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David Chew

White House News Summary

Monday, August 3, 1987

Beginning today, the White House News Summary will produce a daily clips package on the nomination of Judge Bork to the Supreme Court, using newspaper stories, analyses, editorials and columns from our own files as well as those given to us by other offices.

The format generally will be as follows:

- I. News stories
- II. News analyses
- III. Editorials
- IV. Columns

NOTE ON TODAY'S PRODUCT: Stuart Taylor Jr.'s article, "Justice Stevens, in Unusual Move, Praises Bork as Nominee to Court," which appeared in Saturday's New York Times, is followed by an article by David Thompson that was read into the Congressional Record and a copy of Stevens' article.

# Justice Stevens, in Unusual Move, Praises Bork as Nominee to Court

By STUART TAYLOR Jr.  
Special to The New York Times

WASHINGTON, July 31 — Justice John Paul Stevens has entered the fray in support of Judge Robert H. Bork, the nominee to the Supreme Court, in unusual public remarks praising his qualifications and implicitly rejecting the portrait of a rigid, right-wing ideologue painted by some opponents of the nomination.

In a little-noted public speech in Colorado two weeks ago, Justice Stevens likened Judge Bork's constitutional philosophy as expressed in one 1984 opinion to that of himself and two other moderate centrists on the Court, Justice Lewis F. Powell Jr., who retired June 26, and Justice Potter Stewart, who retired in 1981 and has since died.

"I personally regard him as a very well-qualified candidate and one who will be a very welcome addition to the Court," Justice Stevens said of Judge Bork. "There are many, many reasons that lead me to that conclusion."

### Possible Impact of Remarks

Justice Stevens's remarks could be helpful to Bork supporters, both because it is quite unusual for Supreme Court Justices to speak out publicly on nominations and because of Judge Stevens's reputation as a centrist who has voted with the Court's liberals on such issues as abortion, affirmative action and separation of church and state.

While he did not directly challenge the widespread view that Judge Bork would shift the Court's ideological balance sharply to the right, Justice Stevens's remarks strongly suggested

that Judge Bork was in the legal mainstream, at least on some issues.

Justice Stevens made his statements publicly in a speech to the Eighth Circuit Judicial Conference, a meeting of Federal judges from several states, in Colorado Springs on July 17.

A transcript based on a tape recording was provided to The New York Times today by a Bork supporter who insisted on anonymity. The Stevens remarks had previously been reported by The Omaha World-Herald but not in the national press.

Justice Stevens's secretary, responding to a message a reporter left for him Thursday at his hotel in Aspen, Colo., said today that the Justice would not speak to a reporter or elaborate, but confirmed that Justice Stevens made the remarks July 17.

After delivering his prepared text for that speech, Justice Stevens added his assessment of Judge Bork and said one of the reasons he welcomed the nomination was a concurring opinion by Judge Bork in a libel case in 1984, from

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# Stevens, in Unusual Move, Hails Bork as Nominee

Continued From Page 1

which Justice Stevens proceeded to read aloud at some length.

The Bork opinion, arguing that judges should provide greater protection for the press against certain libel suits even though the framers of the First Amendment apparently did not intend to curb libel suits at all, cited the "judicial tradition of a continuing evolution of doctrine to serve the central purpose of the First Amendment."

This view of constitutional interpretation, Justice Stevens told the group, "is consistent with the philosophy that you will find in opinions written by Justice Stewart and Justice Powell and some of the things that I have written."

### Private Expression of Support

Justice Stevens noted, in his speech, that he had already expressed his favorable opinion of Judge Bork to an American Bar Association representative preparing a report on the nomination, and added, "I see no reason why I shouldn't express it publicly."

Several legal analysts said today that they could not recall a previous occasion on which a Justice had publicly endorsed a nomination to the High Court. But the American Bar Association's Standing Committee on Federal Judiciary, in its favorable report last

summer on Associate Justice William H. Rehnquist's nomination to be Chief Justice, said that it had interviewed most or all other members of the Court and that they had uniformly praised his temperament, professionalism and integrity.

Many critics of Judge Bork, as well as many more neutral analysts, have said that his published views place him well to the right of Justice Powell and others including Justices Stevens and Stewart, and that his confirmation would tip the closely divided Court's ideological balance well to the right.

For example, Justices Powell and Stewart joined in the Court's 1973 decision legalizing abortion, and Justice Stevens, who was appointed later, has supported that ruling. Judge Bork has

strongly assailed the abortion ruling as "unconstitutional," and it seems highly probable that he would provide the fifth vote on the Court to narrow or overrule it. Justice Stevens did not mention Judge Bork's views on abortion or other positions, except for the 1984 libel opinion, in his speech.

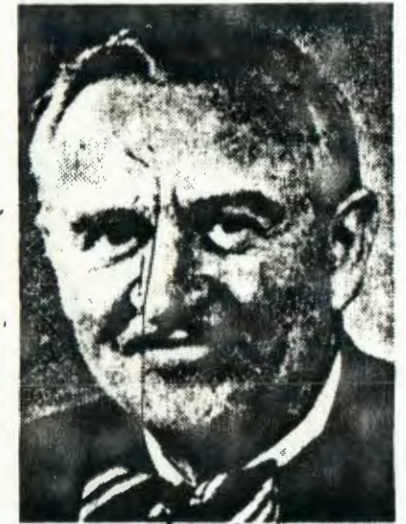
Justice Stevens also had praise for Justice Powell and for the Court's two most conservative members, Chief Justice Rehnquist and Justice Antonin Scalia, a friend of Judge Bork, whom President Reagan appointed to the Court last summer.

Justice Stevens called Justice Scalia "a very delightful and excellent, powerful addition to the Court," who has "an excellent sense of humor" and an open mind. He said Justice Scalia had sometimes been persuaded by colleagues to change his initial view of a case, and vice versa.

He said Chief Justice Rehnquist, who has long been well-liked even by members of the Court like Justice Stevens who have major philosophical disagreements with him, has been "a fine Chief Justice."

He said Justice Powell's surprise retirement had been "a very emotional experience because he is a person of whom all of us were particularly fond and have particular respect."

"I have always considered him a



Justice John Paul Stevens

particularly wise man," he said of Justice Powell, citing his sound sense of how to handle "cases that don't always fit into logical boxes and neat doctrine and all the rest."

Justice Stevens's remarks on Judge Bork's libel opinion seemed implicitly to challenge critics who have characterized as rigid and anachronistic Judge Bork's view that the "original intent" of the framers of the Constitution is the only legitimate basis for constitutional interpretation.

### Amy Carter Hospitalized

CHARLOTTE, N.C., July 31 (AP) — Amy Carter was listed in good condition today at a hospital here after she hurt her back on a visit here with her parents, former President Jimmy Carter and his wife, Rosalynn. Ms. Carter, 19 years old, was hospitalized early Thursday for a ruptured disk that was pinching a nerve in her back, said a spokeswoman at Presbyterian Hospital.

July 23, 1987

**JUSTICE STEVENS BACKS BORK**

(By David Thompson)

COLORADO SPRINGS, COLO.—Robert H. Bork will be a "welcome addition" to the U.S. Supreme Court, a member of the court told a group of lawyers and judges meeting here Friday.

Supreme Court Justice John Paul Stevens, appointed to the court in 1975 by Republican President Ford, made what legal observers said was the first public appraisal of Bork by a sitting member of the court.

President Reagan's selection of the 60-year-old Bork, now a federal appeals court judge in Washington, D.C., has drawn strong criticism from liberals, women's groups and others.

The chairman of the U.S. Senate Judiciary Committee, Sen. Joseph Biden, D-Del., has scheduled hearings for September on the Bork nomination.

Stevens said he gave his recommendations on Bork to the chairman of the American Bar Association committee that has been asked to evaluate the president's selection.

"I think Judge Bork is very well qualified," Stevens told those attending the 8th U.S. Circuit Court Judicial Conference.

"He will be a welcome addition to the court."

Stevens—a moderate on what court observers and scholars have characterized as an increasingly conservative court—followed his endorsement by reading extensively from an opinion that Bork wrote earlier this year in a libel case.

The justice quoted Bork as decrying "mechanical jurisprudence," trying to force certain kinds of cases to meet a specified number of legal requirements.

Stevens quoted Bork as saying that there has to be "a continuing evolution" of judicial doctrine.

Stevens, like Bork, was a federal appeals court judge when he was appointed.

Stevens also offered observations about the newest member of the court, Justice Antonin Scalia, and the new chief justice, William Rehnquist.

Stevens said Scalia, regarded as a strong conservative before he stepped up to the Supreme Court last October, keeps an open

mind on cases while they are being discussed by the judges.

Stevens said Scalia has been known to change his views on a case between the time the justices begin their discussion and the time a final decision is rendered.

Scalia also has persuaded others on the court to change their minds during the same process, Stevens said.

The associate justice said a year's experience has shown Rehnquist to be "a fine chief justice."

Stevens also said the surprise retirement of Justice Lewis Powell—whom Bork has been selected to succeed—"was an emotional experience" for all members of the Supreme Court.

Stevens described Powell as "a gentleman and a friend to all members of the court."

The associate justice was one of a series of speakers at the annual conference conducted for federal judges and lawyers who practice in the seven states of the 8th Circuit, Nebraska, Iowa, the Dakotas, Missouri, Minnesota and Arkansas.

Approximately 60 lawyers and judges from Nebraska are attending.

JUSTICE JOHN PAUL STEVENS

To answer the six rhetorical questions that my good friend and colleague, Judge McMillan, has put, with respect to the first, I think it depends a little bit on how one defines a right.

With respect to the second, my answer is yes.

With respect to the third, I think it is important to serve both the people and the government.

My answer to the fourth, is yes.

With respect to the last two, I would like to postpone my answer until I read a paragraph or two from an opinion that I would like to take up just another minute of your time with. We will get out of here before 1:00, be sure.

I thought perhaps I might digress from the subject a little bit to just informally make these brief observations about certain changes in the Court in the last year.

First of all, our new colleague, Justice Scalia, is a very delightful and excellent, powerful addition to the Court. We are neighbors on the bench, and I can assure you he has an excellent sense of humor. I can also assure you that he is a fine workman, that he has an open mind, because there have been cases, and that he has an impact on the Court because there have been cases in which his views on an opinion actually came down were different from those that were originally expressed either during colloquies and oral argument or during conferences. And it is likewise true that he has persuaded other members of the Court to change their views, their original views of cases, so he is an important and welcome addition to the dynamics of the Court.

Secondly, I would like to say, that as I think most of you know, when Justice Rehnquist's hearings were being held on whether he should become our Chief Justice, many of us, and I know I was one of those, expressed the view that he would be a fine Chief Justice. And I would just briefly say that this year's actual experience very strongly confirms the opinion that the members of the court expressed in advance.

Thirdly, I would like to again very, very briefly just express the emotional experience we all went through when with really very little, I should say no notice on Friday, June 26, Justice Powell advised us of his decision. Which was the morning before we went on the bench to announce the remaining few cases. It was a very emotional experience because he is a person of whom all of us were particularly fond and have particular respect. I just, I probably am repeating things you have heard many times, but he is such a gentleman and such a good friend to all of us that you just cannot help but have the deepest affection for him. And also there are many, many comments about his part in the Court, and I would just say that apart from his fairness and his ability to wait out and hear all the arguments before reaching a decision, there are so many virtues in his work, but there are two of his virtues that have always particularly impressed me. I have always considered him a particularly wise man. Whatever that term means, he brings a certain kind of wisdom to the cases that doesn't always fit into logical boxes and neat doctrine and all the rest, but he is a person who is almost always--in fact, I shouldn't put in the "almost"--he is always worth listening to.

And secondly, he had a special, special quality of patriotism that is very hard to describe. He really had an understanding of the traditions of our country and what it is all about that aren't always articulated, but is somehow felt, and I always particularly valued the opportunity to associate with him.

Finally, let me just--because our time is out I will make this very brief. I wanted to read a couple paragraphs from an opinion that Judge Bork has written. \* \* \* Court for their views about the new nominee. And I really feel that since I have expressed my opinion to Mr. Bob Fisk of the American Bar Association I see no reason why I shouldn't express it publicly. I personally regard him as a very well qualified candidate and one who will be a very welcome addition to the court. There are many, many reasons that lead me to that

conclusion. But let me just read from one of his opinions and I think it will speak for itself, because I think it expresses a judicial philosophy that responds to the last two questions that were rhetorical questions and is consistent with the philosophy that you will find in opinions written by Justice Stewart and Justice Powell and some of the things that I have written.

In the case of Ollman against what's the last name, Ollman against Evans, which was a case involving a libel situation in the question of distinguishing between fact and opinion. Judge Bork wrote, "The temptation to adhere to sharply defined categories is understandable. Judges generalize, they articulate concepts, they enunciate such things as four-factor frameworks, three-prong tests and two-tiered analysis in an effort laudably, by and large, to bring order to a universe of unruly happenings and to give guidance for the future to themselves and to others. But it is certain that life will bring up cases whose facts simply cannot be handled by purely verbal formulas, or at least not handled with any sophistication and feeling for the underlying values at stake. When such a case appears and a court attempts nevertheless to force the old construction upon the new situation, the result is mechanical jurisprudence. Here we face such a case and it seems to me better to revert to first principles than to employ categories which in these circumstances inadequately enforce the first amendment's design." And skipping along. "We have a judicial tradition of a continuing evolution of doctrine to serve the central purpose of the first amendment." Judge Scalia's dissent, and of course Judge Bork disagreed with Judge Scalia in this case, implies that the idea of evolving constitutional doctrine should be anathema to judges who adhere to a philosophy of judicial restraint. But most doctrine is merely the judge-made super structure that implements basic constitutional principles. There is not at issue here the question of creating new constitutional rights or principles, a question which would divide members of this Court along other lines than that of the division in this case. When there is a known principle to be explicated, the evolution of doctrine is

inevitable. Judges given a stewardship of a constitutional provision such as the first amendment, whose core is known but whose outer reach and contours are ill defined, face the never ending task of discerning the meaning of the provision from one case to the next. There would be little need for judges and certainly no office for a philosophy of judging if the boundaries of every constitutional provision were self-evident. They are not. In a case like this, it is the task of the judge in this generation to discern how the framers' values defined in the context of the world they now apply to the world we know. The world changes in which unchanging values find their application. The fourth amendment was framed by men who did not foresee electronic surveillance. But that does not make it wrong for judges to apply the central value of that amendment to electronic invasions of personal privacy. The commerce power was established by men who did not foresee the scope and interdependence of today's economic activities. But that does not make it wrong for judges to forbid states the power to impose burdensome regulations on the interstate movement of trailer trucks. The first amendment's guarantee of freedom of the press was written by men who had not the remotest idea of modern forms of communication. But that does not make it wrong for a judge to find the values of the first amendment relevant to radio and television broadcasting. And I would submit to you that the idea of liberty has been with us a long time.



# Justice Stevens backs Bork

## Supreme Court nominee called 'welcome addition'



John Paul Stevens  
*Saw no reason to stay silent*

NEW YORK (AP)—Justice John Paul Stevens called Supreme Court nominee Robert H. Bork a "very well-qualified candidate" and a "welcome addition to the court," according to published reports.

Public remarks by sitting justices on the qualifications of nominees are rare, but Stevens told a meeting of federal judges he saw no reason to hold back, the New York Times reported in its Saturday editions.

President Reagan nominated Bork to replace Justice Lewis F. Powell Jr., who retired June 26 and was considered a centrist. Bork is regarded as a conservative, and his nomination drew fire from liberals.

Stevens, who joined the court in 1975, is considered a centrist who votes with the court's liberals on abortion, affirmative action and separation of church and state.

Stevens made his remarks in Colorado

Springs, Colo., before the Eighth Circuit Judicial Conference on July 17. The Times said it had obtained a transcript based on a tape-recording from a Bork supporter. The story was first reported by the Omaha (Neb.) World-Herald.

"I personally regard him as a very well qualified candidate and one who will be a very welcome addition to the court," Stevens said of Bork. "There are many, many reasons that lead me to that conclusion."

In another report Saturday, the Knight-Ridder news service said Stevens repeated his remarks Tuesday in Aspen, Colo.

In response to a question, Stevens said, "If you want my personal opinion, I would vote to confirm Judge Bork."

The Times reported Stevens noted an opinion Bork wrote in a 1984 libel case. The opinion argued that judges should provide greater protection for the press against certain libel suits

even though the framers of the First Amendment apparently did not intend to curb libel suits at all.

The opinion cited the "judicial tradition of a continuing evolution of doctrine to serve the central purpose of the First Amendment."

This view of constitutional interpretation, Stevens told the group, "is consistent with the philosophy that you will find in opinions written by [the late] Justice [Potter] Stewart and Justice Powell and some of the things that I have written."

Bork, contacted by telephone Saturday at his Washington home, declined to discuss Stevens' remarks, saying he would not comment during the confirmation process.

Stevens also praised the court's two most conservative members, Chief Justice William H. Rehnquist and Justice Antonin Scalia, who was appointed last year by Reagan.

CHICAGO SUN-TIMES, Monday, August 3, 1987

# Kennedy assails Bork in visit here

By Susy Schultz

Sen. Edward F. Kennedy brought his campaign against Supreme Court nominee Robert H. Bork to Chicago on Sunday, saying President Reagan should not be allowed to "tilt the balance" of the court for the next generation.

"We must not permit the president to rule our future through the nomination of Robert Bork," Kennedy (D-Mass.) said, adding that the Reagan Administration has heightened its public relations campaign for Bork "to change Mr. Bork's spots and portray him as a model of moderation."

But the Massachusetts Democrat said, "The public positions of Mr. Bork speak louder than the public relations of the White

House ... and Ronald Reagan is wrong to try to put him on the Supreme Court.

"On area after area, he is out of the mainstream," Kennedy said.

Bork, a U.S. Circuit Court of Appeals judge in Washington, D.C., was nominated to succeed Justice Lewis F. Powell. He is widely favored by conservatives and it is believed his appointment would tip the high court's majority to the right.

Kennedy, a member of the Judiciary Committee, has taken an aggressive stand against Bork, saying the appointment would endanger past decisions by the court on abortion, equal rights, civil rights and the First Amendment.

The audience of more than 700 welcomed Kennedy warmly as the convention of pro-

gressive activists ended at the O'Hare Holiday Inn. It was sponsored by the Chicago-based Midwest Academy and Citizens Action, a national coalition.

Kennedy was given rousing applause that interrupted his speech 25 times. He praised the group for its support of his proposed legislation for a minimum health insurance package for all workers and their families.

Citizens Action, which represents more than 1.5 million people in organizations supporting progressive causes, has made the health insurance issue its top priority for the coming year, according to spokesman Bruce Kozarsky.

Kennedy closed the convention, speaking after former Sen. Alan Cranston (D-Calif.), who talked about opening voter registration.

The two contenders for past presidential nominations offered a nostalgic contrast to some of the 12,000 people attending, especially after speeches Friday and Saturday by six candidates who have announced or expressed an intention to seek the 1988 Democratic presidential nomination.

"I guess the major contrast is that these two men have really shown a level of commitment in their actions which, quite frankly, I haven't seen from any of the [six] candidates," said Greg Mowat, secretary-treasurer of Citizens Action.

"When Kennedy ran for president, he had his name," said Brian Corr, 21, of Chicago. "When you watch these people who are running now, you see them struggling to make that name for themselves."

# New storm over Bork nomination

*rare tactical move may let  
court pick bypass Senate*

INDIANAPOLIS — Senate Republican leader Robert Dole yesterday hinted that President Reagan might steal a page from his football past and pull an end-around to get his Supreme Court nominee, Robert H. Bork, past a hostile Congress.

Dole warned his Senate colleagues yesterday that should they stall on deciding whether to confirm Bork's nomination, Reagan might turn to a little-used but shrewd political maneuver — a recess appointment — and place Bork's name in nomination when Congress begins its summer recess on Aug. 7, thereby immediately putting the conservative jurist on the bench.

The Constitution "allows the president to fill any vacancy on the Supreme Court while Congress is in recess and provides

that the person filling that vacancy shall serve until the end of the congressional session," Dole (R-Kan.) said in remarks to the National Conference of State Legislatures in Indianapolis.

Reagan announced his nomination of Bork, a conservative federal appeals judge, on July 1, but the Senate Judiciary Committee does not plan to begin about two weeks of confirmation hearings until Sept. 15. That means the full Senate would not vote on confirmation in time for the Oct. 5 start of the Supreme Court's new term.

If Democrats, led by Judiciary Committee Chairman Joseph R. Biden of Delaware, continue to drag their feet, the president would be justified in putting Bork

# Bork one-sided in judicial decisions, study says

By AARON EPSTEIN  
*Herald Washington Bureau*

WASHINGTON — Supreme Court nominee Robert Bork compiled a far more conservative record than the average Reagan appointee to federal appeals courts, according to a study by two student editors of the Columbia Law Review.

The study said that Bork cast conservative votes almost 90 percent of the time.

The study of Bork's record stemmed from a one-year research project by Jess Vebna and Timothy Tomasi. The original study showed that, contrary to popular opinion, judges appointed to U.S. courts of appeals by President Reagan are not significantly more conservative than judges

named by Republican Presidents Eisenhower, Nixon and Ford.

But President Reagan's July 1 nomination of Bork to succeed Lewis Powell on the Supreme Court led the two authors to expand their study to determine how Bork measured up against other Reagan-appointed appeals judges.

They found that since 1982, when Bork joined the U.S. Court of Appeals for the District of Columbia, he cast "liberal" votes in only 10 percent of 42 nonunanimous decisions — compared to 31 percent for the average Reagan-appointed appeals judge.

That meant, according to the authors, that Bork's votes were more hostile to criminal defendants, minorities, the dis-

abled and others asserting constitutional rights or claiming government benefits.

In government regulation cases, Bork voted consistently in favor of business groups and against public-interest groups, the study showed. Bork voted on the liberal side of regulation cases only 9 percent of the time — far less than the 42 percent rate of other Reagan appointees.

The researchers found that Bork, who advocates restraint in overturning government decisions, applied that philosophy inconsistently. They said that he regularly voted to uphold federal agencies when public-interest groups complained, but often voted to overturn government decisions when businesses filed suit.

Velona and Tomasi, who are entering their third year at Columbia University

Law School, said they had re-examined all of the more than 1,200 nonunanimous decisions of the U.S. courts of appeals in 1985 and 1986, and all of Bork's votes in nonunanimous rulings.

The authors warned that their study measured only the numbers of conservative votes. It did not assess the degree of conservatism expressed in the judicial opinions.

But they said that Bork should explain "what we have identified as an apparently one-sided approach in ... a significant portion of his judicial decisions."

A Senate Judiciary Committee hearing on the Bork nomination is scheduled to begin Sept. 15, which means that the Senate would not vote on confirmation

until after the Supreme Court's next term begins Oct. 5.

Senate Republican leader Robert Dole of Kansas, urging an earlier hearing, said Monday that President Reagan could put Bork on the high court while Congress is in recess.

Bork then could serve as a recess appointee until January, when Reagan would have to seek Senate approval for Bork to remain on the court. In the court's history, only five appointees have taken seats as recess appointees.

However, a spokesman for Sen. Joseph Biden, D-Del., chairman of the Senate Judiciary Committee, said that the Democrats are not considering any change in the timetable for the Bork nomination.

**BORK RULINGS**

**BY ANDREA NEAL**

WASHINGTON (UPI) -- SUPREME COURT NOMINEE ROBERT BORK HAS REVERSED HIS POSITION IN TWO RECENT APPEALS COURT CASES, BUT LEGAL OBSERVERS ARE DIVIDED OVER WHETHER HIS CHANGE OF MIND SHOWS OPENMINDEDNESS OR AN INCONSISTENT APPROACH TO LAW.

IN BOTH INSTANCES, BORK INITIALLY AUTHORED OPINIONS APPROVING OF FEDERAL AGENCY DECISIONS. SUCH MATTERS OFTEN ARE APPEALED TO THE U.S. CIRCUIT COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, WHERE BORK HAS SERVED SINCE 1982.

BUT LATER, WHEN THE CASES WERE RECONSIDERED BY THE JUDGES, BORK WROTE ENTIRELY DIFFERENT OPINIONS ORDERING THE AGENCIES TO RETHINK THEIR ACTIONS.

"IT'S ONE THING TO CHANGE A VOTE. IT'S ANOTHER THING TO WRITE AN OPINION ONE WAY AND THEN THE OTHER WAY, WHICH IS WHAT HE DID IN BOTH THESE CASES," SAID ERIC GLITZENSTEIN, STAFF ATTORNEY FOR PUBLIC CITIZEN LITIGATION GROUP, WHICH IS INVOLVED IN MANY CASES BEFORE THE APPEALS COURT. "IT RAISES QUESTIONS IN MY MIND, 'WHAT WAS HE LOOKING AT THE FIRST TIME AROUND?'"

WHILE BORK'S OFFICE DECLINED TO EXPLAIN THE JUDGE'S VOTE, GLITZENSTEIN AND OTHER LAWYERS OFFERED SEVERAL EXPLANATIONS FOR WHY THE 60-YEAR-OLD JUDGE WOULD SWITCH HIS VIEWS.

ONE LAWYER, WHO ASKED NOT TO BE IDENTIFIED, SUGGESTED BORK'S ACTION WAS PURELY STRATEGIC AND THAT HE HAD NO CHOICE BUT TO COMPROMISE HIS POSITION IN ORDER TO RETAIN CONTROL OVER THE OPINION.

DAVID GOLDSTEIN, OF THE AMERICAN CIVIL LIBERTIES UNION, SAID BETTER LEGAL ARGUMENTS MAY HAVE BEEN PRESENTED BY THE LAWYERS ON REHEARING OR THE OTHER JUDGES MAY HAVE BEEN MORE PERSUASIVE IN EXPRESSING THEIR OPINIONS.

AT THE APPEALS COURT LEVEL, CASES ARE HEARD BY THREE-JUDGE PANELS AND MAY BE APPEALED TO THE PANEL OR THE FULL COURT.

GLITZENSTEIN SAID BORK'S REVERSAL "CALLS INTO SERIOUS QUESTION HIS WHOLE APPROACH TO CONSTRUING STATUTES AND UNDERMINES THE CLAIM THAT HAS BEEN MADE THAT HE HAS A STRAIGHTFORWARD APPROACH. HOW GOOD CAN IT BE IF IT LEADS TO TWO DIFFERENT RESULTS?"

"IT CALLS INTO QUESTION WHAT ARE THESE RULES OF RESTRAINT HE IS APPLYING," GLITZENSTEIN SAID. "IT'S EXTREMELY RARE FOR A JUDGE TO SWITCH HIS VOTE IN A CASE. IT'S ALMOST UNHEARD OF FOR A JUDGE TO WRITE OPINIONS GOING DIFFERENT WAYS."

LAW PROFESSOR DICK HOWARD OF THE UNIVERSITY OF VIRGINIA PREDICTED BORK WILL BE CLOSELY QUESTIONED ABOUT THE CASES DURING HIS SENATE CONFIRMATION HEARINGS, SCHEDULED TO BEGIN SEPT. 15.

"I SUPPOSE (THE CASES) ARE BOUND TO BE POINTED TO BY BORK'S PROPONENTS AS AN EXAMPLE OF BORK'S OPENMINDEDNESS," HOWARD SAID.

BORK'S MOST RECENT CHANGE OF MIND OCCURRED TUESDAY, WHEN HE AUTHORED AN APPEALS-COURT DECISION THAT DISCREDITED THE ENVIRONMENTAL PROTECTION AGENCY'S METHOD FOR DETERMINING POLLUTANT EMISSIONS STANDARDS. BORK PREVIOUSLY SUPPORTED THE EPA.

EARLIER THIS YEAR, BORK DID A SIMILAR ABOUT FACE IN A CASE INVOLVING UTILITY REGULATION. INITIALLY, BORK UPHELD THE FEDERAL ENERGY REGULATORY COMMISSION'S DECISION TO FORBID A UTILITY FROM RECOVERING THE COSTS OF AN ABANDONED POWER PLANT. BUT ON REHEARING, BORK ORDERED FERC TO RECONSIDER THE RATE REQUEST.

DANIEL POPEO OF THE WASHINGTON LEGAL FOUNDATION SAID HE BELIEVES BORK'S WILLINGNESS TO RECONSIDER EARLIER RULINGS IS A POSITIVE TRAIT.

"I THINK IN HIS CASE IT SHOWS HE'S NOT A RIGID IDEOLOGUE," POPEO SAID. "I THINK HE ANALYZES THE LAW IN EACH CASE AND MAKES A DECISION HE FEELS SHOULD BE MADE."

ANDREW FREY, A WASHINGTON LAWYER WHO WORKED UNDER BORK WHEN HE WAS SOLICITOR GENERAL DURING THE 1970S, AGREED.

"BORK LOOKS AT THINGS CAREFULLY," FREY SAID. "HE'S NOT WEDDED TO WHAT HE SAID THE FIRST TIME AROUND. HE'S OPEN TO THE POSSIBILITY HE IS WRONG."

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## No excuse for delay on Bork

Bob Dole, the Senate minority leader, has come up with one of the odder ideas in the battle over Robert Bork's nomination to the Supreme Court. Faced with stalling by Sen. Joseph Biden, chairman of the Judiciary Committee, Sen. Dole reminded his Democratic colleagues that the President has the authority to place a justice on the court temporarily without Senate approval. President Reagan could appoint Judge Bork during the fall congressional recess, which would allow him to serve on the court until the fall of 1988.

Sen. Dole's idea, which he said is not his preference, is aimed less at providing a real alternative than at expressing his impatience with Senate Democrats. Thanks to the schedule set by Sen. Biden, the hearings on Judge Bork won't begin until Sept. 15, some two months after he was nominated and too late for the matter to be resolved before the Supreme Court reconvenes on Oct. 5. So it will spend at least part of its next term shorthanded and susceptible to tie votes.

The President, like Sen. Dole, probably realizes that this unorthodox option would doom the nomination. But if its availability discourages the Senate from trying to stop Judge Bork through inaction, it will

serve a purpose. The delay in considering the appointment doesn't stem from any need for careful examination of the nominee: Robert Bork has been confirmed by the Senate on two previous occasions and is one of the nation's best-known legal scholars.

Certainly Sen. Biden needs no time to weigh the pros and cons. He already has announced that he will vote no. He apparently hopes that the longer a vote can be put off, the more inclined senators will be to reject Judge Bork so the seat can be filled by the next president. Or maybe Mr. Reagan will give up and withdraw the nomination.

This is an odd strategy for senators who say they represent the sentiments of most Americans in opposing Judge Bork. If they think Mr. Reagan's nominee shouldn't be on the Supreme Court, they ought to have the courage to cast a public vote against him. If not, they ought to approve him speedily and let the court get on with its business at full strength. Majority Leader Robert Byrd claims that the Senate has a duty to scrutinize Judge Bork because it is "the people's branch" of government. So why make the people wait so long to have their say?

## Democrats' suicide complex is evident in Bork opposition

*The Wall Street Journal*

More prominent Democrats are resigning from the stop-Bork campaign. Lloyd Cutler has written a forceful defense of Judge Bork against the critics. Mario Cuomo says, "I'm not referring to anyone in particular," but judgment should come after the hearings, not before. Now Senate Majority Leader Robert Byrd pointedly states that he hasn't decided how he will vote on the Bork nomination and regrets "to see this very important nomination become a strictly partisan matter."

While we wouldn't want to deny that some Democrats really do want to be fair to Judge Bork, we suspect they also worry that the joy riders on the anti-Bork bandwagon may take the Democratic Party right off a cliff.

Consider the spectacle about to unfold:

First, national TV will show the congressional hearing process being used, entirely by Democrats this time, to bully an obviously distinguished American. Playing point man, Sen. Joe Biden will do his best to be a presidential-looking bully.

If this search-and-destroy mission actually picks up enough craven Republicans to succeed, Bork will be replaced by the odds-on alternative nominee, Sen. Orrin Hatch. Democrats should think hard about whether they want 10 to 20 years of Judge Bork or 20 to 30 years of Sen. Hatch. As Gov. Cuomo and others have suggested, Judge Bork's deference to policies set by elected legislatures is an advantage to a party that expects to control Congress and many statehouses. Hatch, after years working in the

PAC-financed congressional sausage factory, figures to be a more conservative activist, overturning laws he has spent his career opposing.

Finally, consider all the issues that will be on stage for continuous public inspection if the Bork nomination is held up: aggressive abortion policies, school prayer, numerical racial quotas, the exclusionary rule, gay rights. Democrats interested in running a competitive presidential race might ponder whether to get the Bork confirmation behind them this summer or keep it on front pages until November 1988.

The sleeper issue in a long battle would be one of Ronald Reagan's favorite topics, judicial activism itself. It's obvious now that the arguments made by Judge Bork's loudest liberal opponents have run the Democrats into an embarrassing intellectual corner. It's clear they believe that appointed judges, not legislatures, ultimately create the nation's laws. Judge Bork opposes judicial policy making. This sort of issue usually doesn't hang in the air of mass politics, but a delayed nomination will ensure that it does.

The Bork nomination, in short, is an exhibit in the built-in suicide complex of the Democratic Party. In order to win the Democratic nomination, a candidate is forced to take positions that will be fatal in the general election. You can't win because if you refuse to become fodder for the party's sacred cows, the cows will trample you. The final result of a long, dirty battle against Judge Bork will be to further convince Messrs. Cuomo, Bradley, Nunn and Robb that the nomination isn't worth having.—(c1987.)



## Biden acting like a hanging judge

Two well-publicized strategies should be ruled out in the battle shaping up over confirming U.S. Appeals Judge Robert H. Bork as a Supreme Court justice.

Senate liberals opposing confirmation should abandon any idea of stalling the nomination until next year, and the White House should put a damper on talk that President Reagan could place Judge Bork on the court as an interim appointee in the event the Senate fails to act before recessing for the rest of this year.

No question of legality exists here. Either strategy would be legal, but that doesn't make them right.

Republicans must not presume that the Democratic Senate will act irresponsibly. With Senate Judiciary Committee hearings beginning Sept. 15, the full Senate has ample time to act before its scheduled October recess, and any pretense that the matter requires more study would be transparent deception for unacceptable partisan reasons. The White House has every reason to expect a timely up-or-down vote and should not even dignify with discussion the possibility of an interim appointment.

On another Bork front, Sen. Joseph R. Biden (D-Del.), chairman of the Judiciary Committee, has been making amazing utterances. The more he puffs up his own importance in the controversy, the more he sounds like a complete ninny.

Sen. Biden's discomforture is of his own making. He doesn't know how to get out gracefully from a pro-Bork remark he made last year. And, despite outspoken opposition to the nomination, he keeps insisting he can do an impartial job presiding over the hearings.

Last November, Sen. Biden was discussing the last Reagan appointee to the high court, conservative Antonin Scalia. He said: "Say the administration sends up Bork and, after our [Senate] investigation, he looks a lot like Scalia. I'd have to vote for him, and if the [liberal] groups tear me apart, that's the medicine I'll have to take."

Sen. Biden, as a candidate for the Democratic presidential nomination, is no longer willing to take the medicine. He explains his turnabout something like this: Judge Bork would be good for the court if his views weren't shared by a majority of his colleagues, but he would be bad for the court if he was in the majority.

His actual words two weeks ago were, "The court should have a Bork on it . . . but it doesn't mean it should have a Bork that is going to be the deciding vote." Why doesn't the senator just say, "I was wrong last November"? His rationalizations don't imply that he is against rigging the court in one direction so much as they imply that he wants to keep it rigged in another direction.

The liberal *Washington Post* already has criticized Sen. Biden's ability to assure a fair hearing when he "has already cast himself in the role of a prosecutor." We don't expect the senator to relinquish the gavel, but neither do we buy his assertion that it is possible, in the manner of the celebrated Judge Roy Bean, to give a fair trial to a man you already have decided to hang.

Joe Biden must have a good friend somewhere willing to pull him aside and tell him simply to shut up.

## ✓ Follow normal route with Mr. Bork

Judge Robert H. Bork's nomination to the U.S. Supreme Court was controversial from the outset, but it could become politically destructive if his critics unnecessarily delay the confirmation process, or if President Reagan is talked into giving the conservative jurist a recess appointment that would put him on the court temporarily without the Senate's approval.

The idea of a recess appointment was broached by Sen. Robert J. Dole of Kansas, a Republican presidential candidate. The president has the constitutional authority to make an appointment whenever Congress is in recess. If Judge Bork were appointed during the summer or fall recesses, he could serve without confirmation through the subsequent session of Congress — through the fall of 1988. Mr. Dole suggested that the recess appointment could be used if the Democratic-controlled Senate dragged out the confirmation hearings, or if the nomination became bogged down in a filibuster.

To his credit, President Reagan apparently intends to follow the regular process. Spokesman Marlin Fitzwater said the White House will seek approval of the nomination by the Judiciary Committee and confirmation on the Senate floor.

That's all to the good. Americans would not welcome yet another presidential at-

tempt to circumvent Congress, given what happened in the Iran-contra affair.

The Senate has a vital constitutional role in the appointment of Supreme Court justices. President Dwight D. Eisenhower was the last to make a recess appointment, in 1959, and it created such a controversy that the Senate later passed a resolution saying that the procedure should not be used "except under unusual circumstances and for the purpose of preventing or ending a demonstrable breakdown in the administration of the court's business."

Besides, a recess appointment, as Judiciary Committee Chairman Joseph R. Biden Jr. observed, might anger the Senate so much that it would harm Judge Bork's chances of ever being confirmed.

Mr. Biden can play an instrumental role in keeping the Bork nomination on the regular track. As chairman, he can make sure the committee doesn't dawdle over the appointment. Waiting until Sept. 15, as planned, to begin the committee hearing is going slow, but not unreasonably so. The full Senate, however, shouldn't push the confirmation vote too far past the early October opening of the Supreme Court term.

The Senate can vote down Judge Bork if it wants, but it shouldn't stall the nomination. That could harm the court's operation and, probably, backfire on Judge Bork's critics.

THE CINCINNATI ENQUIRER Tuesday, July 28, 1987

# Biden/Bork

## Hearings on the court nominee should be objective and fair

Senate Judiciary Chairman Joseph Biden Jr.'s confession that he doesn't have an open mind on Robert Bork tells more about him than about the Supreme Court nominee. For the man presiding over what will amount to a trial of sorts to make such a confession raises the question: Whither justice?

Senator Biden's unabashed opposition to Judge Bork may play well in some Democratic presidential primary or caucus circles and among the special-interest groups seeking a presidential nominee favorable to their points of view. But it's unlikely to play well in Peoria.

The senator from Delaware, an announced candidate for the presidential nomination, not only says his mind isn't open on the court nominee, but suggests the committee may reject Judge Bork, impelling President Reagan to nominate someone else. He

hinted a Senate filibuster might tie up the Bork nomination if the president stuck with it after a judiciary committee rejection.

All Senator Biden says may be true. But if the American people see Judge Bork rawhided by a panel whose chairman's mind is closed, they're certain to protest. The Oliver North example shouldn't be lost on Senator Biden and the rest of the committee Democrats, including Ohio's Sen. Howard M. Metzenbaum, who is up for re-election next year.

The confirmation hearing that begins Sept. 15 should be as fair, objective and unbiased as any before a court of law. But if it deteriorates into little more than Bork-battering, it will grate heavily on the American people's sense of fairness. A man seeking the White House may want to think at least twice before risking that.

## Biden looks at the record

Those who ache to see Judge Robert Bork on the Supreme Court argue that it is unthinkable and unprecedented for his ideology to be made an issue. It is neither, as Senator Joseph R. Biden Jr. thoughtfully instructed the Senate last week.

The chairman of the Senate Judiciary Committee reviewed the history of Supreme Court nominations and concluded, "Political or philosophical issues have played a role, sometimes a dominant one, in the outcome of all but one of the 26 Supreme Court nominations rejected or withdrawn since 1789."

Senator Biden has now documented and — this may have shocked the Senate — openly discussed what everybody knows but few want to talk about: Supreme Court nominees are never judged solely on their qualifications and abilities. Judicial and political philosophy, and the impact that the individual is likely to have on future court decisions, are always considered to one degree or another. These considerations weigh even more heavily when a nominee comes from either of the far ends of the political spectrum. If President Reagan wanted to keep the political and ideological questions to a minimum, he should have nominated someone less political and ideological, someone nearer the center. Mr. Reagan chose not to do that. A great ideologue himself, he nominated a man he believes will represent his views, who will set the Court and the country on a different path. That's the president's right; he'd probably say it's his duty. The senators who abhor that path have their rights and duties too.

Now, if the conservative Republicans who support Bork want to argue that liberal Demo-

crats have sometimes taken a different position in this debate, they'll be right. But they'll be convicting themselves in the process. When it's an Abe Fortas or a Thurgood Marshall before the Senate, it's the Republicans who demand a critical assessment of judicial philosophy and the Democrats who want to speak only of qualifications. When the nominee is Robert Bork, the opposing factions exchange ends of the field.

Ed Bethune should understand all this. As a Republican congressman and senatorial candidate, he wanted to know where potential judicial appointees stood on the issues of the day. The difference in Senator Biden's case is that he already knows where Bork stands.

The Iran-contra hearings have demonstrated that the more carefully a project is planned, the more confusion results when something goes wrong.

The Carnegie Foundation for the Advancement of Teaching has released the results of a survey of 5,000 college and university faculty members. Most of the professors said the academic abilities of undergraduates were "fair to poor." Perhaps the kids went to college to improve their skills.

Michael Milone, the New Haven, Ct., comptroller, said the city had received a check for \$1,316.19 from Judge Robert H. Bork to "clear up" a 14-year-old delinquent tax debt. The Supreme Court nominee, who will face Senate confirmation hearings, may have read somewhere the warning: "Be sure thy sins will find thee out."

Ralph de Toledano

## Lynch Mob On Judge Bork

WASHINGTON — Sen. Edward M. Kennedy, D-Mass., has taken out after Court of

By  
RALPH  
DE  
TOLEDANO



Appeals Judge Robert H. Bork in a way that would gladden the heart of a hatchet-toting Lizzie Borden.

Discussing the nomination of Judge Bork to the Supreme Court, Kennedy said:

"Robert Bork's America is a land in which women would be forced into back-alley abortion, blacks would sit at segregated lunch counters, rogue police could break down citizens' doors in midnight raids, school-children could not be taught evolution, writers and artists would be censored at the whim of government, and the doors of the federal courts would be shut on the fingers of millions of citizens. ..."

That there are seven outright lies in those 68 words means little to Kennedy. There is little that he understands, so that his major public utterances are prepared for him by his staff. Presumably he is referring to Judge Bork's reading of the Constitution, a document Kennedy once may have had someone read for him.

However, lawyers like Joseph Rauh, the leftist activist who was not above using false "evidence" in an effort to eviscerate the late Sen. Joseph R. McCarthy, sees nothing wrong in delivering the same libels in somewhat different language in a letter that *The Washington Post* ran. Since there are still people who take Rauh seriously — though not so many nowadays — this gives us an idea of what Democratic "intellectuals" are saying and, in some cases, even believing.

What is evident is that the

lynch mob is at work — a mob made up of knee-jerk ideologues, screaming leftists and other assorted liberals, sustained by a substantial part of the national media. They are very adept at discoursing on what Bork may or may not have said when he was in college but they shun like the plague his legal opinions, writings and expressed views. Of this they know almost nothing, and what they think they know is misinformed.

When Franklin D. Roosevelt named Hugo Black to the Supreme Court, the liberal/left community rallied behind him, even after it became known that he had once been a Ku Klux Klansman. What was important to the liberals was that he would rubber-stamp the New Deal agenda, no matter how repugnant it was to the Constitution. Ditto when Tom Clark, a machine politician of

### Efforts to stop his confirmation may spend \$18 million.

dubious qualifications, was named by Harry Truman.

The irony is that the liberals should be applauding the Bork nomination because he believes that it is up to Congress and not the Supreme Court to legislate. The courts must apply and interpret the laws unless they are in flagrant violation of the Constitution. And the Supreme Court must not make its independent decisions as to what is good for the country but rather weigh legislation against constitutional precedent.

Nevertheless, the liberals are mounting the biggest mobilization against Bork that the country has seen since the blue-noses rammed through the Prohibition Amendment while America was off to the wars. The National Abortion Rights Action League is shoveling out the dough to "operate phone banks (and) distribute litera-

The women's libbers are also hard at it. People for the American Way — that "way" being so left that it almost tips over into the Pacific — has announced that it will spend \$1 million of its \$8 million tax-exempt budget to clobber Bork. In fact, it is estimated that the campaign to destroy Judge Bork will rise to about \$18 million.

Oddly enough, the AFL-CIO has remained officially ambivalent, with President Lane Kirkland advising his fellow Big Labor leaders "not to make an early commitment on the nomination." Is this shrewd politics or fear of retaliation? Certainly everyone in Washington knows that Sen. Joseph Biden, D-Del., the chairman of the Senate Judiciary Committee, is the AFL-CIO's candidate for the Democratic presidential nomination — and that he is violently opposed to the confirmation of Judge Bork — opposed, in fact, not on the usual grounds but because he considers Bork to be a conservative — something that gives the high-minded solon conviction fits.

The problem for the AFL-CIO is that it does not know what will hurt Biden more, a yes or a no vote. And Biden is not sure himself. He has been advised to maintain a low profile and to keep his mouth shut. But there is as little chance of that as of Niagara Falls flowing backward. It is said that Biden has the fastest mouth in the East, capacious enough to hold both his feet.

There is another problem for the anti-Bork forces. The judge has one of the best and sharpest legal minds in the country, and he also knows how to handle himself well. He already has put to rout at least one TV interviewer who prides himself on booby-trapping those who venture onto his program.

So though the Democrats on the Senate Judiciary Committee intend to go after Judge Bork with a meat hook, they may find themselves the victims of their intended mayhem.

## An intellectually distinguished choice

George F. Will



What'll they think of next, those battalions contending over the nomination of Robert H. Bork to the Supreme Court? Sen. Robert J. Dole, R-Kan., thought that President Reagan might, as the Constitution permits, make Bork a recess appointment. Dole says the idea is "food for thought" for Bork's most inflamed opponent, Sen. Joseph R. Biden Jr., chairman

of the judiciary committee.

Biden is malnourished regarding thoughtful approaches to the confirmation process. He is stalling the process to benefit his flagging presidential campaign. But a recess appointment would forfeit the moral high ground that Biden, by his rush to judgment, has handed to Bork's supporters. Republicans should not contemplate a shortcut around a process that Biden is short-circuiting.

Dole says he mentioned the recess-appointment possibility only to pressure Biden, but the threat is not believable. True, Reagan could appoint Bork in December to counter an unbreakable filibuster. But Bork's tenure would extend only through this Congress, expiring as Reagan leaves office. The new president could renominate Bork, or nominate someone else. A recess appointment would mean an immediate opportunity for a Democratic president.

Biden's exploitation of the process for political profit involves treating coarsely the most elegant branch of government. The judiciary is the intellectual branch. The executive and legislative branches legitimately can act on motives that are validated by simple power calculations — by the pressure of a majority or a salient faction. The judiciary must ground its actions in reasoning about principles.

Bork is the most intellectually distinguished nominee since Felix Frankfurter, who was nominated by Franklin D. Roosevelt 48 years ago. His Republican and Democratic supporters should be as eager for an intellectually serious confirmation process as Biden is eager for something quite different. The purpose of Biden's stall is to give inter-



Paul Kotz / Dallas Morning News

est groups time to marshal enough force to turn the confirmation process into a sweaty struggle of political power and intimidation.

How else can one explain the 71 days that will have passed between Bork's nomination and the beginning of the hearings on Sept. 15? For the last 16 nominees, hearings began, on average, 18 days after the nominee's name was sent to the Senate. The longest delay was 42 days. If Biden wanted an intellectually serious process, one turning on a searching examination of the great themes of constitutional law, he could have begun the hearings weeks ago.

However, pounding from the right may hammer Democrats into something like a solid bloc. Some conservative organizations not famous for delicacy are portraying the entire Democratic Party as Bork's opposition. That is dangerous to Bork, who will need Democratic votes to stop a filibuster, if it comes to that. If it does, his supporters can then adopt scorched-earth tactics.

If Biden enlists enough senators to sustain a filibuster and block cloture, Bork's supporters could tie the Senate in knots, making it impossible for anything debatable to be acted upon.

George F. Will is a syndicated Washington columnist.

**George Will**

## Bork supporters should keep the moral high ground

WASHINGTON — Samuel Goldwyn ("Oral agreements aren't worth the paper they're printed on") committed one of his famous locutions in the quadrangle of Brasenose College, Oxford. Puzzled by something high on the wall of that ancient institution, he was told it was a sundial. When its working was explained to him, he exclaimed, "What'll they think of next!"

What'll they think of next, those battalions contending over the nomination of Robert Bork to the Supreme Court? Bob Dole has thought that Reagan might make Bork a "recess appointment." Dole says the idea is "food for thought" for Bork's most inflamed opponent, Sen. Joe Biden, chairman of the judiciary committee.

Biden is malnourished regarding thoughtful approaches to the confirmation process. He is stalling the process to benefit his presidential campaign. But a recess appointment would forfeit the moral high ground that Biden has handed to Bork's supporters. Republicans should not contemplate a shortcut around a process that Biden is short-circuiting.

Dole says he mentioned the recess-appointment possibility only to pressure Biden, but the threat is not believable. True, Reagan could appoint Bork in December to counter an unbreakable filibuster. But Bork's tenure would extend only through this Congress, expiring as Reagan leaves office. The new president could renominate Bork, or nominate someone else. A recess appointment would mean an immediate opportunity for a Democratic president.

Eisenhower made three recess appointments (Earl Warren, Potter Stewart, William Brennan). All were subsequently confirmed, but the Senate passed a non-binding resolution deploring the procedure. The Senate was right then for the reason Biden is irresponsible today. Biden's exploitation of the process involves treating coarsely the most elegant branch of government. The judiciary is the intellectual branch. The executive and legislative branches legitimately can act on motives that are validated by simple power calculations. The judiciary must ground its actions in reasonings about principles.

Bork is the most intellectually distinguished nominee since Felix Frankfurter. His Republican and Democratic supporters should be as eager for an intellectually serious confirmation process as Biden is eager for something quite different. The purpose of Biden's stall is to give interest groups time to marshal enough force to turn the confirmation process into a sweaty struggle of political power and intimidation.

How else explain the 71 days that will have passed between Bork's nomination and the beginning of hearings on Sept. 15? If Biden wanted a serious process, one turning on an examination of the great themes of constitutional law, he could have begun the hearings weeks ago. He could have, unless the chairman of the judiciary committee is not prepared to discuss those themes. If not, how was he prepared to prejudice Bork within hours after Bork was nominated?

Bork will have Democratic supporters. Two judiciary committee Democrats — Alabama's Howell Heflin, a former judge, and Arizona's Dennis DeConcini, who has said he does not believe in ideological tests for nominees — seem likely to resist being roped into Biden's herd. Majority Leader Robert Byrd, while reserving judgment, has deplored attempts to make the Bork vote "a litmus test of party loyalty."

However, pounding from the right may hammer Democrats into something like a solid bloc. Some conservative organizations not famous for delicacy are portraying the entire Democratic Party as Bork's opposition. That is dangerous to Bork, who will need Democratic votes to stop a filibuster, if it comes to that. If it does, his supporters can then adopt scorched-earth tactics.

The Senate runs on rules that presuppose mutual civility. Biden, the Oliver North of the confirmation process, is shredding that civility by treating the Bork nomination as a national emergency that licenses his extremism. If he enlists enough Northlings to sustain a filibuster and block cloture, Bork's supporters can tie the Senate in knots, making it impossible for anything debatable to be acted upon.

Until then, Bork's supporters should resist being Bidenized. In "Animal Crackers," Groucho Marx asks the musically minded Chico, "How much do you charge not to play?" That is the question Bork's wise supporters should ask some of his other supporters.—(c1987.)

# Why Bork won't be rejected



**WILLIAM  
MURCHISON**

I am taking bets around here. I think Robert Bork will make it. I think so in part because of my faith in the common sense of the American people. And because of other factors, including:

1) *Rhetorical overkill by the mob trying to lynch his honor.* My impression is that if Bork is all his loquacious

opponents say, the Senate shouldn't just defeat him — it should ride the so-and-so out of town on a rail. He is a moral monster on a level with, gosh, for all anyone knows, Calvin Coolidge.

Jane Stern of the National Education Association discloses breathlessly that Bork is a "compulsory pregnancy man." In "Robert Bork's America," Teddy Kennedy moans, "rogue police would break down citizens' doors in midnight raids."

Yes, I can see it now — Mr. Justice Bork, at the head of a police mob, bursting into the nation's bedchambers, crying, "Sir! Madam! I order pregnancy to commence tonight!"

Just this sort of verbal tripe has been served up in quick bites on the 5:30 and 10 p.m. news ever since President Reagan proposed to seat Bork on the nation's highest court. However heavily sauced, however artistic the manner of its presentation, tripe is tripe.

Various of our political leaders obviously think the voters are dolts. Which, however, they aren't. The connection is going to be made: Nobody as reprehensible as Bork is said to be could reap all but unanimous praise for the quality of his mind and temperament; nor could he have won unanimous confirmation to the federal appeals bench a couple of years ago.

2) *The potential of the confirmation hearings, especially if televised, to backfire on the lynch mob.* Bork is sure to prove a formidable witness in his own cause. He probably knows more constitutional law than all the Judiciary Committee members combined; he is blessed likewise with a courteous, genial demeanor. Embarrassing him may exceed the committee's competence. Even if he could be embarrassed, partisanship in committee hearings doesn't seem to play well at the moment. Ask Arthur Liman and John Nields, crestfallen inquisitors.

Especially delicate is the situation of Delaware Sen. Joe Biden, Democratic presidential candidate and, coincidentally, chairman of the Judiciary Committee. In November, Biden said he would support a qualified conservative nominee to the high court. But that was then, this is now. Biden came out against Bork almost the minute the nomination became public.

On the Bork question, says Chairman Joe, "I don't have an open mind." Just what we want in a president — the temperament of an ideologue, firmly persuaded of his personal righteousness.

A related problem — one over which Biden has fretted publicly — is that opposition to Bork could come to focus on the ever troublesome issues of abortion and affirmative action. The early liberal strategy was to decry Bork's probable lack of support for the approved liberal position on those issues.

The trouble is, such a strategy energizes not just the pro-abortion, pro-affirmative action folk but the antis as well. *National Right to Life News*, the house organ of the pro-life movement, calls for "an all-out grass-roots mobilization" in support of Bork. The more blatant Biden's partisanship in these emotional issues, the dimmer his presidential prospects look.

3) *The precedent a heated confirmation battle would set.* Say Bork is after all defeated on philosophical grounds. Say Biden is elected on whatever grounds. What happens when the new liberal chief executive nominates a jurist philosophically offensive to conservatives — as Bork was philosophically offensive to liberals? What use then to argue high-mindedly that a judge is a judge, a scholar a scholar? The senators who voted for Bork will know better; those who voted against him will have fouled their own nest.

4) *The illogicality of supposing that to defeat Bork is to thwart Reagan.* That is to underestimate Reagan, who has another year and a half in office and who wants another conservative on the court in furtherance of his campaign against judicial legislating.

Bork is our leading conservative jurist but not the only specimen of the type. If he falls in battle, the list of prospective replacements is lengthy — Judge Clifford Wallace, Judge Ralph K. Winter and so on. How long is the Senate prepared to fight over Reagan's undoubted right to nominate justices of his own philosophy, a right exercised by all his predecessors?

The incentive of Biden and his fellow Democrats to battle but not to block Bork is considerable. The campaign against him looks easy now, but so did World War I, until the machine guns opened up.

I am going to suppose something I may have no right to suppose — that Biden and the Democratic leadership have a lively sense of self-interest and therefore know when to fight and when not to. We'll see soon enough.

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William Murchison is a columnist for The Dallas Morning News. His column is distributed by Heritage Features Syndicate.



# Democratic hopefuls object to ideological litmus test for justices

By Larry Peterson  
The Register

The president shouldn't use political philosophy as a basis for picking U.S. Supreme Court justices, but if he does, it's OK for the U.S. Senate to reject his choices on the same grounds.

That's the way several of the declared candidates for the Democratic presidential nomination in 1988 are viewing President Reagan's selection of conservative jurist Robert Bork for a U.S. Supreme Court vacancy.

"There is no room for an appointment to come from this point on the ideological spectrum or that point on the ideological spectrum," Massachusetts Gov. Michael Dukakis said in Tustin this week.

Dukakis, a leading contender, added that he would be just as opposed if a president named a justice whose views were from the left end of the spectrum.

Three other Democratic hopefuls — U.S. Sen. Joseph Biden of Delaware, Rep. Richard Gephardt of Missouri and former Arizona Gov. Bruce Babbitt — have taken similar positions.

The nomination of Bork to replace Justice Lewis Powell faces heavy Democratic opposition in the Democrat-dominated Senate. Because few question Bork's competence, the dispute appears likely to center on his legal and political views.

But a debate so focused conflicts with a widespread belief that Supreme Court justices do — or at least should — decide cases by interpreting the U.S. Constitution without reference to their personal views. Dukakis paid homage to that tradition when, while discussing the Bork nomination, he described how he chooses justices for Massachusetts' appellate courts.

"I've never asked one of them where they are in this issue or that issue or some other issue," he said. "I think that is an inappropriate question. What I'm looking for is competence, intelligence, integrity and judicial temperament."

But both conservative and liberal political leaders know that Supreme Court decisions aren't made

## OC POLITICAL NOTES

in a vacuum. Depending on who is on the court, different rulings will be made concerning such issues as civil rights, school prayer and abortion, Dukakis acknowledged.

Thus, Dukakis argued, such appointments — made for life — are the most important a president can make "because ... long after we're gone, they will be shaping policies affecting people's lives."

But he, Biden, Gephardt and Babbitt blame Reagan, not opponents of Bork's nomination, for injecting political ideology into the selection process.

Biden, for example, said recently that he probably wouldn't oppose Bork if Reagan appointed him to replace a conservative justice. But by picking Bork to replace Powell, a moderate, Reagan is trying to shift the balance of power on the court to the right, Biden said.

Gephardt spokesman Mark Johnson said that because Bork's positions are "so far out of the mainstream," he would disrupt a national consensus that has been reached on issues such as civil rights and abortion.

"Congressman Gephardt obviously prefers that there be no ideological litmus tests," Johnson said. "But if one side does it, the other side has the right to do it."

Sens. Albert Gore Jr. of Tennessee and Paul Simon of Illinois, however, approach the issue differently.

In a recent speech to the annual convention of the National Association for the Advancement of Colored People, Gore said there is much in Bork's record that he doesn't like. But to use ideology as a basis to reject a nominee could set a bad precedent, he said.

"In a future year, we don't want to see the Senate deny a fair hearing to a Supreme Court nomination by a progressive Democratic president because he does not pass Strom Thurmond's and Jesse Helms' litmus tests." Thurmond and Helms are conservative Republican senators.

# TOMORROW

## A POLITICAL BRAWL OVER THE BORK NOMINATION

### ■ PRESSURE GROUPS CLOSE IN

The Senate fight over confirmation of Supreme Court nominee Robert H. Bork is shaping up as one of the most polarizing and vitriolic in years. It may also be one of the closest.

Powerful interest groups from across the political spectrum are mobilizing to influence the Senate's decision. At stake: Probably the most significant ideological shift in the Court in decades.

Because confirmation hearings won't start until September 15, combatants will have weeks to compete for public opinion. Look for liberal and conservative lobbying groups to pour millions into radio, television and print advertisements and direct mailings. Campaigns will focus on states where senators are believed to be wavering, such as Alabama, Arizona, Arkansas, Florida, Georgia, Illinois, Kentucky, Maine, North Carolina, Oklahoma, Pennsylvania, Tennessee and Vermont.

The battle carries political risks for presidential contenders of both parties. Senate Judiciary Chairman Joseph Biden (D-Del.), for example, will be pictured as doing the bidding of civil-rights and women's groups that oppose Bork. Other Democrats also could face a backlash if they appear too strident. Minority Leader Bob Dole (R-Kans.) already is drawing fire from conservatives for saying that Bork has only a 50-50 chance of confirmation and raising the possibility of an interim appointment of Bork to the High Court.

The two lobbying forces will use different strategies: Bork's conservative backers will stress his powerful intellect and background as an appeals-court judge and law-school professor but play down any ideological bent. Opponents will depict Bork as far outside the legal mainstream--an extreme conservative who is insensitive to the disadvantaged. They will emphasize his past criticism of such civil-rights staples as abortion, busing for desegregation and the one-man one-vote doctrine in legislative apportionment.

Where does Bork stand now in the Senate? Slightly ahead, according to unofficial tallies. But by no means safe. Vote counts range from a 45-45 split to 45-35 in Bork's favor, with 10 to 20 senators undecided. It takes just 41 votes to sustain a filibuster. Majority Leader

Robert Byrd may be the key. He's noncommittal now. But if the West Virginia Democrat invokes party discipline against Bork, it could doom the nomination.

### ■ CLEAR SAILING FOR SESSIONS

William Steele Sessions should have no trouble winning confirmation as the new FBI director. Senate investigators have found nothing in the San Antonio federal judge's background so far to suggest he doesn't measure up to his image as a hard-driving, fair and competent advocate of law and order. Insiders say the biggest problem facing Sessions may be in fitting his Senate hearings around the Bork fight.

What will he do as FBI chief? Those who know him say his personal distaste for drug abuse points to a strong attack on illegal-drug trade, especially where organized crime is involved. The same for pornography. And, as a former prosecutor of draft evaders, he is said to be keenly interested in counterintelligence.

### ■ NOW OR NEVER ON DEFICITS?

Economists worry that this year may be the last best chance for Congress and the President to make real progress against federal budget deficits. But there's little urgency on Capitol Hill. Latest thinking there favors putting off tough decisions until after the 1988 elections.

After months of frustration over White House refusal to consider a tax hike to help slash next year's deficit by some \$36 billion, lawmakers now appear willing to settle for less. Democrats had hoped to force the President to yield on taxes by exposing the Pentagon budget to automatic spending cuts under a rejuvenated Gramm-Rudman Act. Trying to fix that law's enforcement mechanism--which was struck down by the Supreme Court--has monopolized much of Congress's time this summer. Now leaders of both parties are backing a plan to restore the enforcement feature while easing the deficit target for next year. That would make automatic spending cuts less likely and a big tax hike less crucial--at least until after a new President and Congress are seated.

That may please the politicians, but not the economists. They see opportunities slipping. Latest estimates show that without new taxes or big spending cuts the deficit will climb to \$185 billion next

# The Washington Post

DATE: 9/4/87  
PAGE: A23

The nomination of Appeals Court Judge Robert H. Bork to the Supreme Court has been marked by charge and countercharge. Last month, the White House distributed its briefing paper on the Bork nomination, and yesterday the chairman of the Senate Judiciary Committee, Sen. Joseph R. Biden Jr. (D-Del.), released a report by committee consultants who were asked to respond to the administration paper. Following are excerpts from those reports.

## White House's Briefing Paper On Judge Bork

Judge Robert Bork, nominee for associate justice of the United States Supreme Court, has been a practicing attorney, a professor of law, the solicitor general of the United States, and a federal appellate judge. He is among the most eloquent and principled proponents of judicial restraint. This philosophy of the law holds that judges must faithfully interpret the Constitution and statutes. Judges must give full effect to values that may be fairly discovered in the text, language, and history of the Constitution and apply them to modern conditions as a check against government action . . . .

Judge Bork's legal philosophy follows directly in the mainstream tradition exemplified by jurists such as Frankfurter, Harlan and Black rather than the "activist" trend which resulted in the invalidation of major New Deal legislation in the 1930s and has recently reemerged in some quarters . . . . Judge Bork has never wavered in his consistent and principled protection of civil rights, civil liberties and other values that can actually be derived from the Constitution and federal law . . . .

### Civil Rights

During his term as solicitor general . . . Judge Bork was responsible for the government arguing some of the most far-reaching civil rights cases in the nation's history. For example, in the area of voting rights, Judge Bork argued successfully before the Supreme Court in landmark cases, occasionally arguing for even more expansive interpretations of the law than handed down by the court . . . .

Since being elevated to the District of Columbia Circuit Court of Appeals, Judge Bork has participated in a number of important opinions upholding the rights of minorities. In the extended voting rights litigation in *Sumter County v. United States*, he joined an opinion refusing to allow a county to implement an at-large election system because the county failed to show that the voting system had "neither the purpose nor effect of denying or abridging the right of black South Carolinians to vote" . . . .

Judge Bork has joined in several far-reaching decisions that expand the force of laws prohibiting discrimination based on sex. He agreed, for example, that the Foreign Service was subject to the Equal Pay Act, and reversed a district court that had adopted the contrary view . . . .

It has been suggested that Judge Bork may be less sympathetic to affirmative action than was [retired] Justice [Lewis F.] Powell. This assumption is based on Bork's criticism, while a law professor, of Justice Powell's opinion in the *Bakke* case, which authorized racially preferential treatment in certain circumstances. (Judge Bork has not had occasion to issue any rulings in affirmative action cases while a federal judge.) Thus, any claim that Judge Bork is less sympathetic to "civil rights" than Justice Powell can logically refer—at most—solely to this one issue and rests wholly upon comments made several years ago . . . .

Bork has always emphasized his "abhorrence of racial discrimination . . . ."

### Social Issues

When he was in academic life, Judge Bork criticized the Supreme Court's right-to-privacy decisions as not sufficiently grounded in the Constitution. He has, nevertheless, opposed what he views as impermissible attempts to overturn these decisions . . . .

[Regarding abortion] Judge Bork has never stated whether he would vote to overrule *Roe v. Wade* . . . . [He] has in the past questioned only whether there is a right to abortion in the Constitution . . . .

### The Bork Record

Judge Bork is an open-minded judge who is well within the mainstream of contemporary jurisprudence . . . . Statistics prove that Judge Bork voted with the majority in over 94 percent of those cases.

Judge Bork's record on appeal is impeccable. The Supreme Court has never reversed any of the majority opinions written by Judge Bork, which total over 100. Indeed, the Supreme Court has never reversed any of the over 400 majority opinions in which Judge Bork has joined in one way or another . . . .

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Cont'd

### **First Amendment**

During his five years on the bench, Judge Bork has been one of the judiciary's most vigorous defenders of First Amendment values . . . . In *Ollman v. Evans and Novak*, Judge Bork greatly expanded the constitutional protections courts had been according journalists facing libel suits for political commentary . . . .

In a letter published in the ABA Journal in 1984, [Bork wrote], "I do not think . . . that First Amendment protection should apply only to speech that is explicitly political . . . . I have long since concluded that many other forms of discourse, such as moral and scientific debate, are central to democratic government and deserve protection . . . ."

More

## Senate Panel's Consultants Offer Response

A vacancy on the Supreme Court is always a national concern. But this particular vacancy—occurring at this particular time—carries historical weight. In this year of its bicentennial, the Constitution is more than the object of celebration; it is the focus of a critical national debate about what it is, what it means and what it requires . . . .

Neither the Constitution nor judicial practice enshrines any particular philosophical balance on the Supreme Court. And the president must have some latitude to select Supreme Court nominees who generally share his philosophical perspective.

That latitude is exceeded when a president attempts to remake the Supreme Court in his own image by selecting nominees whose extensive expressions of views on major, specific issues clearly parallel his own; when the president and the Senate are divided deeply on the great issues of the day, and when the court itself is closely divided philosophically, and a determined president could bend it to political ends that he cannot achieve through the legislative process . . . .

Contrary to the assertions of the White House position paper, the direction of the Supreme Court is very much at stake.

### Civil Rights

Judge Bork's extensive record shows that he has opposed virtually every major civil rights advance on which he has taken a position, including such issues as the public accommodations bill, open housing, restrictive covenants, literacy tests, poll taxes and affirmative action.

- In 1963, Judge Bork opposed the public accommodations bill on the ground that it would mean "a loss in a vital area of personal liberty" . . . .
- In 1968, the nominee attacked a Supreme Court decision striking down a referendum that revoked a state open-housing statute . . . .
- In 1968, 1971 and 1973, Judge Bork sharply criticized the decisions establishing the principle of one-person, one vote . . . .
- In 1971, he challenged the decision striking down racially restrictive covenants in housing . . . .
- In 1972 and 1981, he criticized decisions banning literacy tests in voting . . . .
- In 1973 and 1985, he attacked the decision outlawing poll taxes as a prerequisite to voting . . . .

- In 1978, he rejected the [*Bakke*] decision upholding affirmative action . . . .
- In 1987, he stated that "I do think the Equal Protection Clause probably should be kept to things like race and ethnicity," indicating that he would not extend protection, for example, to women . . . .
- Judge Bork has opposed the Equal Rights Amendment because it would, in his view, constitutionalize issues of gender equality . . . .
- Commenting generally on the Bill of Rights, Judge Bork says that it was "a hastily drafted document on which little thought was expended."

### Social Issues

Judge Bork has repeatedly and consistently rejected the right to be free from governmental interference [in] one's private life . . . .

The nominee has repeatedly rejected the decision upholding the right of married couples to use contraceptives . . . .

Judge Bork described as "unconstitutional" the decision upholding the right of a woman to decide with her doctor the question of abortion . . . .

### The Bork Record

The [White House] compilation of statistics seriously distorts Judge Bork's record.

The statistical analysis is uninformative since the nominee, as a circuit court judge, has been constitutionally and institutionally bound to follow Supreme Court precedent . . . .

Since Judge Bork concedes that 90 percent of his docket has been nonideological . . . his Circuit Court record says little about his suitability for the Supreme Court . . . .

### First Amendment

Judge Bork's record on First Amendment issues demonstrates that he would narrow many well-established First Amendment protections.

[His] criticism of landmark Supreme Court decisions suggests that he would tolerate far broader prior restraints on the press than have historically been deemed constitutional, as well as permitted far more governmental punishment of speech than has traditionally been protected . . . .

Judge Bork's writings show that he would protect only speech that is tied to the political process, and that he would not protect artistic and literary expression such as Shakespeare's plays, Rubens' paintings and Baryshnikov's ballet . . . .

# White House Paper on Bork Inaccurate, Biden Aides Say

By Ruth Marcus  
Washington Post Staff Writer

1289

A White House position paper on Supreme Court nominee Robert H. Bork "seriously distorts" Bork's record on the federal appeals court here, misstates his views and contains other "major inaccuracies" in an attempt to depict Bork as a moderate, according to a review released yesterday by Senate Judiciary Committee Chairman Joseph R. Biden Jr. (D-Del.).

The response disputes the administration's characterization of Bork, contained in a briefing book distributed by the White House last month, as a "mainstream" jurist who, in succeeding retired Justice Lewis F. Powell Jr., would not alter the balance on the high court. [Excerpts on Page A23.]

"The picture painted by the White House is inaccurate and incomplete," said the response, prepared by two Judiciary Committee consultants, Jeffrey Peck and Duke University law Prof. Christopher Schroeder. "Among the omissions are clear examples of Judge Bork's advocacy and implementation of conservative activism, which demonstrate that he is not the apostle of judicial restraint and moderation described in the White House position paper."

Bork's addition to the high court, they wrote, "would cement a five-vote majority for undoing much of the social progress of the last three decades."

Justice Department spokesman Terry H. Eastland, commenting on the review's characterization of Bork, said, "it's nonsense to say that he's a judicial activist. His career as a judge has been spent in the service of defining and applying neutral principles of law, whatever the political outcome might be."

In addition, Eastland said, "It's not the briefing book that's been nominated, it's Judge Bork. Whatever anyone may wish to say about whatever various people have said about Judge Bork, it is he whose record and whose testimony during the hearings will be relevant during the confirmation process."

The two documents offer a preview of the debate on Bork when the Senate Judiciary Committee begins two weeks of hearings on the nomination Sept. 15.

Although Biden did not explicitly endorse the consultants' report, it was approved by First Amendment expert Floyd Abrams, Washington lawyer Clark Clifford, Duke University law Prof. Walter Dellinger and Harvard Law School Prof. Laurence Tribe, who have been advising Biden.

The response criticizes as "uninformative" and "distorted" White House statistics, cited often by President Reagan and other administration officials, showing that Bork, in five years on the appeals court, has never had one of his more than 100 majority opinions reversed by the high court. In fact,

the response states, the court has not yet reviewed any Bork majority opinions.

In addition, the response said, the White House statistics "ignore" the Supreme Court's unanimous rejection of Bork's position in a 1986 sexual harassment case.

"In a factually inaccurate and misleading description," the response said, "the White House position paper claims that the Supreme Court 'adopted positions similar to those of Judge Bork' in the case, which involved a bank teller who claimed she had sexual relations with a supervisor who threatened to fire her if she did not comply with his demands."

Bork dissented from the full appeals court's decision not to review the case, saying that the bank should not be held liable if the teller's relations with the supervisor were "voluntary." The Supreme Court, in a unanimous opinion written by Chief Justice William H. Rehnquist, "flatly rejected" Bork's view, the response said.

The response also criticizes the administration's attempt to equate Bork's views with those of Powell, saying that it glosses over "many fundamental differences" between the two judges. Moreover, the response said, Bork's "judicial record—far from supporting the position paper's assertions of restraint—is replete with examples of an activist approach" in which Bork has been willing to ignore liberal precedents.

It quotes, for example, from a 1984 case involving a homosexual sailor in which four of Bork's colleagues accused him of conducting "a general spring cleaning of constitutional law," adding, "Judicial restraint begins at home."

Although the White House paper asserts that Bork "has never wavered in his consistent and principled protection of civil rights," the response states that "Bork's extensive record shows that he has opposed virtually every major civil rights advance on which he has taken a position."

Likewise, the position paper says that Bork's rulings "suggest a strong hostility to any form of government censorship and that 'he would be a powerful ally of First Amendment values on the Supreme Court.'" The response asserts that Bork "would narrow many well-established First Amendment protections," citing his suggestions that First Amendment protections apply only to speech on political issues and his criticisms of some Supreme Court cases on press rights.

# Reagan view of Bork's record

By Aaron Epstein  
Inquirer Washington Bureau

## disputed in panel report

WASHINGTON — The White House distorted the record of Supreme Court nominee Robert H. Bork in an attempt to portray him as "a mainstream moderate," according to legal consultants to the Democratic-controlled Senate Judiciary Committee.

The consultants' report, issued yesterday by committee Chairman Joseph R. Biden Jr. (D., Del.), concludes that "the record of Judge Bork's public pronouncements and actions over the past quarter-century paint a picture of Judge Bork as an extremely conservative activist rather than a genuine apostle of judicial moderation and restraint.

"The attempt by the White House to depict Judge Bork as a mainstream moderate simply does not comport

with his record."

Nevertheless, the report said, there remains "room for debate and disagreement over the ultimate issue — whether the Senate should grant or withhold its consent to the pending nomination."

President Reagan's nomination of Bork, which has triggered an unusually bitter and widespread controversy, will be considered by the Judiciary Committee in hearings beginning Sept. 15.

The consultants' 72-page report was a response to a White House document distributed Aug. 3 to provide the administration's view of the record of Bork, a Reagan-appointed judge on the federal appeals court here. The report said that the White House distorted the facts in the following areas:

**First Amendment.** The White House has contended that Bork's record in First Amendment cases shows "a strong hostility to any form of government censorship" and suggests that "he would be a powerful ally of First Amendment values on the Supreme Court."

The consultants say Bork's record demonstrates that he would narrow constitutional protections for the press, be inclined not to protect artistic and literary works, and seek to introduce some religion into public schools.

**Civil rights.** The White House document called Bork a strong supporter of civil rights.

The report released yesterday says Bork "has opposed virtually every major civil rights advance on which

he has taken a position, including such issues as the public accommodations bill, open housing, restrictive covenants, literacy tests, poll taxes and affirmative action."

**Opinions.** The White House analysis said that none of Bork's majority opinions has been reversed by the Supreme Court, demonstrating that he is well within the mainstream of the legal philosophy of the high court.

But the Judiciary report noted that none of Bork's majority opinions has been reviewed by the Supreme Court.

**Precedent.** The White House has contended that Bork "believes in abiding by precedent" and that there is no basis for believing that Bork would "seek to roll back many exist-

ing precedents."

But the report notes that Bork has criticized many landmark Supreme Court rulings of recent decades as examples of "unconstitutional behavior" and has said that the "only cure" for such "judicial excesses" is through the appointment of new justices.

**Powell.** The White House says Bork would continue in the "mainstream tradition" of the jurist he would replace, retired Justice Lewis F. Powell Jr.

But the report Biden released argues that the White House ignored significant differences between Bork and Powell on constitutional protections of certain individual liberties, especially the right of privacy. For example, Bork has argued that the

Supreme Court acted unconstitutionally by ruling in 1973 that a woman had a constitutional right to choose abortion. In contrast, Powell has written of the "especially compelling reasons for adhering" to the abortion ruling.

The report of the Judiciary Committee consultants, Washington lawyer Jeffrey Peck and Duke University law professor Christopher Schroeder, was reviewed at Biden's request by four legal experts with liberal credentials: New York press lawyer Floyd Abrams, Washington lawyer and former Democratic diplomat Clark Clifford, Duke University law professor Walter Dellinger and Harvard University law professor Laurence Tribe.

All four endorsed the report "wholeheartedly," Judiciary Committee aides said.

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## White House ripped on Bork record

WASHINGTON (AP)—An analysis released Thursday by the chairman of the Senate Judiciary Committee says the White House is conducting a "transparent effort" to make U.S. Supreme Court nominee Robert Bork appear as the ideological equivalent of retired Justice Lewis Powell.

The report was requested by committee chairman Joseph Biden (D., Del.) and was written by two committee consultants. It is a broad attack on a White House position paper issued last July that extolled Bork's record as a federal appellate judge.

Biden, who has announced his opposition to Bork, called the White House account a distortion and said the committee report was attempting to "depict Judge Bork's record more fully and accurately."

Issued 12 days before the start of Bork's confirmation hearings before the Judiciary Committee, the analysis:

- Called Bork a pillar of "conservative activism" rather than "the apostle of judicial restraint and moderation described in the White House position paper."

- Said Bork rejected the right of citizens to be free from governmental interference in their private lives.

- Accused the nominee of attacking "virtually all" of the nation's basic antitrust laws.

- Accused Bork of favoring a narrowing of many 1st Amendment protections, favoring prior restraints on the press, limitations on release of information under the Freedom of Information Act, protection of only political speech but not artistic expression, and calling for reintroduction of some religion into public schools.

- Contended Bork opposed "virtually every major civil rights advance on which he has taken a position," including laws on public accommodations, open housing, restrictive covenants, literacy tests, poll taxes and affirmative action.

- Contended Bork would refuse to adhere to Supreme Court precedents, noting that he said the Supreme Court ruling granting a woman's right to abortion, *Roe v. Wade*, was "by no means the only example of unconstitutional behavior by the Supreme Court."

At the heart of the new analysis is a rebuttal to the White House claim that Bork and Powell, the latter a respected conservative, agreed with each other in nine of 10 relevant cases that advanced from the U.S. Court of Appeals in Washington to the Supreme Court.

Referring to the White House position paper, the new report said "it thus continues its transparent effort to depict Judge Bork as the ideological equivalent to the retired Lewis Powell. Such depiction has no basis in fact."

The Biden-released analysis said the White House "seriously misrepresents some of those cases," including a sexual harassment case in which the administration study

portrayed the two men in agreement when they actually were on opposite sides.

"Furthermore, a careful analysis of the remaining cases cited by the [White House] position paper shows that Judge Bork and Justice Powell both wrote opinions in only two" of the cases cited.



## Biden report: White House 'distorts' Bork's record to win over moderates

By Bob Minzesheimer  
USA TODAY

The battle over Supreme Court nominee Robert Bork is being waged with conflicting reports.

First, the White House issued in July its 77-page account of Bork's record, portraying him as part of the legal "mainstream" who wouldn't shift the balance on the court.

Thursday, Senate Judiciary Committee Chairman Joseph Biden Jr., D-Del., released a 72-page rebuttal that says the White House report "distorts" Bork's record "as it stretches to find moderate allies."

Biden's report — written by Washington lawyer Jeffrey Peck and Duke University law Professor Christopher Schroeder — says Bork's conservatism "could dramatically change" the court's direction.

It stresses differences between Bork, an appeals court judge, and Lewis Powell, the retired high court justice Bork would replace.

■ Powell voted for the decision establishing a woman's right to abortion. Bork called it "unconstitutional" and a "serious and wholly unjustifiable judicial usurpation of state legislative authority."

■ Bork criticized court rulings upholding the right of married couples to use contraceptives, banning literacy tests in polling, and establishing the

### Disparate views of the same man

How reports from the White House and Sen. Joseph Biden Jr., D-Del., compare Supreme Court nominee Robert Bork:

**WHITE HOUSE:** The Supreme Court hasn't reversed any of Judge Bork's 106 majority opinions.

**BIDEN:** It's more accurate to say the court didn't review those opinions.

**WHITE HOUSE:** In five years as an appeals court judge, Bork wrote only nine dissents.

**BIDEN:** Bork concedes 90 percent of circuit court cases are non-ideological; his record says nothing about his suitability for the Supreme Court, whose docket is more controversial.

**WHITE HOUSE:** Quotes a *Los Angeles Times* news story: "Bork has proved to be a judge who follows the law and legal precedent — not his personal preferences —



By Cal Romias, USA TODAY

**BORK:** At center of dispute

in arriving at his opinions."

**BIDEN:** Quotes a *Los Angeles Times* editorial: "Bork's addition to the court would cement a five-vote majority for undoing much of the social progress of the last three decades."

**WHITE HOUSE:** Bork won't swing the court.

**BIDEN:** The ideological balance on the court is at stake.

Idea of one-person, one-vote:

The White House report also has been criticized by conservative legal scholar Bruce Fein, a former administration official who's backing Bork.

"They chose Bob Bork because they wanted him to make changes in the law," Fein

said. He urged Reagan to be "straightforward" and say "these are the major areas where he believes the court has erred in the past and where he believes Justice Powell perhaps cast an errant vote and he would hope that Judge Bork would correct these."

## Study of Bork's views for Judiciary PAGE: 3A

By Lyle Denniston  
Washington Bureau of The Sun

### panel finds little moderation

WASHINGTON — Legal analysts recruited by the chairman of the Senate Judiciary Committee denounced the White House yesterday for "grave distortions," "inaccuracies" and "critical omissions" in an administration report aimed at getting moderate senators to vote for Supreme Court nominee Robert H. Bork.

The sharply worded attack, released by committee Chairman Joseph R. Biden Jr., D-Del., was aimed at a study that described Judge Bork as a jurist who is "thoroughly in the mainstream." Presidential aides sent the study to the Senate on Aug. 3.

That report was part of a basic administration strategy to prove to the Senate that the Supreme Court and constitutional law would not be much different if Judge Bork were confirmed as a new justice.

Administration officials, as a part of that strategy, have even criticized conservative supporters of Judge Bork for seeking to portray him as one who would take a distinctly different view of the Constitution.

Opponents of President Reagan's choice have conceded that the fight over the Bork nomination will come down, in the end, to a bid for the votes of middle-of-the-road senators, who number as many as 30. The foes thus have been arguing that Judge Bork is a radical, not a conservative or a moderate.

The Judiciary Committee analysts directly attacked the White House approach in the nomination fight: "The attempt by the White House to depict Judge Bork as a mainstream moderate simply does not comport with his record."

His actions and statements over the past quarter-century, they added, "paint a picture of Judge Bork as an extremely conservative activist rather than a genuine apostle of judicial moderation and restraint."

In 72 pages and two appendices, the analysts offered a point-by-point response to the White House study, concluding that a number of major Supreme Court rulings — which Judge Bork strongly criticized as a judge or as a law professor — would be threatened with reversal if he were on the court.

"The Bork nomination is a decision about the future," the committee review argued. "Contrary to the assertions of the White House position paper, the direction of the Supreme Court is very much at stake."

The White House study said that there was "no basis" in Judge Bork's record for a fear that he would seek

to roll back many earlier court decisions — a statement bluntly challenged by the committee analysts. The judge's record raises "serious questions," they said, "about his willingness to respect and adhere to landmark decisions of the Supreme Court."

The committee review was conducted by a Washington lawyer, Jeffrey Peck, and a Duke University law professor, Christopher Schroeder. Mr. Biden said that their work was reviewed and approved by Clark Clifford, a prominent Washington lawyer and frequent presidential adviser; by Floyd Abrams, a New York City lawyer and First Amendment specialist; and by law professors Walter Dellinger of Duke and Laurence H. Tribe of Harvard.

Their analysis made a particular point of disputing a White House suggestion that there is a close simi-

larity between the judicial positions of Judge Bork and the retired Supreme Court justice he would replace, Lewis F. Powell Jr.

In recent years, Justice Powell often cast a decisive vote when the court was closely divided on key issues. The White House study said Justice Powell had agreed with Judge Bork in nine of 10 "relevant cases" that went to the Supreme Court.

The committee analysts reviewed those 10 cases and concluded that the White House "seriously misrepresents some of those cases."

To the White House claim that "the Supreme Court has never reversed any" of the 100 opinions Judge Bork has written for a majority of the U.S. Circuit Court of Appeals, the analysts retorted that the Supreme Court has never reviewed any of them.

# The New York Times

DATE: 9/4/82

PAGE: All

## Report Assails Bork's Record On Constitutional Questions

WASHINGTON, Sept. 3 (AP) — The chairman of the Senate Judiciary Committee today released a report that attacked virtually every aspect of the record of Judge Robert H. Bork, the Supreme Court nominee.

The report released by Senator Joseph R. Biden Jr. of Delaware, a Presidential contender, attacked Judge Bork's positions on subjects including civil rights, privacy, antitrust, censorship, free speech, religion in the schools and the Supreme Court decision permitting abortion.

The report was written by two committee consultants, a Washington lawyer and a Duke University law professor, and reviewed by four prominent lawyers.

Mr. Biden did not comment on the report, but he has become an outspoken opponent of Judge Bork. Mr. Biden will conduct confirmation hearings that begin Sept. 15.

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# Senate Panel Advisers Call Bork 'Conservative Activist'

By DAVID G. SAVAGE, Times Staff Writer

1268

WASHINGTON—The chairman of the Senate Judiciary Committee released a report Thursday accusing the White House of falsely portraying Supreme Court nominee Robert H. Bork as a moderate jurist and contending instead that he is a "conservative activist."

The analysis, prepared by two legal consultants for Chairman Joseph R. Biden Jr. (D-Del.), said that Bork has denounced a series of high court rulings that advanced civil rights for minority members and women and has favored limits on free speech.

"The attempt by the White House to depict Judge Bork as a mainstream moderate simply does

not comport with his record," the 83-page analysis of Bork's judicial record concluded.

The report was issued less than two weeks before the committee begins hearings on Bork's nomination and is the latest salvo in a war of legal analyses and press releases issued by critics and supporters of President Reagan's nominee.

With many observers believing that the fate of Bork's appointment rests with about a dozen moderate members of the Senate, the White House has been attempting to portray him as a centrist who exercises judicial restraint, while opponents have been tarring him as a right-wing extremist.

Biden did not comment on Thursday's report, but he has declared his opposition to the nominee. He requested the analysis from the committee consultants—a Washington attorney and a law professor—after White House lawyers released a report last month supporting Reagan's assertion that Bork would display the "detachment and statesmanship" of retiring Justice Lewis F. Powell Jr.

"The record of Judge Bork's public pronouncements and actions over the past quarter-century paint a picture of . . . an extremely conservative activist rather than a genuine apostle of judicial restraint and moderation," the report said.

It said that Bork "has opposed virtually every major civil rights advance on which he has taken a position" in his career as a lawyer, a law professor and a judge.

The report noted that in 1963 Bork opposed a law that would give blacks the right to be served in public businesses such as restaurants, denounced the court for striking down housing covenants that excluded blacks from buying homes in certain neighborhoods and criticized the court for ending poll taxes and literacy tests for voting.

On issues of presidential power, the analysis said, Bork has taken strong stands in favor of the chief

executive. It cited Bork's testimony before a congressional committee in 1978 that the President had the right to tap the telephones of spy suspects without getting a warrant from a court. He has also favored prior restraints on the press, it said.

The report was prepared by lawyer Jeffrey Peck and Duke University law professor Christopher Schroeder.

## White House View

In its analysis, the White House said that, as a professor, Bork urged the courts to faithfully follow the law, not to make it, and as a judge voted with the appeals court majority in 94% of the cases, demonstrating that he was in step with his colleagues.

Bork "is among the most eloquent and principled proponents of judicial restraint," the White House said.

# 2 Baptist bodies clash over Bork endorsement

By Larry Witham  
THE WASHINGTON TIMES

128P

The two public affairs panels of the Southern Baptist Convention — one old and the other recently created — have had their first confrontation on who speaks for Southern Baptists.

The denomination's Public Affairs Committee, created by resolution at the church's convention in June, has issued a statement supporting President Reagan's nomination of Judge Robert Bork to the Supreme Court.

But there is some question as to what the "official" Southern Baptist position on the Bork nomination is — if, indeed, there is one.

For 50 years, the Baptist Joint Committee on Public Affairs, which is based in Washington, has repre-

sented the public policy concerns of the 14.6-million-member denomination and spoken for eight other Baptist bodies as well.

With the ascendance of conservative leadership in the denomination, however, the old committee was put on notice for being too liberal on social and moral issues.

Over the past few years, there have been efforts to deny the joint committee its annual \$484,400 allocation from the SBC and to set up "an exclusive Southern Baptist presence in Washington for the purpose of more truly reflecting our views."

The new Public Affairs Committee, based in Nashville, was created in June as a compromise and given the responsibility of representing Southern Baptists on issues of church and state, religious freedom

and matters relating to the "right application of Christianity to the life of the nation." Its members are the 18 Southern Baptists who sit on the joint committee.

The new committee said it endorsed Judge Bork because, among other qualifications, he believes the Constitution does not protect pornography or homosexual behavior but does favor the role of religion in public life.

Stan Hasteley, spokesman for the Baptist Joint Committee, said the Public Affairs Committee is mandated to issue statements "when the Baptist Joint Committee chooses not to or when their view is in conflict with the Baptist Joint Committee."

In its statement, the new committee urged the joint committee to lobby on behalf of the nomination.

But Mr. Hasteley said there was "no basis" for such a request because the joint committee has not yet voiced any opinion on Judge Bork. Meanwhile, he said, "The Baptist Joint Committee is not obligated to fall in line [and support the nomination]."

However, Les Csorba of Alexandria, a public affairs staff member who drafted the resolution, said, "We felt that it was imperative . . . to take a stand [on the Bork nomination] and speak on this issue for Southern Baptists."

The endorsement notes that opposition to Judge Bork already has come from People for the American Way and the National Organization for Women, groups that have social views similar to those held by members of the joint committee, Mr. Csorba said.

By releasing the statement, the new committee was ensuring that "the views that Southern Baptists hold would be greatly promoted," Mr. Csorba said. This is believed to be the first time the denomination has made public its views on a president's nomination. Mr. Hasteley said any position on the nomination taken by the 48-member joint committee will surface at its annual meeting in October.

The decision to back Judge Bork was passed by a 7-5 vote, with six members of the Public Affairs Committee absent.

Board member J.I. Ginnings told the Baptist Press he voted against it because, "While I am sympathetic to his nomination, I believe we should not become a body for endorsing candidates."

## Farm Group Backs Bork Nomination to Supreme Court

WASHINGTON (UPI)—The nation's largest farming organization endorsed the nomination of Judge Robert H. Bork for the Supreme Court, the first time in its history the group has advocated a judicial candidate, a spokesman said Wednesday.

The 24 board members of the American Farm Bureau Federation, which represents more than 3.5 million rural families, met Tuesday in Park Ridge, Ill., to discuss President Reagan's nomination of Bork.

"We were getting requests from farmers to consider doing this," federation President Dean Kleckner said Wednesday in announcing the decision to endorse Bork.

Kleckner said White House Chief of Staff Howard H. Baker Jr. visited with board members Tuesday during their meeting and "talked mostly about Judge Bork."

"In looking at Judge Bork's record, the board of directors concluded the nominee is an eminently qualified jurist," Kleckner said.

"Farmers are as much affected by judicial decisions as any other citizens," he added. "As farmers, we see the need to stand up and be counted this time."

The Senate Judiciary Committee is scheduled to begin Bork's confirmation hearings on Sept. 15.

UP012

UNITED PRESS INTERNATIONAL

R W

BORK

ADV 10 A.M. EDT

BY ANDREA NEAL

WASHINGTON (UPI) -- THE WHITE HOUSE HAS DISTORTED THE RECORD OF SUPREME COURT NOMINEE ROBERT BORK BY PORTRAYING HIM AS A MODERATE CONSERVATIVE WHEN IN FACT HE IS LIKELY TO UNDO THREE DECADES OF SOCIAL PROGRESS, SAID A REPORT RELEASED THURSDAY BY THE SENATE JUDICIARY COMMITTEE CHAIRMAN.

THE 72-PAGE ANALYSIS, WRITTEN BY CONSULTANTS TO SEN. JOSEPH BIDEN, D-DEL., DEPICTS BORK AS A JUDICIAL ACTIVIST DETERMINED TO ADVANCE PRESIDENT REAGAN'S CONSERVATIVE SOCIAL AGENDA WELL INTO THE NEXT CENTURY.

BIDEN COMMISSIONED THE REPORT IN RESPONSE TO A WHITE HOUSE BRIEFING BOOK THAT PAINTS BORK, 60, AS A MODERATE CONSERVATIVE WHO WOULD FOLLOW THE "MAINSTREAM TRADITION" OF RETIRED JUSTICE LEWIS POWELL, WHOM HE WAS NOMINATED TO REPLACE.

THE WHITE HOUSE PAPER, THE REPORT CONTENDS, "IS A DISTORTION OF HIS RECORD" AND CONTAINS "MAJOR INACCURACIES."

BOTH STUDIES ARE LIKELY TO BE USED AS AMMUNITION BY REPUBLICANS AND DEMOCRATS WHEN BIDEN'S COMMITTEE OPENS CONFIRMATION HEARINGS ON THE NOMINATION SEPT. 15. THE MOST RECENT HEAD COUNT INDICATED SENATORS WERE EVENLY SPLIT ON BORK.

A SPOKESMAN SAID SEN. STROM THURMOND OF SOUTH CAROLINA, RANKING REPUBLICAN ON THE JUDICIARY COMMITTEE, HAD NOT SEEN THE BIDEN REPORT IN ADVANCE WEDNESDAY AND HAD NO IMMEDIATE COMMENT.

IN A RELATED DEVELOPMENT WEDNESDAY, HOWEVER, THE AMERICAN CIVIL LIBERTIES UNION, WHICH HAS BROKEN A 36-YEAR-TRADITION OF NEUTRALITY TO OPPOSE BORK'S NOMINATION, ACCUSED THE ADMINISTRATION OF TRYING TO "HIDE THE REAL ROBERT BORK FROM THE PEOPLE" BY CONCEALING HIS CLEARLY "RADICAL" PHILOSOPHY.

SUPPORT FOR THE FEDERAL APPEALS COURT JUDGE CAME FROM THE AMERICAN FARM BUREAU FEDERATION, WHICH REPRESENTS MORE THAN 3.5 MILLION RURAL FAMILIES.

FEDERATION PRESIDENT DEAN KLECKNER SAID WEDNESDAY, "FARMERS ARE AS MUCH AFFECTED BY JUDICIAL DECISIONS AS ANY OTHER CITIZENS. AS FARMERS, WE SEE THE NEED TO STAND UP AND BE COUNTED THIS TIME."

BIDEN'S CONSULTANTS, WASHINGTON LAWYER JEFFREY PECK AND DUKE UNIVERSITY LAW PROFESSOR CHRISTOPHER SCHROEDER, CONCLUDED BORK IS NOT AN ADVOCATE OF JUDICIAL RESTRAINT, AS THE WHITE HOUSE CLAIMS, BUT INSTEAD "HAS OFTEN ADVOCATED AND ENGAGED IN JUDICIAL ACTIVISM."

"FROM HIS RECORD, IT APPEARS THAT BORK'S ADDITION TO THE COURT WOULD CEMENT A FIVE-VOTE MAJORITY FOR UNDOING MUCH OF THE SOCIAL PROGRESS OF THE LAST THREE DECADES," THEY WROTE.

THE REPORT METHODICALLY CHALLENGED THE WHITE HOUSE BRIEFING BOOK ON VARIOUS ISSUES, INCLUDING BORK'S STAND ON THE FIRST AMENDMENT AND ABORTION. WHILE THE WHITE HOUSE CALLED HIM "A POWERFUL ALLY OF FIRST AMENDMENT VALUES," THE REPORT CONCLUDED HE "WOULD NARROW MANY WELL-ESTABLISHED FIRST AMENDMENT PROTECTIONS."

LIKewise, THE WHITE HOUSE STUDY POINTED OUT BORK HAS NEVER ISSUED A RULING INDICATING WHETHER HE WOULD VOTE TO REVERSE ROE VS. WADE, THE SUPREME COURT'S 1973 DECISION LEGALIZING MOST ABORTIONS. THE BIDEN REPORT SAID HIS WRITINGS AND PUBLIC COMMENTS REVEAL HE IS LIKELY TO PROVIDE THE CRUCIAL FIFTH VOTE NEEDED TO REVERSE THAT LANDMARK RULING.

THE STUDY ALSO COUNTERED WHITE HOUSE SUGGESTIONS THAT BORK HAS PROTECTED CIVIL RIGHTS CONSISTENTLY.

"IN FACT, JUDGE BORK'S EXTENSIVE RECORD SHOWS THAT HE HAS OPPOSED VIRTUALLY EVERY MAJOR CIVIL RIGHTS ADVANCE ON WHICH HE HAS TAKEN A POSITION," THE REPORT SAID, CITING HIS 1963 OPPOSITION TO A BILL GUARANTEEING BLACKS EQUALITY IN PUBLIC ACCOMMODATIONS AND HIS CRITICISM OF DECISIONS BANNING LITERACY TESTS IN VOTING.

THE REPORT URGED THE SENATE TO SCRUTINIZE BORK'S RECORD BECAUSE THE IDEOLOGICAL BALANCE OF THE HIGH COURT IS AT STAKE.

"WHEN A NOMINEE SUCH AS JUDGE BORK COULD DRAMATICALLY CHANGE THE DIRECTION OF THE SUPREME COURT, EACH SENATOR HAS BOTH A RIGHT AND A CONSTITUTIONAL DUTY TO CONSIDER WHETHER THE JUDICIAL PHILOSOPHY OF THAT NOMINEE IS DESIRABLE FOR THIS TIME AND FOR THIS COURT," THE REPORT CONCLUDED.

UPI 09-03-87 09:37 AED



Thu 3-Sep-87 19:02 EDT

Subject: BORK  
Mail Id: Rodota

SALT LAKE CITY (UPI) — The American Civil Liberties Union Utah chapter Thursday joined the national ACLU in opposing the nomination of federal Judge Robert Bork to the U.S. Supreme Court.

"The adoption of Judge Bork's brand of jurisprudence would mark the end of many of the individual freedoms and liberties enjoyed by the citizens of Utah," said Robyn Blumner, state ACLU executive director.

The Senate Judiciary Committee begins confirmation hearings Sept. 15 on Bork, President Reagan's choice to replace Justice Lewis Powell, who retired last June.

Blumner said confirmation of Bork, 60, a judge on the U.S. Circuit Court of Appeals in Washington, "would jeopardize the right of religious freedom, the virtually unencumbered right to express oneself artistically and the right to reproductive freedom."

The Utah ACLU, Blumner said, objects to Bork's assertions there is no constitutional right to privacy in government regulation of abortion rights and parental rights.

"In addition, the ACLU fears Bork's narrow construction of jurisdictional statutes as well as his strict application of the legal doctrines of standing, ripeness and justiciability would substantially limit access to the courts," she said.

Blumner called Bork "an anti-constitutional candidate" who has shown "deference to the popularly elected branches of government."

"A judiciary which defers to the other branches acts in antithesis of its constitutional role," she said, "and subverts the doctrine of separation of powers by failing to check and balance the will of the powerful majority."

"The ACLU of Utah recommends that he not be confirmed."

upi 09-03-87 03:58 ppd

Thu 3-Sep-87 14:39 EDT  
Subject: BORK  
Mail Id: Rodota

NAACP launches campaign to derail Bork confirmation  
By STEVEN GINSBURG

BALTIMORE (UPI) — NAACP Executive Director Benjamin Hooks Thursday launched a letter-writing campaign to block the confirmation of Robert Bork to the Supreme Court, saying the judge is "bad news for all human rights advocates."

"The man is dangerous, that's all you can say," Hooks said. "He tries to give rational answers to racist arguments. He wants the Supreme Court position for the avowed purpose of rolling back the clock on blacks and other minorities."

Hooks urged those concerned about Bork becoming a member of the nation's highest court to write members of the U.S. Senate and ask them to block the confirmation. Bork was nominated for the position July 1 by President Reagan.

"If the president has a mandate to do what he thinks is right, so does the Senate," Hook said. "The Senate must not just rubber stamp this matter and let him through. It has a right to do what is best for the country, regardless of what the president says."

If confirmed by the Senate, Bork, 60, would fill the vacancy left by the abrupt retirement June 26 of Justice Lewis Powell. Bork has been a member of the U.S. Circuit Court of Appeals for the District of Columbia since 1982.

"Through our vast network of (NAACP) branches, we hope to mobilize the support of our position," Hooks said. "Since we can't talk to all of the senators on the phone, we're going to write them. We feel individual letters would be more effective than a petition campaign."

"It's simply a frightening prospect for every black, every minority that Bork could become a member of the Supreme Court," he added. "He is bad news for all human rights advocates."

Bork has spoken out against Supreme Court rulings giving women the right to an abortion and upholding a couple's right to buy contraceptives. Such matters, he said, should be dealt with by legislatures, not courts.

Those views earned him several positions with the Nixon administration. When Nixon sought out scholars to help formulate and defend his anti-busing proposals, Bork came forward and was named a White House consultant.

"Every decision we (minorities) have won recently have been by a 5-4 margin and most times Justice Powell was the vote on our side," Hooks said. "There's no question in my mind Bork would be the fifth vote against us. His confirmation to the Supreme Court is just plain scary."

upi 09-03-87 02:32 ped

Thu 3-Sep-87 12:42  
Subject: BORK  
Mail Id: Rodota

FERGUS FALLS, Minn. (UPI) — Sen. Robert Dole, R-Kans., said Thursday he would, as president, consult with congressional leaders before taking on any covert actions overseas.

"You'll see Bob Dole consult with the congressional leadership," the Senate Republican leader said at a town meeting.

Dole said he was not criticizing President Reagan for failing to consult with Congress in the past.

But he cited President Jimmy Carter's failure to inform the congressional leadership in advance of his unsuccessful attempt to rescue Americans held in Iran in 1980.

On other matters Dole said he favors the elimination of farm subsidies but it is not likely to happen in the near future.

"I hope some day we don't have subsidies, but in the real world that is not going to happen," he said.

He said he also favors putting a limit on the amount of money farmers can borrow from the financially strapped Federal Farm Credit System.

"We have to authorize whatever is necessary to help the system so farmers can be able to borrow," he said.

Dole also said Judge Robert Bork of the U.S. Circuit Court of Appeals should win Senate confirmation to a seat on the Supreme Court. Bork's confirmation hearings are scheduled to begin Sept. 15.

"Judge Bork will have waited 72 days since the day he was nominated before the hearings begin," Dole said. "That's the longest any judge has had to wait since 1962."

Dole said he has a highly favorable rating among Republicans as well as Democrats for his presidential candidacy.

"That means I'm electable and I'm going to have a lot of Democratic support," he said.

upi 09-03-87 12:34 ped

Thu 3-Sep-87 18:30 EDT  
Subject: BORK  
Mail Id: Rodota

Dole takes presidential campaign to Minnesota State Fair  
By RICHARD McFARLAND

ST. PAUL, Minn. (UPI) \_ Senate Republican leader Robert Dole walked smiling through the crowded streets at the Minnesota State Fair Thursday, shaking hands with young and old, seeking support for president. . .

Dole predicted a "heated" controversy in the Senate over Judge Robert Bork's appointment to the Supreme Court but said Bork is well qualified, will be his "own best witness," and "in the final analysis he will be confirmed."

"How about Bush?" someone asked.

"For Supreme Court?" Dole popped back. Then he added that Vice President George Bush and his other opponents for the Republican nomination for president are "all good friends of mine and good candidates."

...When Dole came out of the news conference, several women were holding up small signs saying, "Stop Bork."

Thu 3-Sep-87 13:07

Subject: BORK

Mail Id: Rodota

Congress resumes busy session Wednesday

UPI Spot News Weekender (800) By BUD NEWMAN

WASHINGTON (UPI) — Congress returns from its summer recess this week to face a fall full of controversies including continued Contra aid, battles over budget busting, raising taxes and confirmation of Supreme Court nominee Robert Bork. . .

And, in what could be one of the biggest ideological battles of Reagan's presidency, the Senate Judiciary Committee is scheduled to begin confirmation hearings Sept. 15 on Reagan's nomination of Robert Bork, a conservative judge on the U.S. Circuit Court of Appeals for the District of Columbia, to the Supreme Court.

The panel, headed by Sen. Joseph Biden, D-Del., a Bork opponent and presidential candidate whose political fortunes could flourish or flounder on how he handles the Bork nomination, hopes to end testimony and vote by Oct. 1.

Signs points to a close vote, both in committee and in the full Senate where opponents are waging an all-out campaign to defeat Bork, fearing that his confirmation will give the high court a conservative tilt for years to come. . . .

Thu 3-Sep-87 19:45 EDT

Subject: BORK

Mail Id: Rodota

ill., del., mass. Levin raps Persian Gulf policy

By JAMES ROSEN

LANSING, Mich. (UPI) — U.S. Sen. Carl Levin on Thursday condemned American involvement in the Persian gulf, saying the United States risks getting drawn into the Iran-Iraq War. . .

Addressing other issues, the Detroit Democrat said he is withholding judgment on both President Reagan's nomination of Robert Bork to the U.S. Supreme Court and his own party's nomination of a presidential candidate next year. . .

Levin said he has not taken a position on Bork's nomination to the high court.

"I think Robert Bork deserves and will get a thorough hearing," Levin said. "I want to withhold judgment until after those hearings are completed."

Levin added, however, that he is "particularly troubled by allegations that (Bork) is so rigid in his doctrine, he would not be able" to make impartial decisions in cases before the court.

Levin said Bork's political ideology should be a factor in his nomination only if it prevents him from being a fair judge.

"I expect a judge to be able to lay aside ideology," Levin said.

The second-term senator said he has taken a personal oath of strict neutrality in the Democratic presidential candidates' contest.

"I'm not going to state a preference because I'm so close to so many of them," Levin said.

He cited candidates Sen. Joseph R. Biden, D-Del., Massachusetts Gov. Michael S. Dukakis, and Sen. Paul Simon, D-Ill., as especially close associates.

upi 09-03-87 06:42 pcd

Thu 3-Sep-87 13:59 EDT

Subject: BORK

Mail Id: Rodota

(Conrad on Bork nomination)

GRAND FORKS, N.D. (UPI) — North Dakotans appear equally divided on whether U.S. Appeals Court Judge Robert H. Bork should be on the Supreme Court bench, Sen. Kent Conrad, D-N.D., said Thursday.

Conrad said that was the view expressed by those attending town meetings he has conducted across the state in the last three days. He also said the response was similar to one in a survey of North Dakota lawyers.

Conrad, who was elected in November, declined to say whether he supports or opposes President Reagan's nomination of Bork to the nation's high court.

"I have not yet made a determination on how I will vote. I await further hearings. I await further input," Conrad said.

Bork's confirmation hearings in the Senate are scheduled to begin Sept. 15.

It is the responsibility of the Senate to question what effect Bork's elevation to the Supreme Court will have on future generations, Conrad said.

Some who favor Bork have said the Senate should concern itself only with his qualifications, he said.

However, Conrad said he will not attempt to use his own views as a measure of judging Bork's qualifications.

Conrad also said the perceived notion that he opposes Bork's nomination is a result of the press mistakenly lumping him together with Sen. Quentin Burdick, D-N.D., who opposes the nomination.

\_\_\_\_\_ upi 09-03-87 12:50 pcd

Thu 3-Sep-87 14:54 EDT  
Subject: BORK  
Mail Id: Rodota

Bork supporters attack Demo foes

PORTLAND, Ore. (UPI) — More than 200 Oregon government, business and professional leaders took a public stand Thursday in support of embattled Supreme Court nominee Judge Robert Bork.

Bill Moshofsky, co-chair of the Oregon "We the People" Committee, lashed out at Democratic presidential candidates for holding Bork's nomination as a "political hostage."

The group contended Bork is still the qualified jurist unanimously confirmed by the Senate in 1982 to sit on the U.S. Court of Appeals for the District of Columbia.

"Now many in the Senate, who confirmed Robert Bork in the first place, are reversing themselves for political gain," said Moshofsky, a Portland attorney and former unsuccessful Republican congressional candidate.

The other co-chair of the Oregon group is Craig Berkman, head of Synektron Corp. in Tigard. Other prominent Oregonians on the national committee include former Gov. Vic Atiyeh, state Treasurer Tony Meeker and former House Minority Leader Larry Campbell.

"The question here is not an ideological one. It is not a choice of liberal versus conservative appointment," Moshofsky said. "It is a question of qualifications and background."

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--More--

upi 09-03-87 11:46 apd



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A BURELLE'S AFFILIATE

**TRANSCRIPT**

DATE September 1, 1987  
TIME 7:00-9:00 AM (EDT)  
NETWORK NBC  
PROGRAM Today

Jane Pauley, co-host:

Two weeks from today the Senate begins hearings on President Reagan's nomination of Robert Bork to the Supreme Court. Ever since the nomination was announced, groups for and against have staked out positions and geared up for a Senate battle ahead. On Monday still another group announced its stand on Bork, the ACLU. In coming out against Bork, the American Civil Liberties Union had to rewrite its own bylaws. ACLU Executive Director Ira Glasser joins us now.

And you use words like extremist and radical to describe Judge Bork when others would call him a conservative, and the White House would- would- would- ask us to think of him more as a moderate. How do you justify extremist, radical?

Ira Glasser (Executive Director, American Civil Liberties Union): Well, liberals and conservatives may differ on how a particular case should come out, but liberals and conservatives alike believe that the Supreme Court should play a strong role in protecting individual rights against government intrusion. Conservative justices like John Harlan and Felix Frankfurter, and the recently retired Lewis Powell certainly shared that view. They may not have agreed with the ACLU all the time on- on particular cases, but they certainly believed that the Supreme Court should play a strong role in protecting individual rights against the government.

Robert Bork does not believe that. Robert Bork believes that local governments ought to be allowed to impose their morality on individuals and that the Supreme Court should play as small a role as possible. We don't think he believes in the Supreme Court as an essential part of our system, and as a result he's not qualified to sit on it.

Pauley: Also joining us this morning in our Washington newsroom is Gary McDowell from the Center for Judicial Studies, a former chief speech writer for Attorney General Edwin Meese, and he's working in a coalition supporting the Bork nomination.

And good morning, Mr. McDowell. You have heard Mr. Glasser's assessment of Judge Bork. Would you call him a conservative, a moderate, a radical extremist? What- what words do you use?

Gary McDowell (Center for Judicial Studies): Well, he's

certainly not a radical extremist. Judge Bork is clearly in the middle of the mainstream of American judicial thought. The ACLU report, I think, will be seen by many as a shrill and intellectually dishonest effort to discredit him. In many ways they have taken very uncivil liberties with both Judge Bork's record and American constitutional history, and they're going to be very lucky if this does not backfire.

Pauley: What about it? You have seen more of his record, and if you include in his record speeches, writings, and law journals and so forth, things that others have not yet seen?

Glasser: Well, the supporters of Judge Bork are attempting to portray him, dishonestly I think, as within the mainstream of American judicial thought because they are relying on the recent years of his judicial opinions on the bench. But we have seen a lifetime of his writings, of his unpublished speeches, of his articles, and nobody can read those, and the Senate will have those available, and the public will soon have those available.

Pauley: Well, give me a specific.

Glasser: Well, for example, most Americans believe today that they have a right, most married couples, to birth control- to practice birth control, to buy contraceptives at their local drugstore. That right exist because of the Supreme Court decision twenty-five years ago that struck down a Connecticut law that made it a crime to practice birth control and to buy contraceptives.

Pauley: What about it, Mr. McDowell?

McDowell: Well, that's a little bit misleading. The fact is that the Griswold case was dissented to by Justices Hugo Black and Potter Stewart, no raging conservatives in the view of the ACLU I suspect. That fact is that what happened in the Griswold case is not simply a security of a right to privacy, but the creation of a right to privacy, one that does not exist in the text of the Constitution. That is Judge Bork's objection to it, and others have joined him. He's not outside the mainstream on questioning the foundation of the right to privacy.

Glasser: Well, I think that most Americans would find it astonishing and fearful that a man is about to ascend to the Supreme Court who would say that it's okay for a local town to ban contraceptives and make it a crime to buy them. If that's the kind of country we want to live in, then we want a judge like Judge Bork.

Pauley: Before I let you go, there is some feeling that because he is a man of some considerable personal magnetism and charm that the North affect will apply, and that he will sweep the hearings and win the day just like Oliver North surprised everybody during the Contra hearings.

Glasser: Well, charm is a funny thing. He may be charming. There's a lot of people in this country who are charming, but I don't think that people in this country or the United States Senate are about to suggest that charm is the main qualification to sitting on the Supreme Court. I would not consider that a big problem.

Pauley: We'll leave it at that. Mr. McDowell, thank you for joining us in Washington, and Ira Glasser here in New York.

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A SUPREME'S Affiliate

**TRANSCRIPT**

**DATE** August 28, 1987  
**TIME** 10:00-11:00 PM (EDT)  
**NETWORK** CNN-TV  
**PROGRAM** Evening News

Dave Walker, co-anchor:

President Reagan called on the nation's law enforcement officers today to support Supreme Court nominee Robert Bork. In a meeting with top law enforcement officials in Los Angeles, Mr. Reagan described Bork as a law and order judge, and he called his nomination a crucial opportunity in the war on crime. We get more from CNN's Frances Hardin in Los Angeles.

Frances Hardin reporting:

It was an orchestrated display of support for Judge Robert Bork by the president. Mr. Reagan met with Governor Jim Thompson of Illinois and representatives of several law enforcement organizations. The president says that nearly one-third of the cases that come before the Supreme Court are criminal cases. That's one reason he wants Bork on the bench.

Ronald Reagan (United States President): Judge Bork believes that judges should not make the laws. Their function is to interpret the laws based on the Constitution and precedent. It's time we reassert the fundamental principle that the purpose of criminal justice is to find the truth, not to coddle criminals.

Hardin: The president was asked why there were no women among the Bork supporters.

Reagan: I'm not sure they're aren't. Have you asked Nancy?

Hardin: While the president stresses Bork's criminal decisions, many opponents are worried about his civil law record, and what they perceive as a bias toward big business and government.

Fred Woosler (Center for Law in the Public Interest): Judge Bork repeatedly places the economic concerns of a business and- above the health and safety interests of the average citizen, even when Congress has directed the balance to be shifted in the other direction. And in order to achieve his desired result, the reading of his opinions reveals that he feels that he's free to alter the law and ignore established legal and judicial principles when it suits his purposes.

Hardin: The White House Chief of Staff says thirty senators can be counted on to support Judge Bork, while as many as half of the one hundred senators are still undecided.

Howard Baker (White House Chief of Staff): At this point that- that's a favorable arrangement, and I also think Judge Bork will be such a stunningly good witness in his own behalf that he will do very well with the undecided senators.

Hardin: President Reagan is said to be optimistic about Judge Bork's confirmation. Nevertheless, as part of its campaign, the White House given thick briefing books in support of Judge Bork to every senator. The confirmation hearings begin September Fifteenth. Frances Hardin, CNN with the president, in Los Angeles.

Miami Herald  
9/3/97

## Not so, Mr. Justice

**I**MAGINE the ensuing cries of outrage if U.S. Supreme Court nominee Robert Bork were to say the following: "If it's a dope case, I won't even read the petition. I ain't giving no break to no drug dealer. I won't handle incest cases, either. Disgusting."

One's imagination need not be vivid to anticipate an uproar — and not just from grammarians, either. Presidential candidate Joe Biden undoubtedly would stage an emergency meeting of his Senate Judiciary Committee as soon as full television coverage could be arranged.

And surely the American Civil Liberties Union, which opposes Mr. Bork's nomination, would be quick to condemn such an attitude. It suggests, after all, a predisposition to believe that the government is always right in prosecutions involving drugs and incest. Mr. Bork himself has been pilloried for giving "excessive" deference to the government as opposed to the individual.

In this instance, though, Mr. Bork can't be faulted. The remarks were made by Associate Justice Thurgood Marshall,

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### THURGOOD MARSHALL

---

long a pillar of the Court's liberal bloc. His comments were part of an article about the High Court in *Life* magazine's special issue on the Constitution.

In fairness to Justice Marshall, it must be noted that the article, "Justice Revealed," is heavy on personal anecdotes intended to let readers appreciate the human side of the Court's members. It also refers to Justice Marshall's "mask of cantankerousness," which his words exemplify. And, indeed, his record on most civil-liberties issues has been solid.

Even so, Justice Marshall's statement was unfortunate. If it does accurately reflect his position on hearing petitions, then he ought to rethink his position.

It's not that drug traffickers and sex offenders deserve anyone's sympathy; it's just that the principle of due process must be upheld — especially by Supreme Court Justices, and most especially in cases involving despicable crimes.

**ABROAD AT HOME**

Anthony Lewis

128P/278

**Bork  
And the  
Press**

BOSTON

**A**s law professor and judge, Robert H. Bork has criticized judges who in his view read the guarantees of the Constitution too expansively. On that ground he has denounced constitutional decisions going back 60 years.

But in at least one area Judge Bork has himself taken a broad view. That is protection of the press from chilling libel suits. He wrote, in 1984, what advocates of press freedom consider one of the great libel opinions of recent years.

The case was brought by Bertell Ollman, a political scientist specializing in Marxist theory, who had been attacked in a column by Rowland Evans and Robert Novak. The U.S. Court of Appeals in Washington divided over whether one pejorative statement in the column was an expression of opinion, which cannot give rise to a libel action, or a factual charge.

Judge Bork did not rely on the fact-opinion distinction. He joined the majority in rejecting Professor Ollman's suit, but he went on broader grounds.

"Those who step into areas of public dispute," he wrote, "who choose the pleasures and distractions of controversy, must be willing to bear

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**Public  
dispute must  
not be made  
'safe and  
comfortable.'**

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criticism, disparagement and even wounding assessments.

"Perhaps it would be better if disputation were conducted in measured phrases and calibrated assessments, and with strict avoidance of the ad hominem; better, that is, if the opinion and editorial pages of the public press were modeled on The Federalist Papers.

"But that is not the world in which we live, ever have lived, or are ever likely to know, and the law of the First Amendment must not try to make public dispute safe and comfortable for all the participants. That would only stifle the debate."

Noting the growing number of libel suits and the inflation of damage claims, Judge Bork said the courts must act to prevent an intimidating effect on free discussion. His solution was to give nearly absolute protection to speech and writing in "the public, political arena." Judges, he said, must see that cases involving that kind of expression did not go to juries.

The roots of that opinion can be traced as far back as 1971 in Judge Bork's writings. In a speech at the University of Michigan in 1979 he said our democracy would be "meaningless unless citizens are free to discuss and write about political men and issues."

The Michigan speech also included some tart Bork comments on the press. "Not a week goes by," he said, "without thunderings from the journalistic corps that their freedoms are under assault. . . . When the press advances and loses some novel [legal] claim, it responds with an outcry that would lead the uninitiated to suppose it was being systematically stripped of centuries-old rights."

Those comments seem fair enough to me. The American press is the freest on earth, but it does talk sometimes as if it saw doom at hand. I also agree with Judge Bork, most journalists would not, that the press isolates and endangers itself when it seeks special privileges such as immunity from subpoenas.

There are aspects of Judge Bork's views on freedom of the press that are troubling. For example, he has questioned Supreme Court decisions holding, first, that a newspaper could not be compelled to run a candidate's reply to criticism and, second, that a broadcaster who found a rape victim's name in public court records could not be punished for publishing it. Those decisions were unanimous.

Judge Bork has also indicated doubts about the Pentagon Papers case: the 1971 Supreme Court decision refusing to prohibit the publication of excerpts from a secret official history of the Vietnam War. It was the great modern test of the long-established and fundamental principle that the First Amendment disfavors prior restraints on publication.

Libel cases make headlines these days, and libel law is so interesting that much is written about it. But a far greater threat to freedom of the press — and to democracy — lies in the Federal Government's insistent push to restrain and censor in the name of national security. Many cases reflecting that tendency are in the pipeline now.

Outside the press area Judge Bork has consistently supported claims of Presidential power. The question is whether, when a President asserts the power to silence public debate, Judge Bork would see as he does in libel cases that the functioning of our democracy is at stake. □

San Francisco Chronicle  
8/27/87

## Paul Greenberg

### Justice for Bork

**R**OBERT HERON Bork, nominee to the Supreme Court of the United States, deserves to be judged by his own record and views, and not on the basis of accolades from his fans on the right or separate-but-equal hysterics from the left. Examples of both abound:

Terry Eastland of the Justice Department claims Bork has attracted admiration because of "how he decides and not what he decides. The issue is whether the judge follows the terms of the law, no matter what the outcome might be."

That may come as news to groups looking to Bork's critical vote in order to outlaw abortion or re-introduce Official Prayer Time in the schools. They might be willing to trade a boxcar of fine philo-

sophical reveries for a passel of 5-4 victories on the issues dearest to their hearts, and guts.

On the other, left hand, there is Ted Kennedy. He warns that "Robert Bork's America is a land in which women would be forced into back alley abortions, blacks would sit at segregated lunch counters, rogue police would break down citizens' doors ... school children could not be taught evolution, writers and artists could be censored at the whim of government."

Sounds like Kennedy has hired a new speech writer: Chicken Little.

If there is a basis for confusing Bork with the bogeyman, it is not his mixed bag of actual decisions but his snappy quotes of more philosophical bent.

The literature Bork produces can be dubious, as in his celebrated observation: "The judge who looks outside the Constitution always looks merely inside himself." An epigrammatic observation, but not

very substantial. It requires only a moment's thought to note that even those who ride Bork's pet hobbyhorse — the doctrine of original intent — must look outside that document to determine intent.

A justice who looks beyond the Constitution is scarcely limited to looking "merely" inside himself. If he has some education, and he should, he will have absorbed a wide variety of teachings. It is the judge who has no such resources, or who refuses to use them, who is dangerous — not the one who looks for guidance beyond the letter of the law to the spirit that informs it.

To view the Constitution and its rights as capable of flexibility and growth (which probably was the original intent of at least some of its framers, and surely of many of its ratifiers) is a heretical notion to Bork — to judge by his more philosophical asides. He has warned that such flexibility could lead to a "gentrification of the Constitution" and reduce it to a reflection of upper

middle-class values. (The notion that class determines ideas is clearly not limited to Marxists.)

The source of this warning is ironic, since who today would be better than Bork at expressing the jurisprudence of Yuppiedom — with its individualism, its *laissez-faire* economics, and its view of social responsibility as a real drag? If one went only by his polemics, Bork's nomination would be a good example of the gentrification of the Supreme Court. Yet many of Bork's actual decisions demonstrate an ability to rise above, or at least sidestep, his principles. Examples:

In a series of lectures in 1971, Bork adopted the eccentric view that the right to free speech under the First Amendment applied only to political speech. But of late he has recognized that "many other forms of discourse, such as moral and scientific debate, are central to democratic government and deserve protection."

In 1984, he ruled against a plain-

tiff in a libel case because an "up-surge in libel actions accompanied by a startling inflation of damage awards" was threatening Americans with "self-censorship." Despite his philosophical strictures against the practice, Bork seems quite capable of looking beyond the words of the Constitution to weigh their effect in the contemporary world.

Philosophically, the judge doesn't recognize the right of privacy implied in the Constitution. Yet in a recent case he commented that the right to privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."

Would he still agree with that assertion as a justice of the Supreme Court? That must remain a matter of conjecture. But it is clear that his own jurisprudence has grown and expanded over the years, despite his formal contention that constitutional rights were set once and for all when their language was written and sealed.

Freelance Syndicate



# Biden report calls Bork an activist

By Gene Grabowski  
THE WASHINGTON TIMES

The White House is distorting the record of Supreme Court nominee Judge Robert H. Bork to make him appear as "a genuine apostle of judicial moderation" instead of a conservative activist, according to a report released yesterday by Senate Judiciary Committee Chairman Joseph Biden.

The analysis, which was criticized as unfair by Judge Bork's supporters, was written in response to a White House position paper issued Aug. 3 that praised the judge's five-year record on the U.S. Court of Appeals.

That position paper, which referred to Judge Bork as an advocate of judicial restraint, was issued in response to a firestorm of early attacks on the nomination from lib-

eral groups. Mr. Biden, a Delaware Democrat and candidate for his party's 1988 presidential nomination, has announced his opposition to the controversial nomination. He said the new report is an attempt to "depict Judge Bork's record more fully and accurately."

The 72-page report was requested by Mr. Biden and written by committee consultants Jeffrey Peck, a member of the District of Columbia bar, and Christopher Schroeder, a Duke University law professor.

Committee spokesmen said the report was reviewed and approved by Floyd Abrams, a prominent New York attorney; Clark Clifford, a Washington lawyer and former Cab-

inet member in Democratic administrations; Walter Dellinger, a law professor at Duke, and Laurence H. Tribe, a professor of constitutional law at Harvard Law School.

In their analysis, the researchers charge that Judge Bork in his writings and court decisions attacks "virtually all" of the nation's basic antitrust laws, favors more narrow interpretations of the First Amendment and opposes "virtually every civil rights advance on which he has taken a position."

The report also said Judge Bork probably would refuse to abide by Supreme Court precedents, notably the 1973 *Roe vs. Wade* decision granting a woman's right to abortion.

"The attempt by the White House

to depict Judge Bork as a mainstream moderate simply does not comport with his record," the consultants said in a statement accompanying the analysis. "The record of Judge Bork's public pronouncements and actions over the past quarter-century paint a picture of Judge Bork as an extremely conservative activist rather than a genuine apostle of judicial moderation and restraint."

The White House had no immediate comment to the committee's report, but some of those supporting Judge Bork's Senate confirmation disagreed strongly with its content.

"This is a little like the pot calling the kettle black," said Patrick McGuigan of the conservative Coalitions for America. "After all, the initial excesses about Judge Bork's record came from the left when they vilified him as soon as his nomination was announced. The White

House responded with its own version, and it presented the facts."

A spokesman for South Carolina Sen. Strom Thurmond, ranking Republican on the judiciary panel, said he would have no comment until he had read the entire document.

"Senator Thurmond has said all along that Judge Bork is the best person to answer these questions about his record and that will happen soon enough," a spokeswoman said, referring to the fact that the committee is scheduled to begin Judge Bork's confirmation hearing Sept. 15.

Asked at a press conference to characterize Mr. Bork's views on antitrust issues, Charles F. Rule, assistant attorney general in charge of the Justice Department's antitrust division, noted, "If you look at the record, he is mainstream antitrust now."

A key element of the new analysis is a challenge to the White House assertion that Judge Bork's opinions on 10 relevant cases agreed with those of former Justice Lewis Powell, whom many considered a judicial moderate and whose retirement created the current Supreme Court vacancy.

The White House position paper, the report said, "thus continues its transparent effort to depict Judge Bork as the ideological equivalent to the retired Lewis Powell. Such depiction has no basis in fact."

Mr. Rule said, however, "I cannot find a vote that Justice Powell cast that would be cast any differently by a Justice Bork."

The White House report in August concluded that Judge Bork "has consistently demonstrated throughout his legal and judicial career that he is committed to the idea of judges confining themselves to interpreting the law rather than advocating their own ideas of wise public policy."

Committee staffers said it was a coincidence that the analysis was released the day after the American Civil Liberties Union also criticized the White House for supposedly distorting Judge Bork's record by issuing selected articles and judicial opinions.

In recent weeks, some conservatives also have scored the White House for failing to represent Judge Bork as a conservative activist.

• Karen Riley contributed to this report.

Paul Harvey

## Bork damned in absence of full hearing

The Record Herald  
9/1/87

Now you'd think that when a presidential appointment comes before the Congress for confirmation, interrogation before the appropriate congressional committee would develop the qualifications of the appointee — so that members of Congress might make a reasoned judgment.

But the nomination of Bob Bork has not even been considered by the Senate Judiciary Committee and already that committee's chairman has made up his mind.

Sen. Joe Biden will vote no — and he is holding meetings with fellow Democrats to try to convince them to vote no.

And on his Judiciary Committee, Democrats outnumber Republicans eight to six.

Can these partisans keep Judge Bork off the Supreme Court merely because his preponderantly conservative philosophy does not agree with their preponderantly liberal philosophy? They can.

The Senate has rejected 11 Supreme Court nominees and blocked action on some 15 others during the past 200 years. And Democrats presently control the Senate 54 to 46.

The nomination need never get to the Senate floor.

Biden and his committee can conceivably stall confirmation into next year, when they would gamble that a Democrat in the White House would nominate a jurist more to their liking.

Republican administrations historically have been able to count on help from "Southern Democrats" but most "Southern Democrats" over the years have been displaced by Southern Republicans, some by liberal Democrats.

It is entirely logical and understandable that liberals in the Senate are trying to stall and, if they can, sidetrack the Bork appointment.

President Reagan has already turned our country back toward economic fundamentalism. If he can now leave us with a strict constructionist judiciary, he will have left an indelible stamp on our nation's history.

Liberal politicians are going to fight that. And it's going to be a far fiercer fight than greeted any of the President's earlier appointments — because this one "tips the balance."

And on such basic issues as affirmative action, racial quotas, abortion, religion, sex and homosex, capital punishment, libel and even one-man-one-vote.

In essence, Judge Bork believes the Constitution is to be "interpreted" by the High Court, not "rewritten," as has been recent practice.

President Reagan has brought marketplace economics back into balance. With the pivotal Bork appointment he hopes to do the same thing for jurisprudence.

Detroit News  
9/4/87

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## Special Column

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# Political Power & the Selection of Justices

By James Q. Wilson

On April 17, 1905, the United States Supreme Court declared that a New York law prohibiting the employees of bakeries from working more than 10 hours a day or 60 hours a week was unconstitutional.

For the majority, Justice Rufus Peckham argued that the New York law violated the "right of contract" that was protected by the 14th Amendment of the Constitution.

The court acknowledged that the states, in the exercise of their "police power," could regulate certain conditions of labor. But baking, it said, was not a hazardous occupation, and bakers were not stupid or passive workers. They should therefore be left "free" to make contracts "upon such terms as they think best."

**LAWS SUCH** as the one in New York were "meddlesome interferences with the rights of the individual," specifically the "liberty of contract."

The case, *Lochner vs. New York*, quickly became famous as much for the dissent of Justice Oliver Wendell Holmes as for any practical effect the decision might have had. (It was substantially overruled three years later.)

Holmes said, rightly, that the court had long deferred to the judgment of state legislatures in regulating the conditions of life. He mentioned laws forbidding usury, prohibiting lotteries, compelling schooling and vaccinations, and limiting miners to eight-hour workdays. "The 14th Amendment does not enact Mr. Herbert Spencer's 'Social Statics.'"

The other dissent, by Justice John Marshall Harlan, put the matter less pithily but more carefully: "A legislative enactment, federal or state, is never to be disregarded or held invalid unless it is, beyond question, plainly and palpably in excess of legislative powers."

**THE NEW** York statute was not a "plain, palpable invasion of rights secured by the fundamental law" because, among other things, the 14th Amendment contains *no* "right of contract."

In 1905, conservatives, such as Peckham, were the judicial activists, and liberals were the defenders of strict construction. The liberal — that is, nonactivist — interpretation earned the praise of most commentators, almost all historians and ultimately the support of the court's majority.

Suppose you were a U.S. senator who had just read the *Lochner* case. How should you, in 1905, evaluate presidential nominees for the court?

One way would be to decide how you felt about the results of the case. Say you were opposed to state laws regulating business. You would then support justices who favored laissez-faire economics.

**BUT WHAT** arguments would you make to other senators whose votes you wish to have in the confirmation battle? "Vote for laissez-faire economics?"

A vote on results is a test of strength, not of principle. The Senate of 1905 had a Republican majority. If it followed your view that only results matter, it would back another justice like Peckham.

But in time the Democrats would win control of the

Senate (as in fact they did, in 1912). What arguments would you then use to dissuade uncommitted Democrats from voting for justices who would always back factory laws? If you had no argument save results, you would have to forgive the Democrats for saying, "We won; it's our turn."

Suppose instead that you were a liberal who believed in factory laws and renounced Herbert Spencer. You could not expect even a Democratic Senate to have a majority of liberals in it. To what principle would you appeal to rally those senators who disagreed with you on factory laws and who rather liked Spencer?

**IN A** mere test of strength, with "results" the only question, it is doubtful that the Democratic-controlled Senate would have confirmed Louis Brandeis in 1916.

It was an appeal to neutral principles that carried the day for some key senators. Harlan and Holmes provided such a principle to the Senate: The states are free to exercise their police powers except when that exercise violates some plain and palpable provision of the Constitution.

Whether judges like or dislike laissez-faire economics is irrelevant. Within broad limits, economic policy is to be decided by elected legislators. In states with liberal majorities, factory laws will be enacted; in those with conservative majorities, such bills will fail.

The Supreme Court is not a legislature. It is an undemocratic, even anti-democratic, branch of government. It cannot justify its claim to extraordinary constitutional powers by appealing to popular consent. It can only justify them by arguing that it explicates and enforces a nonpartisan and often unpopular principle, namely, comparing laws to the Constitution to see if the former square with the latter.

**DECADES AGO** Professor Herbert Wechsler of Columbia University explained the importance for judicial interpretation of neutral principles. They are not always easily discovered, and they are rarely free of controversy.

But by and large those principles have aided "liberal" causes far more than "conservative" ones — witness the growing protection afforded to unpopular minorities by the steady application of the several rather clear principles enunciated in the First Amendment.

If having an ideology that leads to the "right results" had always been the chief test of judicial fitness, the neutral principles on which so much of our liberal state now depends would have been suffocated by conservative majorities.

The Senate would do well to keep this in mind as it debates the nomination of Robert Bork. Currently, activists tend to be liberals and strict constructionists to be conservatives.

**FOR LIBERALS** to make their case against Judge Bork on the grounds that he wishes to condemn women to back-alley abortions or blacks to servitude is as wrong and as shortsighted as for liberals in 1905 to have made their case against Peckham on the grounds that he hated bakers.

In both cases, neutral principles are visible namely, deference to the legislature except when plain and palpable constitutional rights are violated. The senators should explore Bork's understanding of those principles in their questioning of him.

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■ James Q. Wilson is Collins professor of management and political science at UCLA.

THE ATLANTA  
CONSTITUTION  
9-3-87

# Lower federal judges etching Reagan imprint

By David M. O'Brien

*David M. O'Brien, a government professor at the University of Virginia, recently received the American Bar Association's 1987 Silver Gavel Award for his book, "Storm Center: The Supreme Court in American Politics." This article first appeared in the Los Angeles Times*

CHARLOTTESVILLE, VA. — The left and the right are gearing up for September's Supreme Court confirmation battle over Judge Robert Bork. The outcome turns on whether enough senators are persuaded that Bork is in the legal mainstream.

What is being ignored, though, is how profoundly the Reagan administration has already shifted legal thought and the direction of the federal judiciary. In six-and-half years, Reagan has named more lower federal court judges — 317 in all — than Franklin D. Roosevelt did in 12 years — 203 judges. Over 42 percent of those now on the bench were appointed by Reagan and before leaving the Oval Office he may have selected over half of all federal judges.

Democrats have not occupied the White House in 30 years, except for the ill-fated presidency of Jimmy Carter. As a result, no Democrat has appointed a member of the Supreme Court since 1967.

More than any president since Roosevelt, Reagan favors the party-faithful. While all presidents reward those in their own party, Reagan has surpassed others by giving 97 percent of his judgeships to Republicans. And there is more to it than that.

Judges are regarded by the Reagan administration as both symbols and instruments of presidential power — the most lasting legacy of "the Reagan revolution."

From the outset of the Reagan era, power over judgeships was concentrated, with the aim of reversing the trend toward moderate-to-liberal judges. First, Carter's "merit" commissions for nominating judges were eliminated. Then the policy of consulting with the National Bar Association — representing black lawyers — and women's organizations was discontinued. Within the Department of Justice, the judicial-selection process became more rigorous and subject to greater White House supervision. A special committee — including the attorney general, his deputy and several assistants, as well as the counselor to the president and other White House advisers — was created to decide who Reagan should nominate.

The key to Reagan's success lies in an unprecedented screening process. Computer data banks contain records — speeches, articles, court opinions and the like — on hundreds of potential nominees. Then the one or two leading candidates for each vacancy undergo several daylong interviews with Department of Justice officials. During these interviews candidates say they have been asked their views on such controversial rulings as abortion, affirmation action and criminal justice.

This ideological screening draws fire from moderate Republican senators and officials in past Republican administrations, as well as liberals. Herbert Brownell Jr., Dwight Eisenhower's attorney general,

called it "shocking" in a recent interview. Griffin Bell and Edward Levi, former attorneys general for Carter and Gerald Ford, agree that the process has become "badly politicized."

Still, the administration was almost guaranteed success, at least until the Democrats regained the Senate last fall. As chairman of the Senate Judiciary Committee from 1981 to 1986, Sen. Strom Thurmond (R-S.C.) gave rubber-stamp approval.

Since Sen. Joseph R. Biden Jr. (D-Del.) took over the Judiciary Committee, the administration has been slow to fill vacancies and named few controversial conservatives. Another measure of the change is that half the appellate judges put up by Attorney General Edwin Meese and rushed through by Thurmond were given the American Bar Association's lowest ranking of "qualified." And a third were so rated by a split vote, with a minority of the association's committee finding them "not qualified." By contrast, so far this year only one was rated qualified by a split vote; the rest were unanimously found qualified or well-qualified.

The inescapable conclusion remains, as conservative University of Chicago Law School Professor Philip Kurland says: "Judges are being appointed in the expectation that they will rewrite laws and the Constitution to the administration's liking. Reagan's judges are activists in support of conservative dogma — what some people would call hanging judges in criminal law and anti-regulation judges in civil law."

Reagan judges share not just a predictable conservative judicial philosophy. They are disproportionately wealthy, white Protestant males. With over 300 appointments, Reagan has named only 27 women, 12 Latinos, 5 blacks and two Asians. Over 92 percent had incomes exceeding \$100,000 a year, and almost a quarter were millionaires.

In what ways will these judges carry the Reagan revolution? At the very least, they will advance into the next century the movement, building for almost 30 years, toward a far more conservative federal judiciary. This means they will be less receptive to claims for civil rights, the rights of the accused and rooting out vestiges of non-racial discrimination. At the same time, they will be more responsive to property rights, corporations and anti-regulation forces.

Some of the most controversial conservatives named since Meese became attorney general have not had the opportunity to decide many cases. And lower court judges must follow precedents and the Supreme Court's lead. They do not strike out on their own, overturning established law and risking reversal of their decisions on appeal. That is why New Right conservatives have been disappointed when Reagan judges did not immediately strike down abortion laws or take a stronger stand on pornography and other matters the administration failed to get Congress and the Supreme Court to adopt.

Statistics, moreover, cannot tell the whole story. In the short run, Reagan judges are making their mark in cases involving new claims and where the law is relatively undeveloped. District Judge Thomas Hull in Tennessee, for instance, recently ruled that children may opt out of public school classes that require readings their fundamentalist parents find objectionable for promoting "secular humanism."

In the 7th Circuit Court of Appeals in Chicago, judges like Richard Posner and Frank Easterbrook are attracting attention for bringing their free-market economic theories to bear in anti-trust and anti-regulation cases. And in new areas of law, such as sexual harassment, Reagan judges are having an effect. Last year a three-judge panel on the 6th Circuit Court of Appeals was bitterly divided over a woman's sexual harassment claim against her superior, who "routinely referred to women as whores," and regularly commented, "All that bitch needs is a good lay." Both Reagan judges dismissed her charges, over a strong dissenting opinion by one of the few black judges on the bench, appointed by Lyndon Johnson.

Where will it end? How far will the Reagan judges go? Much depends on Bork's confirmation and how the composition of the Supreme Court changes in the future. But the lower federal courts are changing. And whether this is a quiet revolution in-the-making or a continued evolution in the conservative direction, Reagan has made his most lasting imprint on the country. □

## Letters

### Justice Department pursues discrimination on all fronts

The Editors: I am compelled to address one point in William Raspberry's otherwise thoughtful piece, "Why is the administration so set against quotas?" The column concerns a suit filed by this department against a 300-unit apartment complex in Chicago.

Both the suit and the column address troubling issues raised when a landlord imposes racial quotas to maintain project integration by guarding against a theoretical "tipping" point that may cause whites to leave. Mr. Raspberry closes a fairly balanced column with the clear implication that the Department of Justice limits its housing enforcement to this kind of case, while bringing only a "handful" of suits yearly against other forms of housing discrimination.

The criticism implied is that the department pursues only cases which makes its political point while ignoring cases against "major landlords." This is false, as Mr. Raspberry could easily have ascertained. Our record in this regard was as close as his nearest phone. A single call would have disclosed a comprehensive program against all types of housing discrimination.

Concerned about the decline in the number of "routine" housing discrimination cases, in 1983 I reassigned this responsibility from the U.S. attorney's offices to a reconstituted Housing and Civil Enforcement Section in Washington. Since that time the section has conducted over 500 investigations and filed 64 pattern and practice housing cases.

The targets of these suits have included apartment buildings, public housing authorities, apartment referral services, mobile home sales and rentals, real estate companies, agents and brokers, time-share developments for both sales and financing, and creditors engaged in unlawful lending practices.

Nor have our efforts been limited to civil suits. Since January 1981 we have initiated 38 criminal prosecutions alleging housing-related violations.

The public should have the complete, and unvarnished record of the department's effort to combat housing discrimination, wherever, and in whatever form it takes.

WM. BRADFORD REYNOLDS  
Assistant Attorney General  
Civil Rights Division  
U.S. Department of Justice  
Washington, D.C.