tion with a case that had been decided about eight years before Justice Fortas was appointed to the high tribunal.

In the Mallory case of 1957, a confessed rapist's conviction had been reversed because his arraignment was delayed to permit interrogation. "Mallory! Mallory! I want that word to ring in your ears!" the South Carolina Republican shouted.

But Mallory had to do, of course, with no "mere technicality." If one man can be held without arraignment, another man can be. You can be. If, as in the Gideon case which, as a lawyer, Abe Fortas had successfully argued before the Supreme Court in 1963, a man can be sent to jail without counsel, so then can any man.

"To set aside the conviction of a man who has been tried in violation of the Constitution is not to set it aside on a mere technicality." Justice Fortas declared. "Constitutionalism is not a technicality. Constitutional rights are not technicalities. This is the phrase that should ring in the nation's ears."

One man's technicality is another man's liberty, and to ignore the procedural rights which are embedded in the U.S. Constitution is to subvert all our liberties.

There is no reason why, when the Supreme Court has made a decision, the decision should not be subject to criticism. The Court is, after all, composed of men, and men can err. But the kind of vitriol that has been spewed at the Court by other men who should better—Pennsylvania Supreme Court Chief Justice John C. Bell Jr. and Pennsylvania Associate Justice Michael A. Musmanno, for example—does not accomplish precisely the thing they claim they want to accomplish, that is, to restore whatever respect for law may be lacking today.

Neither is there any reason why any U.S. senator should not, if he dislikes the color of Justice Fortas' opinions or his eyes, vote against the Fortas nomination to replace Chief Justice Earl Warren.

But a vote there must be. To block even that by means of a filibuster, as Republican Sen. Robert Griffin of Michigan and other Fortas opponents have threatened, would be to resort to a parliamentary technicality to subvert the processes of democracy.

THE SOVIET INVASION OF CZECHOSLOVAKIA

Mr. JAVITS. Mr. President, I ask unanimous consent to have printed in the RECORD the text of a speech I delivered before the Frontier Press Club, Buffalo, N.Y., on September 14, 1968.

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

SOVIET INVASION OF CZECHOSLOVAKIA REVEALS KREMLIN'S FEAR OF FREEDOM

(Remarks of Senator JACOB K. JAVITS before the Frontier Press Club, Buffalo, N.Y., Saturday, September 14, 1968)

The Soviet invasion and continuing occupation of Czechoslovakia is a barbarous act which challenges the conscience of civilized men. The malice, the crudity and the deceitfulness of Soviet behavior in this instance was highlighted by the bravery, dignity and self-discipline which the Czech people have displayed in the face of overpowering naked force. The contrast could not have been more poignant. It is a situation which inevitably arouses toward the Soviet Union profound feelings of moral revulsion, anger and frustration. The denunciation of these acts which has been voiced around the world seems to fall on deaf ears in the Kremlin. One cannot but feel a measure of chagrin over the seeming inability of the United States and other western democracies to accord any direct protection to the embattled Czechs in their struggle for basic human freedoms and dignity.

All the nations of Eastern Europe are directly affected by the occupation of Czechoslovakia. In dragooning troops from the other Warsaw Pact countries to participate in the invasion, the Kremlin demonstrated both cynicism and ruthlessness. Not only did Moscow seek to taint the communist regimes in Warsaw, Budapest, Sofia and East Berlin with a measure of its own guilt by implicating them in the Czech repression, but Moscow also intended the rape of Prague as a warning to the people of the other nations of Eastern Europe.

Because Soviet action in Czechoslovakia has such menacing overtones, it is critically important that we make an accurate assessment of the situation in framing our response to it. First, it is necessary to see that the Soviet invasion of Czechoslovakia was an act of weakness and desperation—not an act of strength. A great power does not so demean itself in the eyes of the world unless it is gripped by dreadful anxieties and self-doubts concerning its own inner strength and viability.

The world is witnessing the reaction of a reactionary great power. Believing itself safeguarded from effective counter action by the United States, exploiting the priority Washington is now giving to the Vietnam war; determined to allow the Middle East crisis to smolder dangerously on—and obviously relying on the US to recognize the Soviet sphere of influence in Eastern Europe—the Kremlin moved not only to subject Prague to stricter controls but to force it into an anti-Western policy. In doing this, the leaders in the Soviet Union hope to thwart the Western policy of "bridge building," which has so impressed East Europeans.

It is essential that United States policy continue to distinguish between the people of Eastern Europe and the Communist regimes which have been forced on them by the Soviet Union.

We must adopt measures which encourage and keep alive the striving for freedom and normal contact with the West which has persisted through so many dark years in Eastern Europe. Moreover, despite the Soviet use of Warsaw Pact troops of Poland, Hungary, Bulgaria, and East Germany in the occupation of Czechoslovakia, the United States must remain alert to the vital distinctions between these peoples and the USSR itself. We cannot, in our policies, assist Moscow in its efforts to blur or eradicate those differences.

The Kremlin's repressionists who reacted so brutally to stamp out the Dubcek-led reforms were correct in their fear that the evolution of a liberal and humanitarian Czechoslovakia posed a threat to their own continued monopoly of power even within the Soviet Union itself; for freedom is a contagious disease. It could have spread in epidemic proportions throughout the Soviet Union. And there is no doubt that a free Russia would have no place for those obsolete bureaucrats who learned their political techniques in the schools of Stalinism.

Stalin's prime postwar objective was to cement a wall of puppet states on the borders of the USSR that would do what they were told. He was unafraid of the contagion of democracy because he could rely upon his secret police to stamp it out.

Today, the Russians' once paranoiac fears of external aggression from the West have receded into the background. Whatever they may say in public, it is not the supposed West German revanchists who keep Mr. Brezhnev and Mr. Kosygin awake nights; it is the intellectuals and journalists in Prague and Moscow.

The crude repressive techniques of Stalinism are incompatible with the functioning of a sophisticated technological society. To avoid economic paralysis, the Soviet Union itself has found it necessary to discard the rigid discipline of terror based on naked force in many areas of endeavor. The inescapable dilemma of the New Soviet rulers is that they cannot hope to keep pace with the Western democracies in economic growth and technological advance unless they progressively unshackle the creative human spirit of their own people and of the benighted peoples of eastern Europe.

It would be a grave mistake, in my judgment, for Washington to emulate the folly of Moscow by trying to revive the policies and mental attitudes which characterized us twenty years ago. Our interests will be much better served by a response which is forward looking, rather than backward looking. The Soviet Union's monolithic communist empire in Eastern Europe has begun to be cracked wide open—and all the armies of the Soviet Union cannot put Humpty-Dumpty back together again.

Especially, we must resist those voices in our midst who counsel—from whatever motive—that we should respond to the events in Czechoslovakia by cutting off all efforts to arrive at agreements relating to disarmament with the USSR, or by ending, for example, all East-West trade. I believe those who espouse this view are being singularly near sighted. In point of fact, our policy of differentiating between the USSR and the communist countries of Eastern Europe has been a success. Certainly, at a minimum, without such a policy by the United States, the Czechs are less likely to have sought, and gained briefly, the independence and freedoms they enjoyed under Dubcek-creating a precedent toward removing the heavy hand of the Kremlin off Eastern Europe.

About the only thing which could lend an air of justification to the specious deceits being proclaimed by the Soviet occupation officials in Czechoslovakia—which are accepted by no one—would be a revival in the US of the hysteria and kind of knee-jerk rigidity associated with an earlier day.

We must also guard carefully against the specious reasoning of the die-hard hawks who would argue that our response to events in Czechoslovakia should be a break-off of the Paris peace talks and the beginning of another escalation of the Vietnam war or the rejection of the nuclear non-proliferation treaty. I cannot see how this would serve our interests in any way.

Indeed, in my judgment, the crisis in Europe makes it more imperative than ever to accelerate the search for an agreement which will terminate, or at least drastically curtail, our massive combat involvement in the Vietnam war.

The situation in Eastern and Central Europe is extremely volatile. As such, it poses dangers to the peace of the world. This area has twice been the cockpit of war in this century. There has still not been there an overall settlement of the Second World War. The present, ad hoc arrangements are unnatural and inherently unstable.

Just as it would be irresponsible for the US to encourage the peoples of Eastern Europe to rebel openly against their Communist masters, it would be tragic in the extreme for the US to abandon the people of Eastern Europe—thus leaving them indefinitely to the grim fate which Moscow has in mind for them. The people of the United States—so many of whom have come from the Slavic lands of Eastern Europe—will not permit our government to adopt any such passive and defeatist course.

Hopefully, when the Soviet government has recovered its equilibrium it will view its experience in Czechoslovakia as an incentive to move toward an overall European settlement, which alone can bring long-term stability to Europe.

The emergence of a liberal regime in Czechoslovakia, however brief, signals a major

crack in the great freeze which has divided Europe unnaturally for more than twenty years. As such, it heralds a new period in which the United States must again give its first attention in international affairs to Europe. The inevitable break-up of he Cold War arrangements in Europe will be a transition period of great delicacy and potential danger.

Thus, far, the Soviet Union has not demonstrated the poise, the sophistication and the foresight which will be required on all sides if we are to avoid the gravest kind of tensions—and possibilities for blundering into war. It will be a situation requiring the highest order of leadership by the United States. Both resolution and flexibility, as well as firmness and compassion, will be needed. Above all, we must not react blindly by taking hasty action.

ADMINISTRATIVE AGENCIES AS A PART OF CONSTITUTIONAL GOVERNMENT

Mr. ERVIN. Mr. President, the September 16, 1968, issue of the NAM Reports, published by the National Association of Manufacturers, contains an article summarizing portions of the testimony presented at the recent hearings on administrative agencies and in particular the National Labor Relations Board, which were held by the Senate Subcommittee on Separation of Powers, of the Committee on the Judiciary.

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

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

DOES NLRB FOLLOW THE LAW?—WITNESSES TRACE DIVERGENCE BETWEEN COURSE CONGRESS PLOTTED AND PATH THE AGENCY TAKES

(EDITOR'S NOTE.—In the May 13 issue of "NAM Reports," we presented an abridged version of the testimony of Francis A. O'Connell, Jr., vice president of employee relations for Olin Mathieson Chemical Corp., who was the NAM witness before the Ervin Subcommittee hearings. Now, a summary of testimony by other witnesses has been completed, and an article reviewing the highlights of these authoritative statements has been prepared for wide distribution to the trade and general press; this digest will be published first as a series in "NAM Reports." The initial installment appears here.)

"Whether we like it or not, the administrative agency has come to be a primary instrument of government in our country," according to Senator Sam J. Ervin, Jr. (D., N.C.).

"Although the nation now accepts the administrative agency as a normal and constitutional part of the government," Sen. Ervin declared, "there still remains the problem of assuring that the independent administrative agencies faithfully execute the laws entrusted to them by Congress. . . ."

Authorized by Congress, the administrative agency gets its policy and principal rules of procedures at the same time that it is created. During the key periods of their growth—in the 1920's and 1940's—such agencies became fairly independent. In their evolution, they attained the unique status of possessing executive, legislative and judicial powers, while qualifying neither as legislature nor court—and while remaining independent of the executive branch.

Now Congress, in its role of lifegiver and lawgiver, has become restless with this arrangement. This is because, in the words of Sen. Ervin, "the exercise of their powor directly or indirectly affects every citizen, and the work product of these administrative agencies constitutes the largest source of 'law' in our country . . ."

Since Congress has had mixed success in its occasional legislative efforts to correct questionable behavior by administrative agencies, the Senate Subcommittee on Separation of Powers,* chaired by Sen. Ervin, was designated to look into such problems. It chose to examine first the agency that had generated the most controversy—the National Labor Relations Board.

"Constitutional law and representative government cannot exist," Sen. Ervin pointed out in his preliminary remarks, "if officials of the executive branch, commissioners and board members of the agencies, or the judges on the courts, have the power to modify, repeal, or ignore the will of Congress as expressed in statutes."

It was precisely to guard against such encroachments that the Subcommittee launched a series of extensive hearings in the Spring of 1968. At the outset, the chairman declared that "policy-making is not a function that properly can be performed by a small group of appointed officials . . . In the case of the National Labor Relations Board . . . these problems are particularly acute . . .

"Some of the criticism directed at the Board," he continued, "may be explained by the importance of the issues it decides and the passions these issues engender. But it would be a mistake to excuse all criticism on these grounds." The Senator stated that the Board has been criticized "for making decisions contrary to the policy and rules announced by Congress—which the Board definitely is not authorized to do."

The viewpoints of the Congressmen, former NLRB members, law professors, attorneys and other distinguished experts who were invited to testify was summarized by Leonard S. Janofsky, a recognized authority on labor legislation and the first senior Regional Attorney for NLRB in Southern California and Arizona. Said Mr. Janofsky:

"For 33 years, the National Labor Relations Board has been part of the fastest growing area in the legal domain—administrative law. While other administrative agencies generally have kept abreast of the socio-economic changes in the areas they regulated, the NLRB persisted in its 1935 vision of employers and unions. The Board seems to harbor a conviction that employers are the last obstacle standing between the working man and his self-betterment.

"This credo best explains the NLRB's frequent disregard or contravention of the will of Congress, under whose authority it functions. This it does on the theory that Congress meant its Preamble to the 1935 Act to be immutable and that any reassessments, such as the 1947 and 1959 amendmentes, are not to be taken seriously."

BOARD RESISTS LIMITS

The charge that the NLRB has usurped legislative powers is a recurrent theme of the Ervin hearings, and its genesis was decisively described by Gerard D. Reilly, another former NLRB member and the ex-Solicitor of the Labor Department. After observing that the Board was envisioned as an impartial, quasi-judicial tribunal which would review transcripts of testimony and make findings of facts, Reilly declared:

"I have come to the opinion that the present Board has never reconciled itself to so limited a role, but conceives of itself as a maker of national labor policy . . . It should always be borne in mind that the Board as created by Congress is essentially a court, for unlike other independent agencies vested with quasi-legislative powers, Congress did not entrust it with policy-making authority . . .

"One of the most startling aspects of how the present Board has disregarded Congressional intent and cast aside guiding precedent has been a series of decisions which have virtually restructured the whole foundation of bargaining in certain industries."

He cited Board orders compelling multi-plant employers to engage in bargaining simultaneously with a coalition of unions for system-wide wages and working conditions. Such actions, Reilly pointed out, contravene certifications issued by the Board itself, *limiting each union's authority to speak for the workers in a particular plant.* (Italics ours.)

It is important to appreciate the significance of this last point. While expressing concern that the Board decisions will inflict serious damage on an employer's bargaining position, Reilly asserted that such NLRB approval violates the Taft Hartley Act and deprives workers of fundamental representation rights.

(Editor's Note.—This trend to coalition bargaining was dramatically demonstrated by the nine-month copper strike. The objective of some 26 unions, led by the United Steelworkers, was to force the four major copper producers to sign contracts with all the unions on a company-wide basis, covering thousands of employees doing different kinds of work in various parts of the country.

(Such a bargaining approach—by its huge mass and impersonal nature—obviously cannot be responsive to the widely divergent needs and interests of the workers—and so prevents them from enjoying the representational benefits to which they are entitled by law.)

"LITTLE PEOPLE BEING HURT"

Testimony of other witnesses who appeared at the hearings reflects similar concern with the threat to individual freedoms. The conclusion that emerges from their voluminous statements is that the little people—small businesses, independent unions, and the individual employees—are being hurt as much as, and possibly more than, the large companies by the misapplication of labor laws.

On this point, former Representative Fred A. Hartley, Jr., co-sponsor of the 1947 Act that bears his name, charged that the Board consistently favors the big AFL–CIO unions, adding that as early as 1940, independent unions were demanding abolition of the NLRB because of the Board's bias and prejudice against them.

In his statement before the Subcommittee, the former chairman of the House Committee on Education and Labor asserted that the Taft-Hartley amendments provided procedures for employees to secure a Board decertification election when a majority of workers no longer wanted a particular union as bargaining representative.

"The NLRB, manifesting its usual pro-union, anti-employee, anti-management bias, soon reduced these new procedures to a shadow of what Congress intended," he declared.

"Employers were denied the right to petition for a Board election," Hartley went on, "unless they proved their good-faith of the union's claimed majority status. Employees were prohibited from changing their bargaining representative, even if it had lost a majority, and unions were permitted to punish by fine or other form of discipline union members who sought to invoke the decertification procedures under the Act."

Reinforcing this concern with NLRB's exhibition of favoritism toward the major union organizations were the observations of Senator Robert P. Griffin (R., Mich.), co-author of the 1959 Landrum-Griffin Act, the sweeping reform statute that was over-

* It is pertinent to note that Sen. Ervin instructed his witnesses to concentrate on these three main questions—(1) Do the independent agencies exercise powers greater than those granted them by Congress? (2) If so, what explanations can be offered? (3) How can Congress improve its oversight so that the exercise of agency power can be brought into better balance with Constitutional responsibilities of Congress.