Sarokin proclaimed, ''we must identify the mentally and physically ill, the drug addicts and the alcoholics,

and then either treat them or hospitalize them.'' ''And,'' Judge Sarokin continued, ''we must feed, clothe, and shelter the homeless and, most important, for those who can benefit, we must educate and train them so that they can have some hope and some reason to live.''

Now, I am not critical at all of identifying mentally and physically ill people, treating them, hoping to treat alcoholics and drug addicts and see that they recover, hospitalize the sick, feed, shelter, and clothe the homeless. There is nothing wrong with any of that. But what does that have to do with the violent crime in the United States of America today?

Mr. President, as that quotation demonstrates, Judge Sarokin does not get it. He just does not get it. ''It's the criminal, stupid,'' to use an expression that was used in the last campaign, referring to the economy. Criminals cause crime.

Why do we all have to feel guilty because somebody who had a tough childhood or some social problem commits a violent crime? And it is our fault, not his fault or her fault; not the perpetrator of the crime. It is not their fault. It is society's fault-do not accept any responsibility in society today, absolutely not; blame somebody else; whatever happens to me, it is somebody else's fault. If I commit a murder, it is not my fault. I had a tough childhood. I did not get any help from the rest of society when I needed it. So, therefore, somebody else is to blame for the fact I killed somebody.

In his public statements, his written articles, and his opinions in cases on which he has sat as a Federal district judge, Judge Sarokin has shown time and again that he has inordinate sympathy [*S13998] for criminal defendants, that he has a disturbing attitude toward law enforcement, and that he gives insufficient weight to the requirements of public safety.

This is the nomination that we are faced with here today on the floor of the U.S. Senate. The President makes a choice. We do not challenge that. We confirm. The question is, if you want someone who is tough on crime, really tough on crime, is Judge Sarokin your man? Not in my estimation.

A prime example of this, what I call, soft-on-crime philosophy is Judge Sarokin's steadfast opposition to the preconviction detention of criminal defendants. In a 1988 article entitled ''Beware the Solutions!'' which was in the West Virginia Law Review, Judge Sarokin stated his belief that any incarceration of accused criminals violates the presumption of innocence and, therefore, he opposes ''(p)utting people in jail before they are convicted.''

Now, that is a very, very dramatic and far-reaching statement-very much so. A violent person who is accused-admittedly accused-of a crime but a very violent one should not be jailed. The people around that person in that community should not be protected from that person, even though he committed a violent crime or may have committed a violent crime, is accused of committing a violent crime. He should not be incarcerated. We should leave him out on the street.

So that would include, I suppose, under the judge's definition, Charles Manson, Sirhan Sirhan, and others. Let them back out. They are not convicted yet. Leave them out on the street. Maybe they will do it again to somebody else four or five more times. How many times do they have to do it, I would say to the judge? Do they have to kill 25 times, 6, 7, 8, 15, before we finally say, ''Well, this is a violent person; we ought to keep them incarcerated pending trial''? How many times? What is the threshold?

The time-honored presumption of innocence, however, relates to conviction and not to preconviction detention. And that is a very important point.

As the Washington Post reported in a July 1994 news article, more and more violent crimes are being committed by criminal defendants who are released pending trial. The American people are

not interested in this kind of a judicial attitude. The American people are interested in trying and convicting and punishing violent criminals. Period. They do not want them out on the street.

Judge Sarokin does not get it. President Clinton does not get it, because if he did he would not be sending this nomination to the U.S. Senate.

This same Post report focused on how witnesses to crime are increasingly being terrorized and even murdered. The people who witnessed the crime are being terrorized and even murdered by the accused. If Judge Sarokin's extreme view were to become the law, I believe this trend would get worse.

Mr. President, not only does the judge that is before the Senate right now for confirmation, Judge Sarokin, think that the accused-and often dangerous-criminals should be allowed on the streets before they are convicted, he is also a very strong supporter of a liberal legal doctrine that makes it harder to get them convicted at all-at all.

In his West Virginia Law Review article, Judge Sarokin stated his opposition to even the good-faith exception to the controversial so-called ''exclusionary rule. Judge Sarokin believes that suppressing evidence obtained by a search that is later to have been determined to have been improper is necessary to deter police lawlessness, even when the police acted in the good faith belief that their search was conducted properly, and even when it means that a guilty defendant will go free. ;Even in that circumstance, even in that circumstance, Judge Sarokin believes that this evidence obtained by that search is improper.

This is a very liberal view of the law-a very, very liberal view of the law. And in my opinion out of touch, way out of touch with the mainstream of the citizenry of this country.

Judge Sarokin took this view, even though the Supreme Court recognized just such a good-faith exception to the exclusionary rule 4 years before his law review article appeared. Not only does this judge think that even violent criminals should roam free pending conviction, and not only does he have a view of the exclusionary rule that makes it more difficult for prosecutors to get criminals convicted, but Judge Sarokin also opposes tough sentences even for criminals who have been convicted. In this very revealing article in the 1988 West Virginia Law Review, Judge Sarokin took the position that he is opposed to ''mandatory and uniform sentencing.'' Such tough-on-crime approaches to criminals, the judge says, ''deprive judges of the right to grant mercy.'' That deprives judges of the right to grant mercy.

So, this judge wants the right to grant mercy to a convicted murderer. I do not think the American people are interested in mercy for a convicted murderer. How about some mercy for the victims? How about some compassion for the victims of the murderer, and their families?

We see, again, the judge and the President just do not get it. That is not what the American people are saying when they say get tough on crime. Again, it goes back to the crime bill debate. Everybody is against crime. Where we differ is punishment for the crime committed-that is where we differ. That is where Republicans and Democrats have had some huge debates on this issue. Do you punish the violent criminal or not? That is why parole in Virginia was eliminated-or will be. That is why, because in Virginia, as well as other States all across America, they are sick and tired of the rhetoric, they are sick and tired of the inaction, they are sick and tired of judges letting people out on the street as fast as the police officers arrest them. That is what the American people are saying. And if you want to change it, you want to stop it, you cannot put judges in powerful positions like this one. And in spite of the rhetoric, in spite of all the talk on the tough crime bill, here comes this appointment.

Thus far I have illustrated Judge Sarokin's liberal philosophy on crime by quoting from a speech that he made, and from his 1988 law review article. Let us take a look, now, at his judicial record on the U.S. District Court for New Jersey. In 1984, in the case of U.S. versus Rodriguez, which I

know has been discussed earlier in this debate, the defendant was arrested on theft-related charges and given his Miranda warning. In addition, the defendant was then provided with a form, again advising him of his rights, and stating that by voluntarily signing the form-voluntarily signing the form-he could agree to waive those rights. Rodriguez did, indeed, voluntarily sign the form, thus indicating his waiver of his rights. But in so doing he used a false name.

Notwithstanding Rodriguez's voluntary written waiver of his rights, Judge Sarokin granted the defendant's motion to suppress his subsequent incriminating statements to the FBI-to suppress his incriminating statements to the FBI. Ruling in direct contravention of governing third circuit precedent, Judge Sarokin contended that Rodriguez' use of a false name made his waiver of rights somehow involuntary.

I guess that sends out a pretty clear message to anybody who is apprehended by a law enforcement official anywhere around the country, does it not? If you get caught red-handed, give a false name and you are home free. That really makes a lot of sense. I guess there are people-judges, I suppose are a lot smarter than the rest of us. They seem to be a lot smarter than the American people-at least they think they are. You tell me how in the world anyone could justify that kind of an argument? That is what it says. All the criminals out there listening to this debate, or any potential criminal, just give a false name and you are home free. Do not sign your name because then you have given yourself the waiver. Sign somebody else's name and you get off. The Rodriguez case demonstrates Judge Sarokin's propensity to ignore settled, governing law in order to create loopholes for criminal defendants. That is a fact.

Perhaps the worst example of where Judge Sarokin's soft-on-crime judicial philosophy has led him in the criminal cases that have come before him on the district court is his record in the case of a convicted cop killer by the name of James Landano, a case to which a [*S13999] number of Senators have alluded to and referred to during this debate. Judge Sarokin was reversed no less than 4 times-4 times-by the U.S. Circuit Court of Appeals and the U.S. Supreme Court during the course of his consideration of the Landano case.

In one of his opinions in that case, Judge Sarokin offered the following social commentary. Remember, Landano was a murderer, a cop killer. Here is what the judge said.

We must ask ourselves why the current clamor and rush to carry out death sentences, but no similar urgency in freeing one who might be wrongly convicted and confined. * * * Rather than crying out for speedy convictions for those who have been convicted of capital crimes, we should be crying out for prompt release of those who may have been wrongly convicted and confined-cries of freedom rather than death.

It is interesting, no one would disagree that if somebody is wrongly convicted we should be crying out for prompt release. But why would you make a statement like that during the case of a convicted cop killer? It is obvious, because, again, the sympathy is with the accused. The sympathy is with the killer-not with the victim. Do you hear the victim mentioned anywhere? Not that I hear; not that I read.

Mr. President, that statement by Judge Sarokin in this case seems to me to reveal a very clear prejudice on his part toward the death penalty. President Clinton has said-this is where it really gets interesting. Let us just put the rubber right on the road. President Clinton has repeatedly said he supports the death penalty. Once again we see a certain divergence, to put it kindly, as nicely as I can, between Mr. Clinton's tough-on-crime rhetoric and his latest soft-on-crime judicial nominee.

Actions do speak louder than words. Is it not a pretty simple question that involves a basic simple answer? If you are for the death penalty, and you are the President of the United States, why would you not appoint judges who are for the death penalty? You are only President, if you are lucky, for 8 years; and most for 4. You do not have that many judicial appointments,

nominations. When you make them, why not appoint people who back up and support your feelings on the various issues?

Here again, this is not the first one. There have been others. He sends us a judge who does not support the death penalty. So do not tell me President Clinton supports the death penalty. I know he carried it out as a Governor of Arkansas. But he has a chance to impact, for years, crime in this country, by appointing tough Federal judges. And he is not doing it.

Do not believe me. Read the cases. Read the facts. Listen to the debate. Early in his administration President Clinton nominated another liberal law professor, Lani Guinier, to be the Assistant Attorney General in charge of the Civil Rights Division of the Justice Department. As some of her more radical writings on legal ;issues came to light, President Clinton's nomination of Ms. Guinier came under increasing fire. Finally, President Clinton reported, he sat down and read some of the most controversial of Ms. Guinier's legal articles. After doing so, President Clinton said, he decided to withdraw the Guinier nomination.

Mr. President, I would respectfully suggest that President Clinton ought to sit down and read Judge Sarokin's 1988 West Virginia Law Review article. While he is at it, he ought to study Judge Sarokin's actions in the Rodriquez and Landona cases. As the Wall Street Journal noted in its fine editorial opposing the Sarokin nomination, ''* * * perhaps Mr. Clinton doesn't even know his real record.''

Mr. President, if President Clinton really means it when he talks tough on crime, then I trust that he will conclude that he has no choice but to withdraw the Sarokin nomination. Failing that, Mr. President, I urge my colleagues in the Senate to vote against confirming Judge Sarokin for a seat on the Court of Appeals for the Third Circuit.

Thank you, Mr. President. I yield the floor.