NEW YORK DAILY NEWS
9/16/87

Tells Sen. panel he'd be less rigid

By JOSEPH VOLZ and FRANK JACKMAN
News Washington Bureau

WASHINGTON—Under assault from liberals on the Democratic-controlled Senate Judiciary Committee, Federal Appeals Judge Robert Bork yesterday stuck by his philosophical guns, but conceded he would be less rigid as a Supreme Court justice than he had been as a law professor.

"In a classroom, nobody gets hurt," Bork said. "In a courtroom, somebody always gets hurt."

The 60-year-old Bork, praised by former President Gerald Ford as perhaps "the most qualified nominee to the Supreme Court in more than half a century," told the committee in his opening statement that "my philosophy of judging is neither liberal nor conservative."

Instead, he said, it is a philosophy "which gives the Constitution a full and fair interpretation, but where the Constitution is silent leaves the policy struggles to Congress, the President, the legislatures and the executives of the 50 states and to the American people."

Under sharp questioning from Committee Chairman Joseph Biden (D-Del.) and Sen. Edward Kennedy (D-Mass.), both of whom have expressed opposition to his nomination, Bork defended statements he had made criticizing some key top-court rulings.

Admits civil-rights error

But he acknowledged to Kennedy at one point that he was wrong in 1963 when he criticized the public accommodations section of the Civil Rights Act of 1964, and he said that the 1954 Supreme Court decision outlawing racial segregation in the nation's schools "represents perhaps the greatest moral achievement of our constitutional law."

Questioned by Sen. Orrin Hatch (R-Utah) about how he would act should the Supreme Court's controversial 1973 decision legalizing abortion come before the top court again, Bork avoided giving a direct answer; instead, he outlined a number of possible forms his ultimate decision might take.

Kennedy summed up the opposition to Bork when he charged that "in Robert Bork's America, there is no room at the inn for blacks, and no place in the Constitution for women. And in our America, there should be no seat on the Supreme Court for Robert Bork."

The first day's public questioning was exclusively concerned with Bork's legal philosophy and views, though Hatch claimed that the judge was "experiencing the kind of innuendo and intrigue that usually accompanies a campaign for the Senate."

One development that may fall into that category was a report in an Ohio newspaper that a confidential FBI background report on Bork raised the question of whether the judge had a drinking problem. According to the Cleveland Plain Dealer, which quoted unidentified committee sources, the report described two incidents on Dec. 21 and Dec. 23, 1983, when Bork was injured in falls at his Washington home. Neither committee members nor staffers would confirm the FBI report yesterday.

Earlier, in an unprecedented appearance by a former President, Ford told the committee that Bork, as solicitor general and No. 3 official in the Justice Department, acted "with integrity" when he carried out then-President Richard Nixon's order to fire Watergate special prosecutor Archibald Cox

The crisis was "not of his making," noted Ford, who said that Bork "acted with integrity to preserve the continuity of both the Justice Department and the special prosecutor's investigation. I think in retrospect that history has shown that his performance was in the national interest."

But Sen. Dennis DeConcini (D-Ariz.), one of the uncommitted committee members, said that Bork, now a judge on the U.S. Court of Appeals for the District of Columbia, still had some questions to answer about the firing.

PHILADELPHIA INQUIRER
9/11/87

Promises to respect precedent

By Aaron Epstein
Inquirer Washington Bureau

WASHINGTON — Judge Robert H. Bork, fighting for confirmation of his bitterly contested nomination to the U.S. Supreme Court, declared yesterday that he has criticized dozens of Supreme Court decisions because of what he sees as flawed reasoning, not because he is insensitive to individual and minority rights.

Bristling under a vigorous attack on his civil rights views by Sen. Edward M. Kennedy (D., Mass.) during the first day of nationally televised Senate Judicary Committee hearings, Bork exclaimed: "You will read my writings from beginning to end and you will never find a mark of racial or ethnic hostility."

Bork, asserting that his legal philosophy was "neither liberal nor conservative" and promising to "give great respect to precedent," was defending himself publicly for the first time against accusations that he is a right-wing zealot bent on diminishing the rights of individuals, minorities and women.

"It is one thing as a legal theorist to criticize the reasoning of a prior decision, even to criticize it severely, as I have done," he said. "It is another and more serious thing altogether for a judge to ignore or overturn a prior decision."

The 60-year-old federal appeals judge, accompanied by his wife Mary Ellen, his three children and a neighbor, the widow of retired Justice Potter Stewart, spent about four hours answering questions about a lifetime of legal opinions and writings in which he had criticized Supreme Court rulings on subjects ranging from privacy to poll taxes and racial equality. He will return for more questioning today.

The outcome of the hearings, held in a packed Senate room recently used for the Iran-contra hearings, could affect the direction of the Supreme Court for years to come. President Reagan nominated Bork to replace retired Justice Lewis F. Powell Jr., who was considered the pivotal vote on such significant issues as affirmative action, abortion and church-state relations.

Sen. Edward M. Kennedy (D., Mass.), leader of the anti-Bork forces in the Senate, charged early in the hearing that Bork "has consistently demonstrated his hostility to equal justice for all."

"The strongest case against this nomination is made by the words of Mr. Bork himself," Kennedy said in an opening statement. "In Robert Bork's America, there is no room at the inn for blacks, and no place in the constitution for women. And in our America, there should be no seat on the Supreme Court for Robert Bork."

Kennedy recalled Bork's opposition to passage of the Civil Rights Act of 1964. Bork had written at the time that a proposed law to ban racial discrimination in public places was an unwarranted coercion of property owners, based on "a principle of unsurpassed ugliness."

Yesterday, the nominee explained that he had subsequently changed his mind, that he had made "the intellectual mistake" of trying to apply free market economic principles to social situations.

Kennedy berated Bork for taking a decade to recant. "Weren't you worried about the coercion that was happening to millions of blacks in this country?" Kennedy asked.

Bork recalled that he also had written in the early 1960s that racial segegation, too, was "a principle of unsurpassed ugliness," and that he became convinced that the civil rights laws "do much more good than harm" and "have helped bring this nation together."

In his testimony, however, Bork criticized Supreme Court decisions that developed a constitutional right of privacy, established the principle of "one person, one vote" representation in legislative bodies and struck down a poll tax and racially discriminatory provisions in real estate transactions.

Several senators asked Bork to explain his criticism of a 1965 ruling in which the high court struck down a Connecticut law that barred access to contraceptives, even to married couples.

He described the Connecticut law as "an outrage." But Bork attacked the ruling striking it down, he said, because it was based on an undefined general right of privacy that he said was not found in the Constitution. "Privacy to do what?" he asked. "We don't know."

He said he was "not alone" in attacking the reasons behind the contraception decision. "A lot of people, including justices, criticized that decision," he said.

Because the right of privacy underlying that decision became the Supreme Court's rationale for declaring in 1973 that women have a constitutional right to an abortion, Bork said he was equally critical of

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the abortion ruling.

That ruling, in *Roe vs. Wade*, "contains almost no legal reasoning" rooted in the Constitution, Bork declared.

But he would not say whether he would vote to uphold or overrule it should such a case come before a court on which he sat. Bork said that he opposed efforts in Congress to overturn the abortion decision or to strip the Supreme Court of jurisdiction over the subject.

Bork described the Supreme Court's one-person, one-vote rule of equal legislative representation as rigid and artificial. It has the effect, he said, of carving out political districts based on numbers, without regard to the political consequences of "cutting up communities."

He also defended his criticism of a 1966 Supreme Court decision striking down a $1.50 Virginia poll tax, saying there was insufficient evidence of racial discrimination or that the law was being unequally applied in that case. "I have no desire to bring poll taxes back into existence," he said, however. "I don't like them myself."

Of his criticism of a 1948 Supreme Court decision invalidating racially discriminatory real estate contracts, Bork said he opposed such restrictions but continues to believe that the court's rationale was wrong.

The problem, he explained, was that the reasoning could be used by courts to convert virtually all private actions into unconstitutional conduct. Fortunately, he said, that has not happened.

Despite his low regard for the reasoning behind these and other landmark rulings, Bork assured the committee that he was not "itching to overrule" court precedents.

Bork, in his opening statement, sought to explain how he reasons as a judge.

"The judge's authority derives entirely from the fact that he is applying the law and not his personal values," Bork said. "The only legitimate way" for a judge to "go about finding the law," Bork said, "is by attempting to discern what those who made the law intended. . . ."

Before testifying, Bork listened for nearly three hours as some Democrats on the closely divided committee castigated him as a right-wing extremist and some Republicans praised him as a brilliant legal scholar well within the mainstream of American jurisprudence.

Across the street, about 350 demonstrators carried anti-Bork signs and listened to speakers call for Reagan to withdraw Bork's nomination and appoint someone else.

Sen. Howell Heflin (R., Ala.), who has been besieged by constituents who argue that Bork should be disqualified on grounds that he is an agnostic or does not believe in God, said that should not be an issue. It is unconstitutional to prescribe a "religious test" for a federal office holder, Heflin said.

And Sen. Dennis DeConcini (D., Ariz.) said during a recess that Bork's drinking habits are not important either. DeConcini said that an FBI report about two drinking incidents had persuaded him not to bring up the subject.

Heflin, DeConcini and Sen. Arlen Specter (R., Pa.) are considered the only undecided votes on the 14-member committee.

In an extraordinary appearance by a former president, Gerald Ford accompanied the nominee to the hearing and praised Bork's conduct during and after the October 1973 "Saturday night massacre," when Bork, then the U.S. solicitor general, obeyed President Nixon's order to fire Watergate special prosecutor Archibald Cox.

Ford said Bork "acted with integrity to preserve the continuity of both the Justice Department and the special prosecutor's investigation."

However, several Democratic committee members said they would raise issues of whether Bork broke the law and later failed to tell the complete truth about his role.

BALTIMORE SUN
9/16/87

Detractors call Bork a threat to nation

By Michael Kelly
Sun Washington Bureau

WASHINGTON — Two days before the 200th anniversary of the signing of the Constitution, the government by and for the people was chugging along nicely in what some (mostly Democratic) lawmakers said was a matter critical to the future of the union and others (mostly Republican) said was not, either: the case of Judge Robert H. Bork.

Inside the Senate Caucus Room, which only last month hosted another matter said to be critical to the future of the union in the Iran-contra hearings, Judge Bork battled with the Senate Judiciary Committee, which must recommend to the Senate whether the judge should be a Supreme Court justice. Then the Senate can fulfill its constitutional right to advise the president, whether the president wants the advice or not.

Outside, in the park next to the Russell Building housing the caucus room, several hundred people wearing "Block Bork" buttons listened to Molly Yard, president of the National Organization of Women, exercise her constitutional right to give Judge Bork hell in a stentorian voice that minced no words.

"I say to the Senate of the United States, this country is on the road to becoming the best that we can become and we will not tolerate one step backwards!" Ms. Yard boomed to enthusiastic applause. Then she led the crowd in a brief chant of "No to Bork!" before they split up into smaller groups to go lobby their home-state senators against Judge Bork.

In line in front of the building, Arnold and Mildred Ginsberg of New York, who are touring Washington this week, waited for their chance to go into the hearing room and listen. After they listen, they said, they planned to make up their minds for themselves on whether Judge Bork should be, as Sen. Edward M. Kennedy, D-Mass, put it yesterday, "one of the nine." Their decision is not likely to have a lot of real effect on Judge Bork's career, but it's their constitutional right regardless and they were taking it with due seriousness.

"I have, of course, read a good deal about Mr. Bork, but I am reserving opinion until I get a chance to get in there and listen for a while to the questions and his answers," said Mrs. Ginsberg. "I feel the same as my wife," said Mr. Ginsberg, who is 67 and retired from the toy business.

"I feel the selection of a Supreme Court justice should not be handled on a political nature. In this case, it's a little difficult because some people may not approve of all of Judge Bork's views, but it should still not be political."

There were no major surprises in the first day of hearings. Those who are on record as opposing Judge Bork continued their opposition; those for, continued for; those fence-sitting continued sitting.

Senator Kennedy, an outspoken opponent, said, "In Robert Bork's America there is no room at the inn for blacks and no place in the Constitution for women. And in our America, there should be no seat on the Supreme Court for Robert Bork."

Sen. Alan K. Simpson, R-Wyo., deplored the furor over Judge Bork as "the four H's: hype, hurrah, hysteria and hubris" and called the allied civil rights groups leading the fight "bug-eyed zealots" who were "salivating at the chops" to get the judge. Ralph Neas, executive director of the Leadership Conference on Civil Rights and the leader of anti-Bork forces, leaning against a marble column in the rear of the room, smiled at that.

Judge Bork came across well in his first day of public testimony. Heavily coached for his appearance by a consultant who has been involved in the administration's efforts to ensure Judge Bork's confirmation, Tom Korologos — who sat right behind him yesterday — the judge was articulate and comprehensive in his answers. When he listened, he was impassive and grave, appearing, with his old-fashioned below-the-chin-line beard and well-padded build, like a Falstaffian Captain Ahab.

The most careful man in the room was committee Chairman Sen. Joseph R. Biden, D-Del., who had to jibe pre-hearings statements that he would vote against the judge with a need to appear fair.

On the one hand, Senator Biden was politely tough in his questioning. On the other, he went to elaborate pains to assure the witness repeatedly that all was fair. At one point, as cameras clicked, he waved his gavel in the air and declared, "Judge Bork, I guarantee you this little mallet is going to assure you every single right for you to make your views known as long as it takes on any grounds you wish to make them."

BALTIMORE SUN
9/16/87

Bork gives Senate analysis of Roe-Wade

ASSOCIATED PRESS

Former President Gerald R. Ford (left) praises Judge Robert H. Bork.

By Lyle Denniston
Washington Bureau of The Sun

WASHINGTON — Supreme Court nominee Robert H. Bork, in a bold and unprecedented move, spelled out in detail yesterday just how he would decide whether the famous 1973 abortion decision should be overruled.

But in doing so, he did not imply that he ultimately would vote to keep the decision in Roe vs. Wade on the books.

Throughout almost four hours on the witness stand in the Senate's historic Caucus Room, the nominee seemed to soften somewhat his criticism of a host of major court rulings on constitutional rights but avoided making any promises that he would not try to undo them if he became a justice.

He explicitly mentioned only one decision he thought should be left as is: a 1948 ruling, in the case of Shelley vs. Kraemer, which struck down any use of state courts to enforce racial clauses in contracts for the sale of houses.

That is "not worth reconsidering," he said, even as he continued to criticize the constitutional reasoning used in the case. He said the court had not used that reasoning even once since. He continued to level heavy criticism at decisions upholding a constitutional right of privacy — the key to the abortion ruling.

Judge Bork, in his first day before the Senate Judiciary Committee and a standing-room-only crowd, broke many of the traditions that have kept past nominees to the Supreme Court from talking directly about specific past and future cases and issues.

Not one question went unanswered, and many prompted him to go deeply into his judicial philosophy in what, at times, seemed like a seminar in constitutional theory. He did not even beg off when pressed about his attitude regarding any constitutional issue or any precedent.

His most revealing comments came near the hearings' close for the evening when Sen. Orrin G. Hatch, R-Utah, asked him whether his strong past criticism of the abortion ruling would necessarily mean that he would vote to overrule it. He said "No," and then launched into a revealing description of how he would handle that issue in a future abortion case.

Judge Bork had indicated that his main criticism of the decision in Roe vs. Wade was its lack of "legal reasoning" — that is, how a "right of privacy" leading to a right to an abortion could be found in the Constitution.

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If a future case came to the court, forcing the justices to choose "up or down" on the constitutional issue, Judge Bork indicated he would go through the following steps before making up his mind whether to overrule the Roe decision:

First, he would ask the lawyer challenging an anti-abortion law in the case to define, in "some principled fashion," how a "right of privacy" could be found in the Constitution.

Then, if the lawyer could not do that, he would ask the lawyer if a specific "right to abortion" could be derived "legitimately from the Constitution."

If the lawyer did not come up with a "viable theory," he would tell the lawyer to discuss whether Roe vs. Wade — even though lacking any theory to support it — should nevertheless not be overruled.

Judge Bork said he would listen to that argument, because he believes that any judge should have a respect for court precedents and should not act to undo precedents without seeing whether a precedent should be left standing, even if wrong in the first instance.

"Maybe some lawyer would suggest something I haven't thought of," Judge Bork said.

The American Civil Liberties Union, commenting after the hearings on the steps the nominee spelled out in discussing Roe's future, suggested that Judge Bork had already made arguments in his writings to answer the questions he would put to the lawyers, and a lawyer seeking to have Roe overruled would just have to quote them back to the judge.

As he began his testimony, following flattering endorsements by former President Gerald R. Ford and Senate Minority Leader Robert J. Dole, R-Kan., Judge Bork — as expected — sought to persuade the senators that he would not be swift to overrule decisions that he has been criticizing for 16 years.

"It is one thing as a legal theorist," he said, "to criticize the reasoning of a prior decision, even to criticize it severely, as I have done. It is another and more serious thing altogether for a judge to ignore or overturn a prior decision. That requires much careful thought. . . . Overruling should be done sparingly and cautiously."

He did say that some decisions "should be overruled" when times change, and he gave as his illustration the Supreme Court's 1896 decision permitting racial segregation — a decision overruled in a landmark 1954 school desegregation case.

He praised the 1954 ruling, in Brown vs. Board of Education, saying that it "represents perhaps the greatest moral achievement of our constitutional law."

Mr. Bork encountered sometimes biting comments from his main foe on the Judiciary Committee, Sen. Edward M. Kennedy, D-Mass., but there were no heated exchanges, and he showed no sign of irritation.

The Massachusetts senator accused him of stopping "your clock on civil rights" with the 1954 ruling, because of his criticism of a wide variety of civil rights rulings handed down since.

But Judge Bork several times sought to draw a distinction between his challenges to the reasoning of Supreme Court decisions on rights and his own views in favor of civil rights. He repeatedly stressed that his challenges were based only on his views of the proper judicial philosophy, not on personal views of what was right and wrong.

"I have the greatest respect for the Bill of Rights, and I will enforce the Bill of Rights," he declared. He specifically noted that while he had criticized the 1948 ruling on race bias in housing sales, he personally had "never been for racially restrictive covenants." He also said he was opposed to poll taxes and would not want to bring them back.

While he repeated his argument that women are not now guaranteed special protection under the Constitution against sex bias, he did suggest that the Constitution could be used to strike down forms of sex discrimination lingering from the past because they could now be found by courts to be "unreasonable" and could be nullified on that basis.

He did not relent in his criticism of the Supreme Court's requirement of equality in population in drawing election districts, saying that the "one person, one vote" approach was "artificial." But he did tell Mr. Kennedy that "I have no desire to go around trying to overturn that decision."

In criticizing a series of decisions beginning in 1965 establishing a constitutional "right of privacy" that has led to the creation of a number of other new rights, including abortion, Judge Bork sought to soften his position by saying that "some other" reasoning than that relied upon by the court might be found to justify the results. "There may be other arguments I haven't thought about," he said.

But when Judiciary Committee Chairman Joseph R. Biden Jr., D-Del., repeatedly pressed him to suggest some other reasoning, the judge did not do so, saying at one point that he had "never engaged in that exercise."

Mr. Biden then said that "if you can't find a rationale" for the basic 1965 privacy ruling, then all following cases based upon it — including the abortion ruling — "are up for grabs." Judge Bork replied: "I don't know whether other cases are up for grabs; if someone can think of a rationale, it might make them rightly decided."

The day's hearing focused almost exclusively on Judge Bork's view of the Constitution, his ideas about the role of judging and his criticism of Supreme Court precedents. He was not pressed heavily on his explanation of his role in firing Watergate prosecutor Archibald Cox in 1973 or on his ethics as a judge.

But one member of the committee, Sen. Dennis DeConcini, D-Ariz., spent some effort outside the hearing room to check into a news report that Judge Bork had had problems with drinking.

Mr. DeConcini said after reading the summary of the FBI background report on Judge Bork that he was "satisfied" that the judge did not have a drinking problem. "It was a one-time occurrence; it is not a major issue in my judgment," the senator said. He refused to discuss specifics of the incident.

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The New York Times

Excerpts From Questioning of Judge Bork by Senate Committee Chairman

After Judge Robert H. Bork's opening statement, Senator Joseph R. Biden Jr. began asking the judge his opinions on a variety of issues. Here are excerpts, as recorded by The New York Times.

SENATOR JOSEPH R. BIDEN Jr.: I'm sure you know that one question to be raised in these hearings is whether or not you're going to vote to overturn Supreme Court decisions, which is obviously your right as a Supreme Court Justice if you are confirmed. In 1981 in testimony before the Congress, you said, quote, "There are dozens of cases," unquote, where the Supreme Court made a wrong decision. And this January in remarks to the Federalist Society you implied that you would have no problem in overruling decisions based on a philosophy or rationale that you rejected. And in an interview with the District Lawyer magazine in 1985 you were asked if you could identify cases that you think should be reconsidered. You said, and I again quote, "Yes I can, but I won't." Would you be willing for this committee to identify the dozens of cases that you think should be reconsidered.

JUDGE ROBERT H. BORK: Well, Mr. Chairman, to do that I'm afraid I would have to go out and start back through the casebooks again to pick out the ones. I don't know how many should be reconsidered. I can discuss with you the grounds upon — the way in which I would reconsider them. Let me mention that Federalist Society talk, which was given from scribbled notes — I had some but I scribbled something in the margin which I got up and said in response to another speaker — and it was that a non-originalist decision, by which I mean a decision which does not relate to a principle or value the ratifiers enacted in the Constitution could be overruled.

If you look at the next paragraph of that talk, which was the written part — written-out part and not the extemporized part — it contradicts that statement, because the very next paragraph states that the enormous expansion of the commerce power — Congress's power under the commerce clause of the Constitution — is settled and it is simply too late to go back and reconsider that, even though it appears to be much broader than anything the framers or the ratifiers intended.

So there is in fact a recognition on my part that *stare decisis*, or the theory of precedent, is important. And in fact I would say to you anybody who believes in original intention as the means of interpreting the Constitution has to have a theory of precedent because this nation has grown in ways that do not comport with the intentions of the people who wrote the Constitution — the commerce laws is one example — and it is simply too late to go back and tear that up.

I cite to you the legal tender cases. Scholarship suggests — these are extreme examples, admittedly — scholarship suggests that the framers intended to prohibit paper money. Any judge who today thought he would go back to the original intent really ought to be accompanied by a guardian rather than be sitting on a bench.

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A Restrictive Racial Covenant

The case that has come up and mentioned I think in your opening statement, Shelley against Kramer. Shelley against Kramer was a case decided under the Fourteenth Amendment. The 14th Amendment, as we all know, applies only when government acts, when government coerces and denies equal protection of the laws or due process. That was a racial covenant — a restrictive racial covenant case. And the Court held that when a state court enforced that contract, that was action by the Government and hence the Fourteenth Amendment applied to private action.

I have never been for racially restrictive covenants. I argued in the Supreme Court that racially discriminatory private contracts were covered by Section 1981, a famous post-Civil War enactment, and outlawed as such by that statute; that was Runyan against McCrary.

BIDEN: What year was the statute, Judge? Do you know?

BORK: No, I don't offhand.

BIDEN: Did it antedate the Shelley case.

BORK: Oh yes, yes; the difficulty with Shelley was not that it struck down a racial covenant, which I'd be delighted to see happen, but that it adopted a principle which, if generally adopted, would turn almost all private action into action to be judged by the Constitution. Let me give you an example.

If people at a dinner party get into a political argument and the guest refuses to leave when asked to do so by the host, and finally the host says — calls — the police to have the unwanted guest ejected.

Under Shelley against Kramer, that would become a state action, and the departing — or guest — could raise the First Amendment. His First Amendment rights had been violated because a private person got sick of his political diatribe and asked him to leave and the police assisted him. In that way any contract action, any court action, any kind of action can be turned into a constitutional case. Now, I'm not alone in criticizing Shelley against Kramer.

Criticism of Connecticut Case

BIDEN: Well, let's talk about another case. Now let's talk about the Griswold case. Now, while you were living in Connecticut, that state had a law that made — I know you know this, but for the record — that a crime, that it made it a crime for anyone, even a married couple, to use birth control.

And you have indicated you thought that law was nutty, to use your word, and I quite agree. Nevertheless, Connecticut, under that nutty law, prosecuted and convicted a doctor and the case finally reached the Supreme Court. The Court said that the law violated a married couple's constitutional right to privacy.

And you criticized this opinion in numerous articles and speeches, beginning in 1971 and as recently as July 26 of this year. In your 1971 article, "Neutral Principles and Some First Amendment Problems," you said that the right of married couples to have sexual relations without fear of unwanted children is no more worthy of constitutional protection by the courts than the right of public utilities to be free of pollution control laws.

You argued that the utility company's right or gratification, I think you referred to it, to make money and the married couple's right or gratification to have sexual relations without fear of unwanted children were. . .identical.

Now, I'm trying to understand this. It appears to me that you're saying that government has as much right to control a married couple's decision about choosing to have a child or not as that government has a right to control the public utility's right to pollute the air. Am I mistating your rationale?

(cont'd.)

BORK: With due respect, Mr. Chairman, I think you are. I was making the point that where the Constitution does not speak, there's no provision in the Constitution that applies to the case, then a judge may not say, "I place a higher value upon a marital relationship than I do upon an economic freedom" — only if the Constitution gives him some reasoning.

And I said a judge — once a judge begins to say economic rights are more important than marital rights or vice versa and. . .if there is nothing in the Constitution, the judge is enforcing his own moral values, which I have objected to.

Now, on the Griswold case itself, I —

BIDEN: Can we stick with that point a minute and make sure I understand it?

BORK: Sure.

BIDEN: So that you suggest that unless the Constitution has, I believe in the past you used the phrase that in the, in its textual identifies a value that's worthy of being protected, then competing values in society — the competing value of a public utility, in the case, the example you use, to go out and make money has no more constitutional — that economic right has no more, no more or less constitutional protection than the right of a married couple to use or not use birth control in their bedroom. Is that — I mean, isn't that what you're saying?

BORK: No, not entirely. But I'll straighten it out. I was objecting to the way Justice Douglas in that opinion, Griswold against Connecticut, derived this right. It may be possible to derive an objection to an anticontraceptive statute in some other way, I don't know. But, starting from the assumption — which is an assumption for the purposes of my argument, not a proven fact — starting from the assumption that there is nothing in the Constitution in any legitimate method of constitutional reasoning about either subject, all I'm saying is that the judge has no way to prefer one to the other and the matter should be left to the legislatures, who will then decide which competing ratification or freedom should be placed higher.

BIDEN: Well, then, I think I do understand it. That is, that the gratification, an economic gratification of a utility company is as worthy as much protection as the economic gratification — as the sexual gratification of a married couple.

BORK: No, I —

BIDEN: Because neither is mentioned in the Constitution.

BORK: Well, neither is mentioned — all that means is that the judge may not choose.

BIDEN: Who does?

BORK: The legislature.

BIDEN: Well, that's my point. So it's not a Constitution — if it were a constitutional — I'm not trying to be picky here; I mean, clearly, I don't want to get into a debate with a professor —

BORK: It's been a while.

BIDEN: But it seems to me that what you're saying is what I said. That is, that the Constitution — if it were a constitutional right, if the Constitution said, anywhere in it, in your view, that a married couple's right to engage in the decision of having a child or not having a child was a constitutionally protected right of privacy, then you would rule that that right exists. You wouldn't leave it to a legislative body, no matter what they did.

BORK: Yes. That's right.

BIDEN: But you argue, as I understand it, that no such right exists.

BORK: No, Senator. That's what I tried to clarify. I argued that the way in which this unstructured, undefined right of privacy that Justice Douglas elaborated, that the way he did it did not prove its existence.

BIDEN: Well, can you tell me — you've been a professor now for years and years; everybody's pointed out and I've observed you're one of the most well-read and scholarly people to come before this committee — in all your short life, have you come up with any other way to protect a married couple, under the Constitution, against an action by a government telling them what they can or cannot do about birth control in their bedroom? Is there any constitutional right anywhere in the Constitution?

BORK: I assume I have never engaged in that exercise. I passed on. What I was doing was criticizing a doctrine the Supreme Court was creating which was capable of being applied in unknown ways in the futures, in unprincipled ways.

Let me say something about Griswold against Connecticut. Connecticut never tried to prosecute any married couple for the use of contraceptives. That statute was used entirely through an aiding-and-abetting clause in the General Criminal Code to prosecute birth control clinics that advertised. That's what it was about.

BIDEN: But, in fact, they did prosecute a doctor, didn't they? Who had given advice — —

BORK: Well, I was at Yale when that case was framed by Yale professors. That was not a — that was not a case of Connecticut going out and doing anything. What happened was some Yale professors sued to have — because they like this kind of litigation — to have that statute declared unconstitutional. It got up to the Supreme Court in the — under the name of Poe against Ulman. The Supreme Court refused to take the case, because there was no showing that anybody ever got prosecuted.

Test of an Abstract Principle

They went back down and engaged in enormous efforts to get somebody prosecuted, and the thing was really a test case — on an abstract principle, I must say.

BIDEN: Well, then let me say it another way, then, without doing the case. Does a state legislative body, or any legislative body, have a right to pass a law telling a married couple or anyone else that behind a married — let's stick with a married couple for a minute — behind their bedroom door, telling them they can or cannot use birth control? Does the majority have the right to tell a couple that they can't use birth control?

BORK: There's always a rationality standard in the law, Senator, and I don't know what rationale the state would offer or what challenge the married couple would make. I have never decided that case. If it ever comes before me, I will have to decide it.

All I have done was point out that the right of privacy, as defined or undefined by Justice Douglas, was a free-floating right that was not derived in a principled fashion from constitutional materials. That's all I've done.

BIDEN: Well, Judge, I happen — I agree with the rationale offered in the case. Let me just read it to you, and it went like this, and I happen to agree with it. It said, in part:

"Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship. We deal with a right of privacy older than the Bill of Rights. Marriage is a coming together for better or worse, hopefully enduring and intimate to the degree of being sacred. The association promotes a way of life, not causes; a harmony of living, not political faiths; a bilateral loyalty, not a commercial or social projects."

Obviously, that judge believes that the Constitution protects married couples, anyone.

BORK: I could agree with almost every — I think I can I agree with every word you read. But that is not, with respect, Senator, Mr. Chairman, the rationale of the case. That is the rhetoric at the end of the case. What I objected to — what I objected to was the way in which this right of privacy was created.

Aspects of Privacy Protected

And that was simply this: Justice Douglas observed, quite correctly, that a number of provisions of the Bill of Rights protects aspects of privacy. And indeed they do, and indeed they should. But he went on from there to say that since a number of the provisions did that and since they had emanations — by which I think he meant buffer zones to protect the basic right — he would find a penumbra which created a new right of privacy that existed where no provision of the Constitution applied. So that he —

BIDEN: Ninth Amendment?

BORK: Well, wait, let me finish with Justice Douglas. He didn't rest on Ninth Amendment; that was Justice Goldberg.

BIDEN: Right. That's what I was talking about.

(cont'd)

BORK: Yeah. And I want to discuss, first, Justice Douglas. And I'll be glad to discuss Justice Goldberg. Now, you see, in that way he could have observed equally well that there, that various provision of the Constitution protect individual freedom and, therefore, generalized a general right of freedom that would apply where no provision of the Constitution did.

That is, that is exactly what Justice Hugo Black criticized in dissent in that case, in some heated terms. And Justice Potter Steward also dissented in that case.

So, observing that Griswold against Connecticut does not sustain its burden, the judges' burden of showing that the right comes from constitutional materials, I am by no means alone. A lot of people, including justices, have criticized that decision.

BIDEN: I'm not suggesting that you're alone or in the majority; I'm just trying to find out where you are.

BORK: Well, I'm just ——

BIDEN: And the fact that I — as I hear you, you do not believe that there is a general right of privacy derived in the Constitution.

BORK: Not one derived in that fashion. There may be other arguments, and I don't want to pass upon those, but ——

BIDEN: Have you ever thought of any? Have you ever written about any?

BORK: Yeah. As a matter of fact, Senator, I taught a seminar with Prof. Alex Bickle. And that was at a time starting in about 1963 or 4 — we taught a seminar called "Constitutional Theory." I was then all in favor of Griswold against Connecticut. I thought that was a great way to reason. And I tried to build a course around that. Only I said we can call it a general rights of freedom, and let's then take the various provisions of the Constitution, treat them the way a lawyer treats common law cases, extract a more general principle and apply that.

I did that for about six or seven years until it became — and Bickle fought me every step of the way; he said it wasn't possible. At the end of six or seven years, I decided he was right.

BIDEN: Judge, you, let me — let's go on. There have been a number of cases that have flowed from the progency of the Griswold case, all relying on Griswold, the majority view, not in — different rationales offered — that there is a right of privacy in the Constitution, a general right to privacy, a right of privacy derived from the due process — it comes from the 14th Amendment. A right of privacy, to use Douglas's word, the penumbra, you know, and which you criticized. And a right which some suggest that Goldberg suggested in the Griswold case...from the Ninth Amendment. It seems to me if you can't find a rationale for the Griswold case, the decision of the Griswold case, then all the succeeding cases are up for grabs.

BORK: I don't — I have never tried to find a rationale, and I haven't been offered one. Maybe somebody would offer me one. I don't know if the other cases are up for grabs or not.

BIDEN: Well, wouldn't they have to be if they're based on the same rationale?

BORK: Well, they may be, it may be some of them. You know, I've written some of these places, some of these cases, which were wrongly decided, in my opinion. Some of them I can think of rationales which would make them correctly decided or wrongly reasoned.

There may be other ways than a generalized — an undefined right of privacy. One of the problems with the right of privacy, as Justice Douglas defined it or didn't define it, is not simply that it comes out of nowhere and it doesn't have any rooting in the Constitution, it is also that he doesn't give it any contours. So you don't know what it's going to mean from case to case.

Protection Against Sterilization

BIDEN: Well, let's talk about another basic right — at least I think a basic right — the right not to be sterilized by the Government. The Supreme Court addressed that right in the famous case Skinner v. Oklahoma. Under Oklahoma law, someone convicted of certain crimes faced mandatory sterilization. In 1942, Mr. Skinner had been convicted of his third offense and therefore faced sterilization and brought his case to the Supreme Court. And the Court said that the State of Oklahoma could not sterilize him. And let me read something from the Court's opinion:

"We are dealing with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of a race. There is no redemption for the individual whom the law touches. Any experimental which the state conducts to his irreparable injury" — excuse me, "Any experiment which the state conducts is to his irreparable injury. He is forever deprived of a basic liberty."

And Judge, you've said that Supreme Court decision is improper and intellectually empty. I'd like to ask you, do you think that is a basic right under the Constitution not to be forcibly sterilized by the state?

BORK: It may well be, but not on the — not on the grounds stated there when — I hate to keep saying this, Mr. Chairman, but much of my objection is to the way the Court — some members of the Court, not always the whole Court — has gone about deriving these things. In Skinner v. Oklahoma, I think it might have been better to say that the statute is not of a reasonable basis because there is no scientific evidence upon which to rest the thought that criminality — it wasn't then, I don't know anything about the state of scientific evidence now — that criminality is really genetically carried.

BIDEN: But if there was, they'd be able to sterilize —

BORK: Well, I don't know. I don't know. But the second thing about that statute and I'll decide — I'd like to decide this case — is that Justice Douglas did say something which is quite correct, and he didn't need to talk about procreation and fundamental rights to do it.

And that is, he noted that the statute made distinctions, for example, between a robber and an embezzler. The embezzler wasn't subject to this kind of thing. Hd he gone on and pointed out that those distinctions really sterilized, in effect, blue-collar criminals and exempted white-collor criminals, and indeed appeared to have some taint of a racial basis to it, he could have arrived at the same decision in what I would take to be a more legitimate fashion.

BIDEN: I thought that under the equal protection clause, that was the essence of it, and you've written — I may be mistaken, I thought you've written that there is no basis under the equal protection clause for having arrived at that conclusion.

The Equal Protection Clause

BORK: Not the way he did it. He starts off with this — see, what the Court was doing with the equal protection clause for many years, and to which I objected more generally in this article, is that they would decide whether a whole group was in or out. And then they would decide what level of analysis, what level of scrutiny, they would give to the statute to see whether it was constitutional or not.

I think that derives — and I hate to get into a technical question, but I think it derives from a footnote in the Caroleen Products case, in which they were supposed to look at groups as such.

BIDEN: Judge Bork ——

BORK: It would be much better if, instead of taking groups as such and saying, "this group is in, that group is out," if they merely used a reasonable basis test and asked whether the law had a reasonable basis. I think the statute in Skinner v. Oklahoma, the sterilization statute, would have failed under a reasonable basis test.

BIDEN: So you have to find a reasonable basis. If there is one, you can sterilize; if there's not one, you can't. It seems to me it comes down to a basic difference. You don't believe the Constitution recognizes what I consider to be a basic liberty, a basic liberty not to be sterilized, period.

BORK: I agree that that's a basic liberty and I agree that family life is a basic liberty and so forth. But the fact is we know that legislatures can constitutionally regulate some aspects of sexuality.

BIDEN: That's true.

BORK: We know that legislatures do, and can, constitutionally regulate some aspects of family life. And the question, I think, has got to be — so that these things are subject to some regulation; we have divorce laws, custody laws, child-beating laws and so forth — the question always becomes, under the equal protection clause, Has the legislature a reasonable basis for the kind of thing it does here. Sterilization law, I think, would require an enormous, perhaps impossible, degree of ——

(cont'd.)

BIDEN: I hope so.

BORK: —— of justification.

BIDEN: Judge, my time's about up. But with regard to the Griswold case, you're quoted in 1985 — as a judge, not on the court but speaking when you were a judge. Not as a judge but in 1985 while you were in the court — you said, "I don't think there is a supportable method of constitutional reasoning underlying the Griswold decision." So obviously you thought about it and you, at least at that point, concluded you didn't — you couldn't find one.

It seems to me, Judge, in my — as I said, there are many more cases I'd like to talk to you about and I appreciate you engaging in this dialogue — that when you say that a state can impact upon marital relations and can impact upon certain other relations, it seems to me that there are certain basic rights that they can't touch.

And what you seem to be saying to me is that a state legislature can, theoretically at least, pass a law sterilizing and we'll see what the courts says. It's not a basic — it's an automatic, it's not basic. They can't — right now, if any state legislature in the country asked counsel for the legislature, "Could we pass a law sterlizing," I suspect the immediate response from counsel would be, "No, you can't do that."

Not only politically but constitutionally. If any state legislative body said, "Can we — can we decide on whether or not someone can or cannot use contraceptives — on a reasonable basis," — I imagine all counsel would say, "No," flatly, "you can't even get into that area."

And it seems to me you're not saying that. You're saying that it's possible that can happen. And in Griswold, you're saying that there's no principle upon which they could reach the result — not the rationale, you say; you say the result.

BORK: Well, I don't think I was talking of the principle underlying that one. But I should say ——

The Right to Privacy

BIDEN: Let me stop you there, Judge, because I want to make sure I understand. The principle underlying that one is the basic right to privacy, right? And from that flows all these other cases, all the way down to Franz, which you spoke to, all the way down to Roe v. Wade. They all are premised upon that basic principle that you can't find. I'm not saying you're wrong, I just want to make sure I understand what you're saying.

BORK: Well, I don't think all those cases necessarily follow. They used the right of privacy in some of those cases and it wasn't clear why it was right of privacy. I should say that I think not only Justices Black and Stewart couldn't find it — and Gerald Gunther, who's a professor at Stanford and an authority in these matters, has criticized the case, and Prof. Philip Curlan has referred to Griswold v. Connecticut as a blatant usurpation.

BIDEN: But most did find it — a majority did find it, though, didn't they?

BORK: Yes. But I'm just telling you, Senator, that a lot of people have thought the reasoning of that case was just not reasoning.

BIDEN: My time is up, Judge. I want to make it clear I'm not suggesting there's anything extreme about your reasoning. I'm not suggesting it's conservative or liberal; I just want to make sure I understand it.

BORK: Yes.

BIDEN: And as I understand what you've said in the last 30 minutes, that a state legislative body, a government, can, if it so chose, pass a law saying married couples cannot use birth control devices.

BORK: Senator, Mr. Chairman, I have not said that. I do not want to say that. What I'm saying to you is that if that law is to be struck down it will have to be done under better constitutional argumentation than was present in Griswold — the Griswold opinion.

BIDEN: And again, I'll quote you, sir, you said, "The truth is that the Court could not reach the result in Griswold through principle." I assume you're talking about constitutional principle.

BORK: I don't know. What is that from?

BIDEN: I'm referring to your — your 1971 article. That's the quote in the '71 article. And then you say ——

BORK: Do you have your page number for that, Senator?

BIDEN: I will get the page number. I'm sorry, 1982 speech, while you were a judge, speaking at Catholic University. You said, "The result in Griswold could not have been reached by" — where's the rest of the quote? — "by proper" — am I reading here? Oh, yes. I can't even read. "By proper interpreptation of the Constitution." We'll dig it out for you here, but, to show — I believe you all sent it to us, so that's how we got it.

BORK: Yes.

BIDEN: Well, my time is up. I'll appreciate it. We'll do more of this.

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The New York Times

As Hearings Begin, Senators Examine Standards for Assessing Nominees

Following are excerpts from statements by former President Gerald R. Ford and members of the Senate Judiciary Committee on the first day of committee hearings on the confirmation of Judge Robert H. Bork as a member of the Supreme Court, as recorded by The New York Times:

Gerald R. Ford

I have known Judge Bork since the mid-1960's when he was a distinguished faculty member of the Yale University Law school, my alma mater. While teaching at the Yale Law School for 15 years, he held two endowed chairs in recognition of his achievements as a scholar. He is an honored graduate of the University of Chicago Law School and managing editor of the Law Review. Prior to law school, he served in the United States Marines and while in law school interrupted his legal education for a second Marine Corps tour.

He had broad experience in private practice as a partner with Kirkland & Ellis, a nationally known prestigious law firm. My friendship with Robert Bork expanded during his service as Solicitor General 1973-1977, while I was the Republican leader in the House of Representatives, Vice President and President. For the record, he was unanimously confirmed as Solicitor General.

Just months into the job as Solicitor General, Robert Bork was faced with a crisis not of his own making. President Nixon, during the Watergate investigation ordered the dismissal of Special Prosecutor Archibald Cox. Judge Bork, when thrust into a very difficult situation, acted with integrity to preserve the continuity of both the Justice Department and the Special Prosecutor's investigation. I think in retrospect that history has shown that his performance was in the nation's interest.

When I became President Aug. 9, 1974, I requested that he stay on as Solicitor General and he distinguished himself as the principal government advocate before the Supreme Court during my Administration. The Ford Administration and the nation benefited enormously from this outstanding service. I was especially pleased that President Reagan nominated Robert Bork for Judge of the United States Circuit Court of Appeals for the District of Columbia and that the United States Senate confirmed him unanimously just five short years ago.

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Senator Thurmond

SENATOR STROM THURMOND, Republican of South Carolina: On earlier occasions I have set forth the qualities I believe a nominee to the Court should possess.

First, unquestioned integrity, the courage to render decisions in accordance with the Constitution and the will of the people as expressed in the laws of Congress. Next, a keen knowledge and understanding of the law, in other words, professional competency. Next, compassion which recognize both the rights of the individual and the rights of society in the quest for equal justice under the law. Next, proper judicial temperament, the ability to prevent the pressures of the moment from overpowering the composure and self-discipline of a well-ordered mind. Next, an understanding of and appreciation for the majesty of our system of government in its separation of powers between the branches of our Federal Government, its division of powers between the Federal and state governments and the reservation to the states and to the people of all powers not delegated to the Federal Government.

There is no doubt that the nominee before us today meets these qualifications.

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Judge Bork is not a new unknown quantity. He has been before this committee twice, previously and both times the committee and the full Senate have deemed him worthy of confirmation, to be Solicitor General and to be a judge of the U.S. Court of Appeals for the D.C. Circuit. It is also worthy of note that both times Judge Bork was confirmed by the full Senate, once when Democrats controlled the Senate and once when the Republicans did. There was not a single dissenting vote. In fact, if we were to put aside questions of philosophy and ideology, Judge Bork would, in all likelihood already be sitting on the Court. However, it is apparent that some would have the issue of philosophy become the standard for whether or not we confirm this nominee for the Supreme Court.

Senator Kennedy

SENATOR EDWARD M. KENNEDY, Democrat of Massachusetts: From the beginning, America has set the highest standards for our highest Court. We insist that a nominee should have outstanding ability and integrity, but we also insist on even more: that those who sit on the Supreme Court must deserve the special title we reserve for only nine Federal Judges in the entire country, the title that sums up in one word the awesome responsibility on their shoulders, the title of Justice.

Historically, America has set this high standard because the Justices of the Supreme Court have a unique obligation to serve as the ultimate guardians of the Constitution, the rule of the law and the liberty and equality of every citizen. To fulfill these responsibilities, to earn the title of Justice, a person must have special qualities:

¶A commitment to individual liberty as the cornerstone of American democracy;

¶A dedication to equality for all Americans, especially those who have been denied their full measure of freedom, such as women and minorities;

¶A respect for justice for all whose rights are too readily abused by powerful institutions, whether by the power of government or by giant concentrations of power in the private sector.

A Supreme Court Justice must also have respect for the Supreme Court itself, for our constitutional system of government and for the history and heritage by which that system has evolved, including the relationship between the Federal Government and the states and between Congress and the President. Indeed it has been said that the Supreme Court is the umpire of the Federal system because it has the last word about justice in America.

Special Quality Needed

Above all, therefore, a Supreme Court nominee must possess the special quality that enables a Justice to render justice. This is the attribute whose presence we describe by the words such as fairness, impartiality, open-mindedness and judicial temperament, and whose absence we call prejudice or bias. These are the standards by which the Senate must evaluate any judicial nominee, and by these standards Robert Bork falls short of what Americans demand of a man or woman as a Justice on the Supreme Court.

Time and again, in his public record over more than a quarter of a century, Robert Bork has shown that he is hostile to the rule of law and the role of the courts in protecting individual liberty. He has harshly opposed and in public, itching to overrule many of the great decisions of the Supreme Court that seek to fullfil the promise of justice for all Americans. He is instinctively biased against the claims of the average citizen and in favor of concentrations of power, whether that is governmental or private. And in conflicts between the legislative and executive branches of Government, he has repeatedly expressed a clear contempt for Congress and an unbridled trust in the power of the President.

Mr. Bork has said many extreme things in his comments of a lifetime in the law. We already have a more extensive record of his work and writings than perhaps we have had for any other Supreme Court nominee in history. It is easy to conclude from the public record of Mr. Bork's published views that he believes women and blacks are second-class citizens under the Constitution. He even believes that in the relation to the executive that members of Congress are second-class citizens. Yet he is asking the Senate to confirm him.

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Senator Biden :

SENATOR JOSEPH R. BIDEN Jr., Democrat of Delaware, the committee chairman: Judge Bork, I guarantee you that this little mallet is going to assure you every single right for you to make your views known as long as it takes, on any ground you wish to make them. That's a guarantee so you do have rights in this room, and I will assure you they will be protected.

JUDGE BORK. Thank you, Mr. Chairman.

SENATOR BIDEN: For the next two weeks or so — obviously only in your case, I hope Judge, for the next couple of days or so — my colleagues and I, yourself and others will be engaged in a historic discussion that could affect the direction of our country. And I think it would be a disservice to the American people if we allow that debate to be clouded by strident rhetoric of the far left or the right right. Such inflammatory statements only distract from the central focus of these hearings.

For better than two decades you have been a distinguished scholar, a man whose ideas have been debated in many constitutional law classes in this country. In your writings, you have forthrightly stated your principles. To use your own words in your published opening statement which you haven't given yet, "My philosophy of judging is neither liberal nor conservative." When I have been asked as I have been after having read your writings this August whether I thought you were a conservative or a liberal, my response was just as yours. I believe you're neither a conservative nor a liberal. You have a very precise, as I read it, viewing of how to read the Constitution.

Bork Defends Watergate Role

WASHINGTON (AP) _ Supreme Court nominee Robert H. Bork Wednesday denied that he had acted illegally in firing special Watergate prosecutor Archibald Cox 14 years ago and said that he "did my utmost" to make sure the investigation into the Nixon administration went forward.

"My moral and professional lives were on the line if something happened to those investigations," Bork said as he recalled the dramatic events of 1973, which culminated in the resignation of President Nixon.

Bork also disclosed that he had rebuffed a request from the White House to resign as a top Justice Department official at the time and become Nixon's chief Watergate defense lawyer. He said he convinced then-White House Chief of Staff Alexander M. Haig that "I was not the right man for the job."

Bork stiffly turned aside a suggestion from Sen. Howard Metzenbaum, D-Ohio, that he had acted illegally in firing Cox in what became known as the Saturday Night Massacre.

Bork said he had fired Cox because Nixon had given him a legal order to do so. Even then, Bork added, he fully expected the Watergate investigation to go forward.

He said he believed at the time that was what the public wanted. "There was never any doubt in my mind that that's exactly what I wanted," said Bork, who was the No. 3 official in the Justice Department at the time.

"And, in fact, I did my utmost to keep that special prosecutor force intact and going forward."

Metzenbaum raised the issue of Watergate rather than ask Bork about his judicial philosophy. The Ohio Democrat and other opponents of Bork's nomination to the high court hope to use the events of 14 years ago to question Bork's fitness as a justice.

Bork's nomination has been intensely controversial, with liberals saying he would use his seat to attempt to overturn previous rulings that have established rights to abortion, privacy and affirmative action, and supporters attempting to portray him as a mainstream conservative judge. Bork has been an appeals court judge in Washington since 1982.

For a few moments, the hearings seemed to be in a time warp as Bork and Metzenbaum clashed over events of 13 summers ago. Ironically, the question and answer session took place in the same Senate Caucus Room where the Watergate hearings were held in 1974.

Bork defended his role in the Watergate events as two committee members who remain undecided on how to vote on the nomination said they still harbor questions about his qualifications.

Bork repeatedly made the point that he often opposed court decisions on civil rights, privacy, women's rights and even abortion on grounds that justices created new rights without any constitutional basis.

"I am not by any means alone" in that view, he insisted, denying that he opposed basic civil rights and civil liberties.

And Bork said he would give "much careful thought" before overturning Supreme Court precedent, because "it is one thing as a legal theorist to criticize the reasoning of a prior decision. ... It is another and more serious thing altogether for a judge to ignore or overturn a prior decision."

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Bork says he's not an agnostic
By JOHN HANRAHAN

WASHINGTON (UPI) _ Supreme Court nominee Robert Bork told a Senate committee Wednesday that, contrary to a published account, he is not an agnostic.

Responding to questions on freedom of religion posed by Sen. Alan Simpson, R-Wyo., Bork said, "I am not an agnostic."

Bork said a reporter had misinterpreted his answer to a question on his personal religious beliefs. What he had meant by his answer to the reporter, Bork said, is that he was not a regular churchgoer or someone of "great piety."

"It's only the fact that it is on the public record that I choose to deny it," Bork said on the second day of his confirmation hearing before the Senate Judiciary Committee. He added that that was all he had to say on the subject.

Time magazine, in its July 13 issue, had reported that Bork "was raised a Protestant and is now an agnostic."

David Beckwith, the reporter who interviewed Bork for that article, said Wednesday that Bork had not labeled himself an agnostic, but had said that he did not belong to a church and had not in his adult life. He said Bork described himself as a "generic Protestant" whose religion was "more philosophical than emotional."

Beckwith also said other acquaintances of Bork had told Time Bork is an agnostic. The information from those sources, in conjunction with Bork's response in the interview, led Time to call Bork an agnostic, Beckwith said.

Bork's first wife, Claire Davidson, who died of cancer in 1970, was Jewish. His present wife, Mary Ellen Pohl, is a former Catholic nun.

In an interview published in the current issue of the weekly Long Island Jewish World, Bork was quoted as saying that the fact he could marry a Jew and then a former nun meant only that "I don't divide the world up in that way. I didn't marry my first wife because she was Jewish or my second wife because she is Catholic. Those things don't trouble me."

Bork has three children, all grown, by his first wife. Responding to a question as to whether his children were raised Jewish, Bork told the Jewish World they "were raised with free choice." Asked by the newspaper if they considered themselves Jewish, Bork answered: "I think one or more tend to regard themselves as Jewish. But if they are, they are non-observant."

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By JUDI HASSON

WASHINGTON (UPI) _ Supreme Court nominee Robert Bork defended his role today in Watergate's "Saturday Night Massacre," and said gender, in some cases, must be "treated differently" than cases involving racial discrimination.

Bork appeared for a second day at his confirmation hearing before the Senate Judiciary Committee and outlined the events of Oct. 20, 1973, when, acting on orders from President Nixon, he fired special prosecutor Archibald Cox after his two superiors at the Justice Department resigned rather than do so.

As the session began, senators turned their attention to the Watergate affair, but eventually returned once again to Bork's controversial views on race, women and the right to privacy.

When Bork told his confirmation hearing that "gender, in some cases, is treated differently" than cases involving racial discrimination, Sen. Dennis DeConcini, D-Ariz., told him that he was concerned that he might not be willing to protect the rights of women.

DeConcini, a swing vote on the Judiciary Committee who has not decided how he will vote on the nomination, said, "I am trying to satisfy myself you are not excluding a large segment of our population."

But Bork replied, "There is no ground in my record anywhere to suspect I would not protect women as much as men."

Many women's groups are opposing Bork because they believe he would provide a crucial vote to overturn the high court's historic 1973 decision legalizing abortion.

Bork, 60, a federal appeals court judge whose nomination is being opposed by many groups on grounds he is a conservative extremist, said he did his best to ensure the continuation and independence of the special prosecutor's office after Cox was fired.

"I understood from the beginning that my moral and professional life was on the line if something happened to the special prosecutor's force," Bork said.

On Oct. 20, 1973, Attorney General Elliot Richardson and Deputy Attorney General William Ruckelshaus resigned rather than fire Cox whose independence they had promised to protect. Cox was fired after a court ordered Nixon to turn over tapes he had subpoened in the Watergate probe.

On that Saturday, Bork, who was the solicitor general, said he went to Richardson's office and was told that Richardson and Ruckelshaus could not fire Cox because of promises they had made to the Senate.

"They said, ±Can you do it, Bob?" ' Bork said he was asked.

"It hit me like a ton of bricks. I got up and walked around Elliot's office," Bork said.

Bork said he told them he could fire Cox because he had not made any promises to the Senate, but then he would have to resign as solicitor general because he did not "want to be regarded as an organization man who does whatever he was told."

But Richardson and Ruckelshaus persuaded him to stay because "I was the only department-wide officer still left who could preserve the department and the special prosecutor's force," Bork said.

"I did my utmost in keeping that special prosecutor's force intact so it could go forward," Bork said.

In the days that followed, Bork sought to keep the special prosecutor's office going in its Watergate probe and began the search for a replacement for Cox.

Sen. Howard Metzenbaum, D-Ohio, a Bork critic who pressed him on his Watergate role, noted that a court had found that Bork had acted illegally in firing Cox. And he said that the illegal action could be a signal to other Americans to break the law.

"You are up for confirmation to be a member of the highest court of the land," Metzenbaum said. "I wonder if Americans can say, ±I can commit an illegal act too." '

But Bork rejected Metzenbaum's contention that he had acted illegally and said he began working to find another special prosecutor because the "American people would not be mollified without one."

He also denied the senator's charged that he had been giving the White House advise on dealing with the special prosecutor in the months before the "Saturday Night Massacre."

"I did not discuss executive privilege with the president," Bork said, adding that he had never advised the White House how to deal with the Watergate special prosecutor's office.

During a discussion of freedom of religion, Bork testified that, contrary to some published accounts, "I am not an agnostic." Bork said, "It is only the fact that it is on the public record that I choose to deny it."

On Tuesday, Bork, called on to defend his 25-year record as an arch-conservative legal scholar and federal judge, sought to assure those who fear he would try to overturn key civil rights rulings that he would not seek to reject prior court decisions without considering the consequences seriously. more

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x x x consequences seriously.

"It is one thing as a legal theorist to criticize the reasoning of a prior decision, even to criticize it severely, as I have done," he said. "It is another and more serious thing altogether for a judge to ignore or overturn a prior decision. That requires much careful thought."

At the same time, Bork repeated his view that the Supreme Court's historic 1973 Roe v. Wade ruling legalizing abortion was wrongly decided, though he said he did not know what he would do if faced with the issue as one of the nine justices. Opponents maintain Bork would vote to overturn the ruling.

"Roe vs. Wade contains almost no legal reasoning," Bork asserted in response to questions from conservative Sen. Orrin Hatch, R-Utah, an abortion foe.

In other bold declarations, Bork said the Supreme Court wrongly decided cases that abolished the poll tax and imposed a "one-man, one-vote" theory requiring every American's vote to be counted equally. He also reiterated his opposition to the Equal Rights Amendment on grounds that it places decision-making power with judges instead of with state legislatures.

Bork said he has changed his position of the 1960s, however, in which he opposed civil rights legislation arguing that government should not impose such will on individuals.

Committee Chairman Joseph Biden of Delaware, a Bork opponent whose handling of the confirmation process is hanging over his 1988 Democratic presidential campaign, opened Tuesday's hearing by noting Bork was "no ordinary nominee" and promising a thorough review of the judge's record.

Biden began by focusing on a 1965 Supreme Court decision that struck down Connecticut's law barring married couples from obtaining contraceptives.

Bork contends the high court used improper reasoning in deciding that a right to privacy protects a couple's right to birth control, and though he conceded Tuesday he did not know what argument he would have used, "I am by no means alone; a lot of people, including justices, have criticized this opinion."

Sen. Edward Kennedy, D-Mass., another Bork opponent, lambasted Bork in an opening statement, saying the former Yale University law professor who has sat for five years on the U.S. Circuit Court of Appeals for the District of Columbia "is publicly itching to overrule many of the great decisions of the Supreme Court that seek to fulfill the promise of justice for all Americans."

"In Robert Bork's America, there is no room at the inn for blacks and no place in the Constitution for women," Kennedy said, meeting Bork's impassive stare. "And in our America, there should be no seat on the Supreme Court for Robert Bork."

Supporters, including Hatch, immediately accused opponents such as Kennedy of politicizing the process. Sen. Gordon Humphrey, R-N.H., said, "The charges against Judge Bork are the worst infestation of politics I have seen."

At a social event Tuesday night, President Reagan told Justice Byron White that Bork was doing fine but was "up against a bunch of bush-leaguers."

Ralph Neas, director of the Leadership Conference on Civil Rights, defended the opposing senators, saying they had let Bork "speak for himself" Tuesday.

"What they are doing is dramatizing the real-life consequences if Robert Bork is confirmed and how we would reopen all of these decisions which most Americans think are settled law," Neas said.

Bork was introduced to the Senate committee Tuesday by Gerald Ford in an unprecedented appearance by a former president on behalf of a Supreme Court nominee, indicating the strong Republican desire to win confirmation.

Ford told the panel that Bork, as solicitor general, was "faced with a crisis not of his making" when Nixon ordered him to fire Cox Oct. 20, 1973. Attorney General Elliot Richardson and his deputy, William Ruckelshaus, had resigned rather than do so, but Richardson recently spoke out in defense of Bork.

"Judge Bork, when thrust into a difficult situation, acted with integrity to preserve the continuity of both the Justice Department and the special prosecutor's investigation," declared Ford. "I think in retrospect that history has shown that his performance was in the nation's interest."

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Wed 16-Sep-87 14:06 EDT
Subject: BORK
Mail Id: Rodota

LARAMIE, Wyo. (UPI) _ Albany County Judge Sharon Kinnison says the 98-year-old Wyoming Constitution includes women's rights provisions that are at least as strong as those in the proposed Equal Rights Amendment.

Speaking at a forum entitled "Women and the Two Constitutions" in Laramie, Kinnison said the first article of the Wyoming Constitution states, "In their inherent right to life, liberty and the pursuit of happiness, all members of the human race are equal."

...During an informal poll at the forum, no one expressed support for the nomination of Judge Robert Bork to the U.S. Supreme Court, although some in attendence said they are neutral on the issue.

Wed 16-Sep-87 12:05 EDT
Subject: BORK
Mail Id: Rodota

NEW ORLEANS (UPI) _ Judge Robert Bork should not be named to the U.S. Supreme because of his poor record on minority rights, the dean of Tulane University Law School has said.

John R. Kramer, who expressed his opposition Tuesday, is one of seven deans from law school around the country who have asked colleagues to protest Bork's appointment.

Bork has a "serious lack of empathy for the way other people who are not upper middle class whites live," Kramer said.

"Almost no one else in the country would come up with a zero batting average on the rights of blacks," Kramer said. "He's never supported any expansion of the equal protection clause."

Two letters to the Senate _ one signed by law school deans, the other by constitutional law professors _ will be made public during Bork's confirmation hearings, which began Tuesday.

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AM-BORK (SCHEDULED)

BORK GRILLED ON CONTROVERSIAL WATERGATE ROLE

BY SUE BAKER

WASHINGTON, SEPT 16, REUTER - FEDERAL JUDGE ROBERT BORK STRONGLY DEFENDED ON WEDNESDAY HIS CONTROVERSIAL ROLE IN THE WATERGATE SCANDAL AS THE SECOND DAY OF SENATE JUDICIARY COMMITTEE HEARINGS INTO HIS NOMINATION TO THE SUPREME COURT GOT OFF TO A CONTENTIOUS START.

BORK, WHOSE NOMINATION TO THE SUPREME COURT HAS SPARKED ONE OF THE MOST BITTER PUBLIC DEBATES IN A DECADE, ALSO DEFENDED HIMSELF AGAINST CRITICS' CHARGES HIS RECORD ON PROTECTING WOMEN'S RIGHTS WAS POOR.

''ON MY COURT OF APPEALS RECORD ... I HAVE VOTED MORE OFTEN THAN NOT FOR THE FEMALE PARTY IN THE CASE,'' HE SAID. ''THERE IS NO GROUND IN MY RECORD ANYWHERE TO SUSPECT THAT I WOULD NOT PROTECT WOMEN AS FULLY AS MEN.''

BORK'S NOMINATION HOLDS HIGH STAKES BOTH FOR PRESIDENT REAGAN AND BORK'S LIBERAL OPPONENTS WHO FEAR HE WILL WORK TO OVERTURN SUPREME COURT RULINGS LEGALIZING ABORTION AND GUARANTEES CIVIL LIBERTIES AND THE RIGHTS OF BLACKS AND WOMEN.

WITH THE NINE-JUSTICE COURT SPLIT BETWEEN CONSERVATIVE AND MORE LIBERAL JUDGES, BORK COULD PROVIDE A CRUCIAL SWING VOTE, TILTING THE COURT TO THE RIGHT FOR THE FIRST TIME IN 30 YEARS AND KEEPING IT THERE FOR A GENERATION TO COME.

''THE THING THAT CONCERNS ME IS YOU ARE UP FOR CONFIRMATION TO BE A MEMBER OF THE HIGHEST COURT OF THE LAND ... AND YET A COURT DETERMINED YOUR ACTION WAS ILLEGAL,'' SEN. HOWARD METZENBAUM TOLD BORK REFERRING TO HIS FIRING OF WATERGATE SPECIAL PROSECUTOR ARCHIBALD COX IN 1973.

BORK SHOT BACK: ''NO, I DON'T THINK IT WAS (ILLEGAL), SENATOR.''

THE COMMITTEE, WHICH WILL HOLD TWO WEEKS OF HEARINGS, WAS LIKELY TO BE CLOSELY DIVIDED WHEN IT VOTES ON BORK'S NOMINATION, PROBABLY EARLY NEXT MONTH. THE FULL SENATE WOULD THEN HAVE TO ACT AND AIDES SAID THAT VOTE COULD ALSO BE CLOSE.

METZENBAUM, AN OHIO DEMOCRAT, OPENED THE SECOND DAY OF HEARINGS INTO PRESIDENT REAGAN'S CONTROVERSIAL CHOICE FOR A KEY SUPREME COURT VACANCY BY PEPPERING THE 60-YEAR-OLD JUDGE WITH QUESTIONS ABOUT THE WATERGATE AFFAIR.

THE CONTROVERSY OVER BORK'S WATERGATE ROLE IN WHAT HAS COME TO BE CALLED THE ''SATURDAY NIGHT MASSACRE'' CENTERS ON HIS DECISION TO OBEY PRESIDENT RICHARD NIXON'S ORDER TO FIRE COX, WHO WAS HEADING A PROBE INTO THE WATERGATE SCANDAL THAT LATER FORCED NIXON TO RESIGN.

BORK'S TWO SUPERIORS, THEN-ATTORNEY GENERAL ELLIOT RICHARDSON AND HIS DEPUTY WILLIAM RUCKELSHAUS, REFUSED TO DO SO AND QUIT IN PROTEST.

Cont. . .

...cont.

BUT BORK SAID HE AND RICHARDSON AND RUCKELSHAUS BELIEVED A PRESIDENTIAL ORDER OVERRULED THE REGULATION PROTECTING THE SPECIAL PROSECUTOR'S OFFICE. HE SAID HIS TWO SUPERIORS QUIT FOR PERSONAL REASONS BECAUSE THEY HAD PROMISED THE SENATE THEY WOULD NOT INTERFERE WITH THE INVESTIGATION.

''THAT NIGHT ... ALL OF US ASSUMED THAT THE REGULATION DID NOT STAND IN THE WAY OF A PRESIDENTIAL ORDER;'' HE SAID.

BORK SAID HE ACTED QUICKLY SO THAT THAT THE INVESTIGATION BY THE SPECIAL PROSECUTOR'S STAFF COULD CONTINUE UNIMPEDED.

''I DID MY UTMOST TO KEEP THAT INVESTIGATION INTACT AND GOING FORWARD;'' HE SAID. ''I UNDERSTOOD FROM THE BEGINNING THAT MY MORAL AND PROFESSIONAL LIFE WAS ON THE LINE IF ANYTHING HAPPENED TO THOSE SPECIAL PROSECUTION FORCES.''

ANOTHER SPECIAL PROSECUTOR WAS NAMED THREE WEEKS LATER.

IN THE FIRST SIGN OF WIDELY PREDICTED FIREWORKS THAT HAD FAILED TO MATERIALIZE IN YESTERDAY'S HEARING; SEN. JOSEPH BIDEN INTERRUPTED METZENBAUM TO ASK SOME QUESTIONS OF HIS OWN. HOWEVER; WHEN ANOTHER DEMOCRATIC SENATOR ALSO JUMPED IN TO QUIZ BORK; THE COMMITTEE'S RANKING REPUBLICAN; STROM THURMOND; OBJECTED AND DEMANDED THAT EACH SENATOR KEEP TO HIS TURN.

BUT BORK; MAINTAINING HIS CALM; SAID HE WAS MORE THAN WILLING TO DISCUSS HIS WATERGATE ROLE IN DETAIL.

''THE FACT IS NONE OF US THOUGHT THAT REGULATION WAS A BAR TO A PRESIDENTIAL ORDER. NONE OF US THOUGHT THAT. HE ASSUMED THE PRESIDENT COULD DO THIS OVER AN ATTORNEY GENERAL'S REGULATION. RIGHT OR WRONG. THAT'S WHAT WE THOUGHT;'' HE SAID.

HE ADDED THAT ''IT HIT ME LIKE A TON OF BRICKS'' DURING A MEETING THAT SATURDAY WITH RICHARDSON AND RUCKELSHAUS THAT HE WAS THIRD IN LINE AND THE TASK TO FIRE COX MAY FALL TO HIM.

HE SAID HE TOLD HIS TWO SUPERIORS HE WAS NOT BOUND BY ANY PROMISES TO THE SENATE BUT; IF HE DID ISSUE THE ORDER TO FIRE COX; WOULD RESIGN IMMEDIATELY AFTERWARDS. HE SAID THEY PERSUADED HIM TO REMAIN ON THE JOB TO ENSURE ''THE CONTINUITY AND THE STABILITY'' IN THE JUSTICE DEPARTMENT.

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TV NEWS REPORT

ABC NIGHTLY NEWS: 9/15/87

SUBJECT: BORK

Now the President's Supreme Court nominee, Judge Robert Bork.

PETER JENNINGS: The Senate Confirmation hearing on Judge Bork actually begins tomorrow. The debate over his nomination has been underway since it was made. It has been a noisy debate so far and it is full of passion because both political conservatives and liberals believe that how Judge Bork might vote as a member of the Supreme Court will make a crucial difference on a significant range of public issues. ABC's Ann Compton is on Capital Hill.

COMPTON: On the eve of Robert Bork's confirmation hearings the public debate stretched from New Hampshire to Chicago to Minneapolis and it has become an expensive debate. One opposition group produced a television commercial on its bottom line argument against the nomination.

TV COMMERCIAL: Robert Bork could have the last word on your rights as citizens, but the Senate has the last word on him. Please urge your senators to vote against the Bork nomination.

COMPTON: Those voices are being heard in Washington. So frequently, in fact, that today Republican Senator Harlem Spector of Pennsylvania had four extra people fielding the calls. Spector is the key Republican swing vote on the Judiciary Committee, and there are two key undecided Democrats, Arizona's Dennis Diconcini and Alabama's Howell Heflin who says the fears that he's hearing from the grass roots are the fears that he'll raise with Bork under questioning.

SEN. HEFLIN: It's largely an individual right fear or loss of individual rights fear as opposed to a desire to have a more conservative court.

COMPTON: When the curtain rises tomorrow former President Gerald Ford will present Bork to the committee. Today President Reagan warned Congress to stick to the issues.

PRESIDENT REAGAN: Too often character assassination has replaced debate in principle here in Washington. Destroy someone's reputation and you don't have to talk about what he stands for. But I hope that Judge Bork's critics would be candid about why they oppose him and not fabricate excuses for attacking him personally.

COMPTON: The Senate Judiciary Committee has no intention of rushing the process, opening statements by the Senators will take

the better part of the day and after two weeks of witnesses Judge Bork may be recalled so he can have the final word.

JENNINGS :Judge Bork is scheduled to make his opening statement to the Senate Committee tomorrow afternoon, ABC news will present live coverage at 2:00 p.m. EST.

NBC NIGHTLY NEWS: 9/15/87

SUBJECT: BORK

TOM BROKAW: President Reagan today gave another ringing endorsement to Robert Bork, his controversial nominee for the U.S. Supreme Court. The President's praise came on the eve of the Senate Judiciary confirmation hearings for Bork which are shaping up as one of the monumental political battles of the 80's. As NBC' s John Dancy reports tonight, when those hearings open tomorrow it will be the Washington equivalent of the heavyweight championship fight.

DEMONSTRATORS: Go after Bork, go after Bork.

DANCY: The political storm brewing around Robert Bork intensified today. Opponents rallied at the federal district court in New York.

DEMONSTRATORS: Are we going to allow the confirmation of a judge who believes that women and blacks are second class citizens?

DANCY: In Washington, President Reagan again today praised Bork as a judge who exercises judicial restraint.

PRESIDENT REAGAN: Judge Bork believes laws should govern our country and if you want them changed, you should convince elected legislatures to change them and not unelected judges.

DANCY: Conservatives have hired the new right fund raising organization of Richard Vigory to launch a huge direct-mail campaign. It's aimed at putting pressure on undecided senators who must vote on Bork's nomination. For the moment the campaigning is aimed at three undecided senators on the 14-member Judiciary Committee. Republican Harlem Spector of Pennsylvania and Democrats Howell Heflin of Alabama and Dennis Diconcini of Arizona.

SENATOR DE CONCINI: I have not decided purposely because I think it's most important that I hear the judge.

DANCY: The Bork nomination has become entangled in Presidential politics. Senator Joseph Biden of Delaware, head of the committee which must decide on the nomination and a candidate for president, has been under heavy pressure from liberal groups but Biden insists his opposition to Bork is not political.

SENATOR BIDEN: Where his views would lead this country are in directions that I think are wrong for the country. I think it's a matter of principle.

DANCY: In the end, the fight over Judge Bork will be as much political as a battle over ideology. Political scientist Norman Ornstein says the battle is to see which image of Bork captures the imagination of the country.

ORNSTEIN: If the opponents of Bork are successful at portraying him as somebody who's really on the fringe, who is an ideological zealot, who will turn the existing society in the past 20 years of the Supreme Court completely on its ear, then Bork is not going to make it.

DANCY: So the pressure will be on Bork and his appearance before the Committee. With less than 24 hours before the hearings begin White House and Senate supporters and opponents, everybody agrees, the outcome is still in doubt.

BROKAW: And our special segment tonight, the Bork record. It provides his supporters and his detractors with an enormous amount of material on the Bork philosophy, for he has been offering judicial and personal opinions on a wide variety of issues for a long time now. NBC law correspondent Carl Stern tonight, on the Bork record.

STERN: What's all the fuss about Robert Bork? Why has he set off debates all over the country?

KATE MICHELMAN (National Abortion Rights Action League): His rigid judicial ideology will turn back the clock on decades of legal protection for individual rights.

DAN CASEY (American Conservative Union): He is probably the greatest legal scholar of our time, probably the most qualified nominee within the last 50 years.

RICKY SEIDMAN (People for the American Way): Imagine a seesaw. Judge Bork's nomination is like dropping a boulder on the one end of it.

STERN: Since the Senate unanimously confirmed Antino Scalia for the Supreme Court promoted William Rehnquist to Chief Justice, both men as conservative as Bork, why the hostility to Bork? The difference is that Bork has spent a quarter century sharply attacking fundamental Supreme Court doctrine long after others stopped arguing about it. Take for example, the right to privacy.

STEPHEN MACEDO (Harvard University): Judge Bork's view is that there is no right to privacy because it is not stated explicitly in the Constitution. So, on his reading of the founding documents, that right would have to be eliminated altogether.

STERN: In a landmark decision 22 years ago involving the sale of contraceptives, the Supreme Court said a right to privacy protected married people from being prosecuted for obtaining contraceptives. Bork vehemently insists the Court was wrong. That new concept of marital privacy was followed two years later by a ruling that interracial marriage could not be forbidden. Bork thinks that was wrong. And then came the 1973 abortion decision involving Norma McCorvey, then identified only as Jane Roe. The Court ruled that abortion is a private choice, at least in early pregnancy, that government cannot prohibit. Bork called the decision wholly unjustified. McCorvey has now come forward to lead opposition to Bork.

MCCORVEY: The nomination of Robert Bork to the Supreme Court represents a threat to our personal privacy. It is an insult to every woman who has had to face the decision about an unwanted pregnancy and especially to everyone who had to seek a back-alley abortion.

STERN: As a judge, Bork ruled that homosexuals could be thrown out of the Navy. He angered women's groups by refusing to consider sexual harassment of this bank employee as unlawful sex discrimination. The Supreme Court later said it was 9-0. Black groups were offended that Bork criticized high court rulings that struck down poll taxes and literacy tests and that knocked out restrictive deeds that barred blacks from white neighborhoods. His defenders say that those are the kinds of social issues that Bork wisely would have the courts stay out of.

PATRICK MCGUIGAN (Institute for Government and Politics): I see the prospect over a number of years for Bork to gradually make the Court less intrusive into the other two branches of government and less intrusive into the political process as a whole.

STERN: Bork became famous in 1973 as the Justice Department official who fired Watergate prosecutor Archibald Cox after the Attorney General and his Deputy refused White House orders to do so.

BORK: My position is that I had the lawful right to discharge Mr. Cox pursuant to a Presidential directive.

STERN: A judge later ruled that Bork's firing of Cox violated the laws under which Cox was hired. But Bork is given credit for keeping Cox's staff which ultimately led to the resignation of President Nixon. It was President Reagan who made Bork an Appeals Court Judge five years ago. Bork's positions have not always proved predictable. He pleased liberals by urging that the press be given more freedom from huge liable suits and he opposed conservative efforts in Congress to strip the Supreme Court of the power to hear abortion and busing cases.

Nonetheless, his opponents say Bork's mind is made up on most issues.

WILLIAM SCHULTZ (Public Citizen Litigation Group): He consistently votes against public interest groups and individuals and labor interests and he consistently votes in favor of business.

STERN: The Senate will concentrate on issues such as abortion and affirmative action where Bork's vote could tip the balance. Bork once said that no one around him ever agreed with him but he'll need only four people to agree with him on the Supreme Court to dramatically change the law.
CBS EVENING NEWS: 9/15/87

SUBJECT: BORK

RATHER: The pressure from those who either want to push or scuttle the Bork for the Court nomination intensified today. On the eve of Senate confirmation hearings, President Reagan pulled out the stops. He again portrayed Bork as a judicial moderate, a portrayal some Bork supporters don't buy. Mr. Reagan tried to portray some of Bork's opponents as out of bounds.

PRESIDENT REAGAN: Too often character assassination has replaced debate in principle here in Washington. Destroy someone's reputation and you don't have to talk about what he stands for. Well, I hope that Judge Bork's critics will be candid about why they oppose him and not fabricate excuses for attacking him personally. That way we can have a full and open debate on an important Constitutional principle. And when the votes are counted, America will win.

RATHER: For all the debate about Bork from President Reagan on down, the CBS News New York Times poll out tonight indicates this. Bork is unknown to almost two-thirds of the public. Among those who do have an opinion, that opinion is divided about whether he should be confirmed. By three to one, those polls say they trust the Senate more than President Reagan when it comes to deciding who should sit on the Court. A majority said a nominee's judicial view should be considered by the Senate. Our poll was taken by telephone September 9 and 10 among 839 adults. Now, beyond all the rhetoric, just what is Robert Borks' judicial record? Eric Engburg looks tonight at Bork.

ENBURG: The popularity of Robert Bork among conservatives rests on his judicial restraint. The belief the Court should stay out of political controversies.

DANIEL POPEO (Captial Legal Foundation): Robert Bork does not see the Federal Court system as a vehicle for social and political change. It's that simple.

ENGBURG: The paradox of Robert Bork is that he argues his view of the Constitution so forcefully he plunges into political thickets.

KURLIN: I think he's a constitutional radical.

ENBURG: Bork opponent and constitutional scholar Philip Kurlin.

KURLIN: His attitude depends very largely on the result which he wants to reach.

ENBURG: Bork, in his five years on the bench, has narrowly defined a host of legal rights to restrict who gets their day in court. Case in point. When safety problems at the Pilgrim Nuclear Power Plant brought on a federal investigation, Massachusetts officials concerned about towns near the plant asked to participate in the inquiry. Bork said no.

JO ANN SHOTWELL (Former Assistant AG, Massachusetts): In the Atomic Energy Act, Congress gave the states the right to participate in matters involving serious questions of safety and it's that right which Judge Bork took away from us in this case.

ENGBURG: Case in point. American Cyanamid Company told women employees at one plant that the threat to unborns from lead poisoning meant they would have to submit to sterilization or loose their jobs. The workers sued. Bork ruled the sterilization plan broke no law. Free market advocates applauded.

POPEO: That was a matter between the employee -- technically a contractual matter between an employee and an employer -- and if you don't want to work for the employer, you don't have to.

ENGBURG: While Bork nearly always favors business in contested cases, he tends to side with government when the challenge comes from citizens. He has ruled against homosexuals fired from the military, against the homeless and against the handicapped. Within the government, Bork's opinions favor broad power for the executive, even when it collides with the co-equal Congress. Case in point. When congressmen sued to overturn an expansion of the President's veto power, Bork concluded they had no right to sue. A judicial philosophy pleasing to the administration.

RICHARD WILLARD: I think it's judicial restraint that the court should only be involved when it's absolutely necessary and when they have a clear mandate.

HERMAN SCHWARTZ (Constitutional Law Professor): But his critics say his record says just the opposite.

ENGBURG: He hasn't hesitated to condemn those kinds of things that seem to him to get in the way of what he wants and if that requires judicial activism he'll be there.

ENGBURG: In the end, Borks confirmation is likely to hinge on whether Senators conclude he has an open mind or a closed agenda.

HUMAN EVENTS
WK OF SEPT. 19, 1987

High Stakes Involved in Bork Confirmation Hearings

As the Senate Judiciary Committee belatedly takes up the nomination of Robert H. Bork to the Supreme Court this week, casual observers may be more than a little confused by the conflicting images of Bork being painted by his supporters and antagonists.

As portrayed by his foes on the political left—including the American Civil Liberties Union, the National Organization for Women, the AFL-CIO and the NAACP — Bork is a "right-wing radical" whose extreme legal views place him completely outside the judicial mainstream. In their eagerness to correct this smear, some Administration lobbyists have portrayed Bork as a moderate who frequently votes with some of his most liberal colleagues on the D.C. Circuit.

Neither caricature fits Bork. Rather, he is a thoughtful and brilliant legal scholar whose judicial philosophy is well summed up in his belief — consistently emphasized throughout his distinguished career as a professor at Yale Law School, Solicitor General of the United States, a lawyer in private practice, and most recently as a federal appeals judge — that judges should limit themselves to interpreting the law rather than imposing their own preconceived preferences about what the law or public policy should be.

By a 10-to-4 vote (one "not opposed") of its 15-member Standing Committee on the Federal Judiciary, the American Bar Association last week awarded Bork a rating of "well qualified." This is the ABA's highest rating for Supreme Court nominees and is "reserved for those who meet the highest standards of professional competence, judicial temperament and integrity."

Yet for all the heated discussion about the validity of Bork's "strict constructionist" or "interpretivist" viewpoint, the vicious effort now being waged to prevent his confirmation has little to do with fine points of legal theory. Nor, despite their protests to the contrary, are his foes losing sleep worrying about what Bork did or did not say in connection with the "Saturday Night Massacre," which is the liberals' exaggerated term for the firing of Kennedy liberal Archibald Cox as Watergate special prosecutor back in 1973.

President Reagan announced his decision to nominate Judge Bork for the Supreme Court at a special news conference held at the White House on June 1.

What is really at stake in this war — hence the take-no-prisoners intensity on both sides — is the future direction of the Supreme Court on many of the most hotly contested issues of the last three decades.

Among them:

Abortion — Bork has made it quite clear that he thinks the High Court's *Roe* v. *Wade* decision striking down anti-abortion laws in the 50 states was an egregious example of judicial activism. "I am convinced, as I think most legal scholars are," Bork testified before a Senate committee in 1981, "that *Roe* v. *Wade* is itself an unconstitutional decision, a serious and wholly unjustifiable judicial usurpation of state legislative authority."

Though Bork has never explicitly said he would vote to overturn *Roe*, most observers believe he would do so, given his consistent denunciations of the decision. At the very least, he is almost certain to uphold abortion curbs passed by the states that the High Court has nullified in the past. Chief Justice William Rehnquist and Justice Byron White have opposed *Roe* from the beginning, and Antonin Scalia is believed to share their view. That would make Sandra Day O'Connor, who has expressed frequent doubts about *Roe* and indicated that she would favor additional restrictions on abortion, the swing vote. A decision could be handed down in the coming term, which begins next month, as the Court has agreed to hear a challenge to an Illinois statute that restricts abortions for minors.

Privacy — Though there is certainly no provision in the Constitution guaranteeing a right to abortion, the court majority in *Roe* claimed to find a "right to privacy" in the document and then claimed to see the right to abortion

(Continued on page 7)

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as an extension of the "privacy doctrine."

However, Bork has questioned the whole notion of a "so-called right to privacy," which originated in the High Court's *Griswold* v. *Connecticut* ruling. "I don't think there is a supportable method of constitutional reasoning underlying the *Griswold* decision," Bork once said.

"The majority opinion merely notes that there are a lot of guarantees in the Constitution which could be viewed as guarantees of aspects of privacy. As a matter of fact, that's a misnomer because a lot of them guarantee public action. But the opinion then says, since we have all these Amendments which can be viewed as guaranteeing particular rights of privacy, we can generalize and create a general right of privacy.... Well, as I said years ago, I thought the privacy notion had little to do with the intent of the framers."

Consistent with this view, Bork and two colleagues ruled 3-0 in a 1984 case that homosexuals have no constitutional "right to privacy" in their sexual activities and that they can be dismissed from the Navy if discovered. In his opinion in that case, Bork wrote that individuals have "no constitutional right to engage in homosexual conduct and that, as judges, we have no warrant to create one."

"If the revolution in sexual mores...is in fact ever to arrive," Bork emphasized, "we think it must arrive through the moral choices of the people and their elected representatives, not through the ukase [order] of this court."

Criminal Law — Bork believes that some courts have taken an overly expansive view of the 4th Amendment's protection of suspects from unreasonable search and seizure. Regarding the so-called exclusionary rule, under which courts refuse to admit in evidence information that was acquired unconstitutionally, Bork has said that such a rule may be useful to the extent it deters unconstitutional police behavior, though even this is open to doubt.

But Bork sees no validity whatever to the notion advanced by some judicial activists that the exclusionary rule should be justified if for no other reason than that "courts shouldn't soil their hands by allowing in unconstitutionally acquired evidence." In his 1985 opinion in the case of *U.S.* v. *Mount*, Bork wrote:

"Where no deterrence of unconstitutional police behavior is possible, a decision to exclude probative evidence with the result that a criminal goes free to prey upon the public should shock the judicial conscience even more than admitting the evidence."

Capital Punishment — With regard to capital punishment, Bork told an interviewer in 1985 that, "for an interpretivist, the issue is almost concluded by the fact that the death penalty is specifically referred to, and assumed to be an available penalty, in the Constitution itself.... It is a little hard to understand how a penalty that the framers explicitly assumed to be available can somehow become unavailable because of the very Constitution the framers wrote."

In recognition of Bork's tough stance toward crime, his nomination is getting vigorous support from law enforcement organizations across the country, including the Fraternal Order of Police.

Campaign Spending — In Bork's view, existing campaign finance law, which places a $1,000 limit on contributions to congressional candidates, is a violation of the 1st Amendment's guarantee of free expression. The donation ceiling, he explains, "directly inhibits the contributor's ability to have his political opinions expressed."

Antitrust — Concerning business and antitrust matters, Bork believes judges should look at the individual case and apply the law as it was intended by Congress. But he has indicated that, as a general matter, they should be aware that there "is just so much regulation we can handle as a society and do so effectively. We must not overregulate people so that they begin to lose their vigor and their innovativeness and so forth."

Such thinking is in sharp contrast to the liberal "judges know best" mentality that has frequently marked major decisions of the Supreme Court over the past three decades, and, given the existing constellation of views among the other justices, would undoubtedly tip the Court in a more conservative direction.

But the mud and vitriol being hurled at Bork by his left-wing opponents is no mere defensive maneuver on their part. By delaying and, if possible, defeating the Bork nomination, several of the radical groups now mobilized against him are hoping to win new victories in the High Court for such "progressive" causes as taxpayer-funded abortions, "gay rights," quotas based on race and sex, and the total secularization of American public life.

In its August 3 issue, *Legal Times* reported that the American Civil Liberties Union, which is mounting a massive effort against Bork, can hardly contain its glee at the prospect that the High Court will be a member short for at least part of its coming fall term. Reason: the ACLU is a "direct participant in six cases the Court has already agreed to hear this fall—an unusually high number including two that will be argued the first week of the term."

In five of the six cases, moreover, it was the other side that appealed to the Supreme Court, which means that a 4-to-4 tie would give the victory to the ACLU.

Among the cases the ACLU hopes to win by keeping Bork off the High Court are *Reagan* v. *Abourezk*, challenging the denial of U.S. visas for foreign Communists; *Karcher* v. *May*, opposing New Jersey's law mandating a moment-of-silence in public schools; *Webster* v. *Doe*, questioning the right of the Central Intelligence Agency to dismiss a "gay" employee; *Hartigan* v. *Zbaraz*, challenging Illinois' law restricting abortions for minors; and *McKelvey* v. *Turnage*, opposing the Veterans Administration's refusal of educational benefits because of alcoholism.

Meanwhile, *Village Voice* reporter Maria Laurino, in an article in the September issue of *Ms.* magazine, urges Bork's rejection precisely because of his judicial philosophy, which emphasizes restraint by the courts. "Bork believes that the legislature, not the court, should decide on moral issues, such as abortion," Laurino complains.

And she quotes Rhonda Copelon, a professor at the City University of New York Law School, who laments Bork's belief that judges should interpret

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the Constitution, rather than read new meanings into it as their own whim dictates.

"Bork's philosophy of original intent precludes recognition of rights not contemplated by the framers of the Constitution. But the Founding Fathers were white men in a quintessentially patriarchal society who wrote slavery into the Constitution and women out of it.

"According to Bork, the Civil War amendments [Amendments XIII–XV] deal with race discrimination but provide no basis for women's or lesbian/gay rights," Copelon is quoted as saying.

In her *Ms.* article, Laurino notes pointedly that the confirmation of Supreme Court justices "has been known to take close to two years." The battle, she adds, "is much larger than Bork."

"If a Reagan nominee is rejected, there is a chance that a new President could appoint a judge even more progressive than Powell and we could begin to win back some things we already lost, like gay rights and Medicaid abortion."

Toward this end, Laurino urges *Ms*'s feminist and lesbian readers to "write their senators and members of the Senate Judiciary Committee, especially the two Democratic presidential candidates —Senators Joseph Biden, who chairs the committee, and Paul Simon. (Write to members at the U.S. Senate, Washington, D.C. 20510.)

"In addition," she writes, "women should contact their local NARAL [National Abortion Rights Action League], National Organization for Women, and National Women's Political Caucus chapters."

With so much on the line, conservatives, both men and women, had better be writing their senators as well. While few doubt that Bork can muster the simple majority of votes needed for confirmation, the anti-Bork shock troops, led by Senators Ted Kennedy (D.-Mass.) and Howard Metzenbaum (D.-Ohio), are gearing up for a filibuster. In order to get a straight up-or-down vote on the nomination, therefore, Bork's supporters will first have to amass the 60 votes needed for cloture, and that will be more difficult. (For a list of senators believed to be undecided on Bork, see box.)

NEW YORK POST
9-16-87

The Kennedy vs. Bork Show:

YESTERDAY'S first-day session of confirmation hearings for Robert Bork as America's 104th Supreme Court Justice was more didactic than dramatic, though there were moments. Most of those moments were provided by Sen. Edward Kennedy, and only a few were broadcast live by CBS, NBC and ABC.

All three networks, in addition to CNN and PBS, were there shortly after 5 p.m. when Kennedy began questioning Bork — but the local affiliates didn't all follow suit. Here, while its competitors stayed with live coverage of the hearings, ABC-owned Channel 7 went with its own newscast as scheduled.

Channel 7 viewers thus were deprived of the ideological showdown between Kennedy and Bork ("Your clock of civil rights," Kennedy charged, "seems to have stopped in 1954"), just as viewers of anything but CNN or PBS were deprived of the entire morning session.

If you watched only Ch. 7's coverage yesterday, you didn't hear Kennedy at all — not in the afternoon, when he pressed Bork on his civil rights record, and not in the morning, when Kennedy's opening statement laid out his objections to Bork's nomination. In split-screen, Kennedy was on the left, Bork on the right — just as it should be.

The afternoon session was Kennedy vs. Bork, and was every bit as mesmerizing as the

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Showdown at hearings

Continued from Page 87

best days of the Iran-contra hearings (and no less important). For Ch. 7 to slide away from ABC's coverage to present its own news would be like cutting away from a rescheduled World Series game to present its scheduled sports show.

The morning show, too, was newsworthy. It was less Kennedy vs. Bork than Griswold vs. Connecticut — and other court decisions that formed the basis of the day's laurels and debates. CBS' Fred Graham joked later that "Something happens to fireworks when you put them in a law library," and much of the talk sounded as if Bork, a former professor, was a student taking the country's toughest oral exam.

Which, perhaps, is a fair way of putting it.

CNN, CBS and NBC helped viewers through the thornier points of law by superimposing visual information about specific cases as they were mentioned — the same visual aids employed so successfully by CNN and ABC, specifically, during the Iran-contra hearings.

Oddly, ABC was less aggressive in providing complementary visual information this time — although, with the hearings continuing for a while, there's time to amend its battle plan.

These hearings, in addition to focusing on the record and beliefs of Bork, also provide closer looks at presidential hopefuls Joseph Biden (who serves as chairman) and Paul Simon. Both senators gave opening speeches yesterday morning, and there were other moments well worth catching yesterday.

My favorites: Biden telling Gerald Ford: "Most of us envy you — not only that you have been President, but that you seem to be flourishing in the status of a former president as well." And Biden again, mistakenly (and sheepishly) referring to Bork as "the administration."

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NEW YORK DAILY NEWS
9/16/87

As bench-pressers, they're a puny lot

By JOSEPH VOLZ
News Washington Bureau

WASHINGTON—Judge Robert Bork could have been forgiven yesterday if at times he thought he had wandered into the wrong hearing room.

After more than two months of increasingly strident lobbying, both for and against his nomination to the Supreme Court, the opening day's hearing before the Senate Judiciary Committee was fairly mild.

By the end of the first hours of questioning, few thought that Bork's opponents had laid a glove on the easygoing judge, a former law professor who heard himself praised by friend and foe alike for his encyclopedic knowledge of the law.

Judiciary Committee Chairman Joseph Biden (D-Del.), a Democratic presidential hopeful all too aware that his own performance would be judged as well as Bork's, went out of his way to assure the nominee of fair treatment. Waving his gavel, Biden told Bork: "I guarantee you (that) with this little mallet you do have rights in this room and they will be protected."

And there was many a merry quip about the presidential ambitions of some senators, Biden and Sen. Paul Simon (D-Ill.), a Judiciary Committee member, and Senate Republican Leader Bob Dole (Kan.), who introduced Bork.

"We miss you here, Mr. President," Biden told former President Gerald Ford, who introduced and endorsed Bork, "and quite frankly, some of us envy you."

For Bork, this may be the calm before the storm.

Leading the charge against Bork was Sen. Edward Kennedy (D-Mass.), who said that the judge "falls short of what Americans demand of a man or woman as a justice on the Supreme Court." But despite the strong rhetoric of his opening statement, Kennedy's delivery seemed muted.

KANSAS CITY TIMES
9/13/87

Strong advocacy of judicial restraint weighs in his favor

By John Danforth
U.S. Senate-Missouri Republican

I look forward to a vigorous debate in the Senate on the nomination of Judge Robert Bork to the Supreme Court. The debate will be about basic philosophy—whether we want an activist Supreme Court or a court which practices judical restraint.

In recent weeks, the confirmation of Judge Bork has been endorsed by a sitting member of the court, Justice John Paul Stevens, and by the former chief justice, Warren Burger, who termed him the best-qualified nominee to be presented to the Senate in 50 years. Lloyd Cutler, one of the nation's most distinguished attorneys and former counsel to President Carter, has compared Judge Bork with Oliver Wendell Holmes, Louis Brandeis, Felix Frankfurter, Potter Stewart and Lewis Powell as one of a few jurists who rigorously subordinate their personal views to a neutral interpretation of the law. Judge Bork's qualifications and character were established even before these impressive endorsements.

Thus, barring wholly unforeseen revelations, the issue before the Senate will be judical philosophy. The debate will be about whether the court should interpret the law written by elected representatives of the people, or, instead, should invent novel or representatives of the people, or instead, should invent novel or strained interpretations of clear language in order to replace the policies of legislatures with its own.

Because the Supreme Court has become so important to our people and our communities, I look forward to this debate. Because Judge Bork has been a strong advocate of judicial restraint, I intend to support his nomination with enthusiam.

How one feels about the power and reach of the Supreme Court is, of course, a political issue. Walter Mondale correctly stressed this in 1984 when he insisted that presidential campaigns are about who will appoint justices to the Supreme Court. Clearly, judicial philosophy is on the mind of a president when he sends a name to the Senate, and judicial philosophy is on the mind of each senator when he votes on a Supreme Court nominee.

Of the eight justices now serving on the Supreme Court, three will be over the age of 80 during the next presidential term. In all probability, the next president and the next Senate will determine the make-up of the court for decades to come. Few presidential decisions are more important to the daily lives of citizens than Supreme Court nominations. Few Senate votes are more important to local communitites than Supreme Court confirmations. Ultimately the issue of judicial philosophy is one for the people to consider and for the people to decide at the polls. The hearings and the debate on the Bork nomination will put the question squarely to the American people: What do *you* think about the power and reach of the Supreme Court?

It is fitting that the debate on basic judicial philosophy should coincide with the bicentennial of the Constitution, for the great constitutional issue was the limitations and locus of governmental power. Precisely the same issue will be before the Senate when we vote on the nomination of Judge Bork. The question will be the extent to which legislatures can define and enforce community values versus the readiness of the court to set aside legislative action as unconsitutional.

Since the early years of our republic, the Congress and state legislatures have been the implementors of community values, but they have been limited in their exercise of power by the Constitution. The question is whether the Supreme Court strictly construes constitutional language, thereby allowing broad discretion to legislatures, or gives the Constitution an expansive interpretation, thereby contracting legislative discretion in favor of judicial power.

As Judge Bork puts the problem: "The courts must be energetic to protect the rights of individuals, but they must also be

See Danforth, pg. 6K, col. 5

President Reagan's nomination of Judge Robert H. Bork to the Supreme Court has stirred much public debate, which will intensify as the Senate Judiciary Committee begins confirmation hearings Tuesday. To show both sides of the controversy, *The Kansas City Star* asked Sen. John Danforth, Missouri Republican, who supports confirmation, and Sen. Joseph R. Biden Jr., Delaware Democrat and chairman of the Judiciary Committee, who opposes it, to discuss their views on this issue.

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scrupulous not to deny the majority's legitimate right to govern."

For example, the court must continue to safeguard important individual rights such as the right to racial equality protected by cases like Brown vs. Board of Education; however, the court should not engage in broad social engineering which encroaches upon the domain of the legislature.

Judge Bork forcefully comes down on the side of strict construction. He believes the Supreme Court should heed the plain meaning of constitutional language. In Judge Bork's words: "When the judiciary imposes upon democracy limits not to be found in the Constitution, it

"... a judge's personal opinions on questions such as abortion should be irrelevant."

—Sen. John Danforth

deprives Americans of a right that is found there, the right to make the laws to govern themselves. As courts intervene more frequently to set aside majoritarian outcomes, they teach the lesson that democratic processes are suspect, essentially unprincipled and untrustworthy."

Some believe a nominee's personal opinions on a range of social issues should be ascertained before he or she is placed on the Supreme Court. My own view is that a judge's personal opinions on questions such as abortion should be irrelevant. Supreme Court justices should not be in the business of supplanting the policies of Congress or of state legislatures with their own political or social views. Public policy should be made by those who are elected by the people, report to the people and can be removed by the people. It should not be made by men and women who have been elected by no one, who are isolated in courthouses and who serve for life. The Supreme Court should be in the business of interpreting the law written by elected representatives. It should not be in the business of creating new law out of whole cloth.

Since 1981, I have had the privilege of recommending seven persons to President Reagan for nomination to the United States District Court. I have never asked any candidate's personal opinion on any political or social issue. I have asked each person I have recommended to take a position on the relative roles of the judicial and legislative branches of government. I do not want a judge who sees his role as an opportunity to impose his own personal opinions on the public, even when I agree with those opinions.

To ideologues of the left or right, it is tempting to select an activist judiciary which will be ready to shove unpopular social policies down the throats of an unwilling public. That is the elitist position which is repugnant to the democratic tradition of our country. The Bork nomination is about democracy versus elitism. It is about philosophy of the judiciary and about philosophy of government. It is about fundamental questions which will be debated before the nation in this bicentennial year of our Constitution. Those fundamental questions will be voted on first in the United States Senate, and then by the people themselves.

BALTIMORE SUN
9/16/87

THEO LIPPMAN JR.

MORE PEOPLE probably have an opinion about Robert Bork today than will have a year from now, whether he gets on the Supreme Court or not.

I base this prediction on a poll recently taken for the Associated Press and Media General newspapers. One question was, "Do you have a favorable opinion about [Bork], an unfavorable opinion, or don't you know enough about him at this time to have an opinion?"

Only 30 percent had an opinion. (Favorable, 17, unfavorable, 13.) But relatively speaking, 30 percent's a lot. The pollsters also asked the same set of questions about each of the eight sitting Supreme Court justices. Six justices were less well known than Bork.

William Brennan has been on the court 30 years. Only 21 percent had an opinion on him (19-2 favorable).

Byron White, 25 years a justice, generated an opinion from only 19 percent (16-3 favorable).

Thurgood Marshall, 20 years, 27 percent (23-4 favorable).

Harry Blackmun, 17 years, 20 percent (17-3 favorable).

William Rehnquist, 16 years, 32 percent (23-9 favorable).

John Paul Stevens, 12 years, 15 percent (13-2 favorable).

Sandra O'Connor, six years, 38 percent (34-4 favorable).

Antonin Scalia, one year, 22 percent (17-5 favorable).

Some of the people who said they knew Rehnquist probably didn't, but felt they ought to because the pollsters identified him as "chief justice." I suspect that Sandra O'Connor and Thurgood Marshall are better known than most of their colleagues not because of their jurisprudence but because of their symbolism. She is the only woman ever to serve on the court, and he the only black.

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The focus of the Bork debate has been on whether he would tip the court's balance to the right. There's another "balance" issue. He would help tip it to western law schools.

A disproportionate number of Supreme Court justices in modern times have come from the Ivy League law schools — 20 of 42 in this century. Of the present eight justices, three went to Harvard Law (Blackmun, Brennan, Scalia) and one to Yale (White).

But the West and Midwest are asserting themselves. There are two Stanford Law graduates on the present court (Rehnquist, O'Connor). One justice is a Northwestern man (Stevens). And Bork's law school is the University of Chicago.

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The law school one *doesn't* attend can lead to the Supreme Court. Marshall reminisced recently, "They wouldn't let me go to the [University of Maryland] law school because I was a Negro, and all through law school [at Howard] I decided I'd make them pay for it, and so when I got out and passed the bar, I proceeded to make them pay for it."

He did that by becoming the nation's leading black civil rights attorney. His courtroom successes won him his appointment.

BALTIMORE SUN
9/14/87

What's At Stake in Bork Hearings ?

Nancy Ohanian

By Carl T. Rowan

Washington.

AS PREDICTED, the Senate hearings to determine whether Judge Robert H. Bork should get a seat on the U.S. Supreme Court will run from controversial to downright nasty. Political partisanship and conflicts of ideology will run through the hearings like a muddy river.

But do not swallow the line that such hearings are "unprecedented" or simply a "witch hunt" carried out by a bunch of liberals. Some of the people fighting hardest to get Mr. Bork confirmed have themselves used political and ideological tests – and the filibuster – to block court nominees they did not like.

When Lyndon B. Johnson nominated "liberal" Abe Fortas to become chief justice, Sen. Strom Thurmond (R-S.C.) told senators: "To contend that we must merely satisfy ourselves that Justice Fortas is a good lawyer and a man of good character is to hold to a very narrow view of the role of the Senate, a view which neither the Constitution itself nor history and precedent have prescribed."

Clearly, this Senate is not going to rubber-stamp the Bork nomination simply because he has taught law, has other academic qualifications and is not guilty of moral turpitude. More is at stake in the Bork nomination than was the case with Mr. Fortas, which is why Mr. Bork is looked at with suspicion, even fear, by millions of Americans.

The questions and answers go beyond ideology, to rights and issues that are vital to every American's life.

Some conservative Southerners of strong religious devotion want their senators to determine whether Mr. Bork is "an agnostic."

Millions of women are asking whether this appeals court jurist believes they have any rights to make reproductive decisions under the Constitution. Does Mr. Bork really think the state is empowered to tell a woman she must carry a baby to term, or tell a couple they may not (or must) use contraceptives?

Many blacks are eager to learn whether Mr. Bork still believes that it is unconstitutional to tell the owner of a restaurant he cannot refuse to accept minority customers. Blacks, like millions of other Americans, want to know whether Mr. Bork ever saw a civil rights law he liked and would approve.

Newspaper and TV people, university scholars, book authors and others are, and should be, shaken by Mr. Bork's 1979 comment that in saying "offensive" language may be constitutionally protected, Justice Oliver Wendell Holmes showed "a strange solicitude for subversive speech." Mr. Bork has never come across as a great friend of a free press.

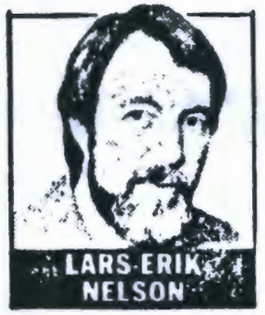
Other Americans fear Mr. Bork has a warped and dangerously restrictive view of how much power the Supreme Court should have to interpret things like "due process of law" and the rights to privacy.

Rights and issues vital to every American are at stake in this hearing, so this is no time for senators to ask perfunctory questions and then cave in before White House demands for confirmation.

If "the real Bork" turns out to be anything like the one who has been writing and talking all these years, the Senate must have the guts to vote him down.

NEW YORK DAILY NEWS
9/10/87

About that bad taste of grilled Bork



Judge Bork, did you ever drive a woman off a bridge? Did you ever cheat on your college Spanish test? Did you ever plagiarize a speech from a British Socialist candidate for prime minister?

Robert Bork went before the Senate Judiciary Committee yesterday to have his integrity scrutinized by Democratic Sens. Edward Kennedy and Joseph Biden, among others. They did not ask the above questions.

I did, muttering to myself.

Kennedy recalled an article that Bork wrote in 1963, denouncing court decisions demanding desegregation. This article is six years older than Kennedy's accident at Chappaquiddick. If we are to have long memories, let them not be selective.

Kennedy accused Bork of being insensitive to racial discrimination because he has written academic articles questioning the reasoning of civil rights legislation. Kennedy then chatted amiably with Democratic Senate Majority Leader Robert Byrd, a former member of the Ku Klux Klan who filibustered against the Civil Rights Act of 1964.

Kennedy also charged that Bork regards women as second-class citizens. Kennedy has spent much of his own adult life regarding women as first-class decorations. Who is he to lead this indignant attack?

The Republicans were no better. Sen. Orrin Hatch of Utah praised Bork on the extraordinary grounds that when Bork fired Watergate prosecutor Archibald Cox in 1973, "you preserved the investigation (and) the President was later forced to resign and several others were prosecuted." Hatch would have us believe he is voting for Bork not because Bork will be his ideological soul buddy on the Supreme Court but because Bork helped to force Richard Nixon out of office. Unbelievable.

The Republican line was that President Reagan had nominated Bork only because he would strictly and neutrally uphold the law, not substituting his own judgment for the majority will of the Congress or state legislatures.

This is a hollow argument from an administration that has defied the War Powers Act by sending the U.S. Navy into the Persian Gulf. The law, passed by a majority of both Houses of Congress, is clear; Reagan is ignoring it. He has substituted his own will for the will of the Congress. He says the Senate should approve Bork because he would not do precisely what he is doing himself—preempt the law.

Previously, this "law-and-order" White House shipped weapons to Iran in violation of the Arms Export Control Act, the Omnibus Diplomatic Security and Anti-Terrorism Act, the Export Administration Act and the National Security Act. It didn't like those laws so it simply ignored them. That was then. Today it is for strict enforcement of the law.

Bork sat at the center of this hypocrisy and hysteria yesterday, looking like exactly what he was: an uncomfortable law professor being held to account for vigorously expressing his thoughts over the past quarter century.

His views were formulated in an ivory tower. They are more rigid, he said yesterday, than the decisions he would make in the flesh-and-blood cases he might encounter on the Supreme Court. That's a risk the nation may have to take, for I believe Bork will be confirmed.

IF LIBERAL Democrats do not like this nomination, they know the solution. They can construct a program that appeals to the majority of this country, run a competent candidate for President, win an election, and nominate their own judges to the Supreme Court. This would be more effective and satisfying than continually losing elections and complaining about the consequences.

NEW YORK POST 9/16/87

Battle over privacy & civil rights

By DEBORAH ORIN
Post Correspondent

WASHINGTON — The opening round of Supreme Court nominee Robert Bork's confirmation hearings yesterday turned into a direct confrontation between Sen. Edward Kennedy and Bork.

"I don't think you have to be a law school professor to know about simple justice," Kennedy said as he challenged Bork's commitment to civil rights and the individual's right to privacy.

Bork retorted that the legal basis for the Supreme Court decision allowing abortion — the concept of a constitutional right to privacy — is meaningless.

"Privacy to do what, senator?" Bork asked. "Privacy to use cocaine in private? Privacy to fix prices in hotel rooms?"

Bork left open the possibility that he might find another legal basis for abortion if he is confirmed to the Supreme Court and is asked to rule on an abortion case.

Kennedy also contended that Bork, at the height of the civil rights movement, had attacked a basic desegregation principle as "a principle of unsurpassed ugliness," and favored poll taxes.

Bork retorted that he now realized he was wrong on the civil rights issue, saying he had made "a not uncommon intellectual mistake."

The Kennedy-Bork showdown was the most dramatic moment in the first day of the hearings, which were haunted by the ghost of Watergate and the early rumblings of the 1988 presidential campaign.

Senate Judiciary Committee chairman Joseph Biden (D-Del.), a 1988 contender, was surprisingly low-key as he presided, constantly reassuring Bork of his determination that the hearings be fair.

But Biden worked in tandem with Kennedy, in a kind of "good cop, bad cop" interrogation, as they pressed Bork to reaffirm his views on controversial matters, including racial discrimination and a married couple's right to use birth control.

Leading the pro-Bork forces was Sen. Orrin Hatch (R-Utah), who praised Bork and accused critics of serving up "claptrap" and using selective quotations to discredit Bork.

Bork, nominated by President Reagan to replace retiring Supreme Court Justice Lewis Powell, is widely considered the swing vote

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who could turn the court in a more conservative direction.

The Bork battle is seen as a test of Reagan's political strength in the final 16 months of his term.

Sen. Howell Heflin (D-Ala.), regarded as one of the three undecided swing votes who will determine the outcome on the 14-member Judiciary Committee, said he was surprised by Bork's style.

"He's certainly not an Oliver North — there's a little bit of absence of pizzazz," Heflin said.

"I would have thought he'd have been a little better honed in public relations. I don't know whether the average listener understands his answers."

Indeed, much of the hearings involved shadow-boxing on fine legal points, with Bork repeatedly using technical language.

Heflin gave no specific clues to his own thinking, but the two other swing committee members — Sen. Arlen Specter (D-Pa.) and Sen. Dennis DeConcini (D-Ariz.) — both voiced concerns about Bork.

Specter, a former prosecutor, said he wants to know how much of Bork's controversial opinions are "hyperbole" and how much are "established judicial positions . . . as you would vote" on the court.

"I have a lot of questions that will have to be answered to my satisfaction, reasonably so, before I could vote for him," DeConcini said.

Bork, in his opening statement, took pains to say that he would be careful in overturning established Supreme Court rulings and wasn't "itching" to shake things up, as Kennedy charged.

"It is one thing, as a legal theorist, to criticize the reasoning of a prior decision, even to criticize it severely, as I have done," said the bearded nominee.

"It is another and more serious thing altogether for a judge to ignore or overturn a prior decision. That required much careful thought."

The hearings began when former President Ford, in an unprecedented role, introduced Bork to the committee.

Ford defended Bork's role in the Watergate "Saturday Night Massacre," in which he decided to fire special prosecutor Archibald Cox, saying that "history has shown that his performance was in the nation's interest."

NEWSDAY 9/10/87

Bork's Nomination and Respect for the Court

By Jack N. Rakove

THE CENTRAL ISSUE in the debate over the nomination of Judge Robert Bork to Supreme Court involves neither his judicial qualifications nor his part in the "Saturday Night Massacre" of 1973, nor even the depth of his conservatism.

What sets this nomination apart from the appointments of Justices Sandra Day O'Connor and Antonin Scalia is the expectation that Bork's presence will give the conservative bloc on the court a reliable five-vote majority, and that this may lead to changes in such important areas as abortion, affirmative action, and the First Amendment.

By repeatedly calling attention to the "swing" that Bork's appointment will presumably produce, the administration of President Ronald Reagan has effectively forced us to recognize that the court is already a politically divided body.

This perception raises two disquieting — and conflicting — questions.

First, while conceding that presidents and senators will naturally apply political criteria to judicial appointments, do we want the composition of the court to be determined primarily by fine calculations of how a particular appointment will accelerate or brake a train of decisions already taken?

But in the second place, if the justices cannot avoid allowing their political values to influence their judicial philosophies, why should presidents and senators not ask how well a nominee's philosophy accords with their own?

Like other contemporary constitutional dilemmas, this one proves difficult to resolve by invoking the "original intentions" of the framers of the Constitution. If the nomination is simply a political matter, the question boils down to whose political claims prevail — the president's or the senate's.

There is, however, another basis for assessing the purposes underlying the Bork appointment on "originalist" grounds.

The administration and Bork's supporters have candidly acknowledged that they hope that the Bork nomination will secure the Reagan social agenda into the next century. That possibility arises, of course, from the lifetime tenure that federal judges enjoy — the same tenure that has allowed Justices Brennan and Thurgood Marshall to stay on the court principally because they hope to frustrate the president's plans.

But the original purpose of life tenure was to secure judicial independence from all forms of political influence and control — executive, legislative, or popular.

How otherwise could the courts fulfill the duties ascribed to them by James Madison in 1789 when he suggested that independence would enable the courts to "be an impenetrable bulwark against every assumption of power in the legislative or executive" and "to resist every encroachment upon rights expressly stipulated in the Constitution."

It is one thing to concede that political values affect judicial decisions, and another to say that judicial appointments should be based on attempts to manipulate the courts in the interest of pursuing political policies.

If the court comes to be perceived as a highly politicized body, it cannot command the respect the ideal of judicial independence seeks to promote.

If confirmed, Robert Bork may well become an eminent justice.

But the circumstances of his nomination, and one's sense that he has been campaigning for the appointment by offering conspicuous support for the Reagan agenda even while sitting on the Court of Appeals, raise troubling questions about the effect his elevation would have on our idea of an independent judiciary.

Jack N. Rakove is an associate professor of history at Stanford University.

NEWSDAY 9/15/87

War Drums on Eve of Bork Hearing

By Rita Ciolli
Newsday Washington Bureau

Washington — With the hearings on the bitterly contested nomination of Robert Bork to the Supreme Court set to start today, both sides yesterday fired up the rhetoric in anticipation.

President Ronald Reagan, whose nomination of Bork to the court could insure a conservative legacy long after he leaves office, continued to be his leading supporter. In a speech to the National Alliance of Business, Reagan demanded that Bork's critics be candid about the reasons for their opposition rather than, he said, attack him personally.

"Too often character assassination has replaced debate and persuasion here in Washington. If you destroy someone's reputation, you don't have to talk about what he stands for," said Reagan.

The hearings, which open today in the same ceremonial room used for the Army-McCarthy hearings and the Watergate and Iran-contra probes, have been preceded by two months of ideological warfare through mass mailings, letter-writing campaigns, press conferences and endless studies of Bork's writings.

"I've never seen this kind of fervor over a nomination before," said Tom Korologos, the lobbyist asked by the White House to guide the Bork nomination. "The liberals and conservatives haven't had an excuse to go after each other like this in years," he said.

The struggle continued yesterday with groups across the nation holding vigils, demonstrations and press conferences. People for the American Way previewed its radio, television and newspaper advertising campaign against Bork. The group said it could spend up to $2 million in advertising.

Republicans trying to get a strategic edge announced that former President Gerald R. Ford will introduce Bork to the committee.

While it is the first time in history that a former president has appeared before the Senate on behalf of a Supreme Court nominee, Ford's appearance will also be a reminder of the connection both men have to Richard Nixon and Watergate.

Acting on Nixon's orders, Bork fired special prosecutor Archibald Cox on Oct. 20, 1973. At the time, Bork was

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the acting head of the Justice Department because Attorney General Elliot Richardson and his deputy, William Ruckleshaus, had resigned rather than follow Nixon's order. Ford, who became president in 1974 when Nixon resigned, quickly pardoned Nixon for any crimes he may have committed. Bork is expected to be questioned during the hearings about whether he tried to block the probe of Nixon.

"If Ford is so impressed with Bork, then why didn't he put him on the court?" asked Pete Smith, a spokesman for Senate Judiciary Committee Chairman Joseph Biden (D-Del.) Bork's name was on Ford's list in 1975 but Ford instead chose John Paul Stevens, who was confirmed 98-0.

From the start Bork faces a tough fight in the committee, controlled 8-6 by Democrats, which will issue a recommendation — against, in favor, or neutral — to the full Senate. The hearings are expected to be held for 10 days over a three-week period with a vote scheduled in the committee for Oct. 1. Close to 100 witnesses will testify both for and against Bork.

Yesterday, the conservative Center for Judicial Studies issued a report disputing studies that claim Bork would overturn numerous Supreme Court decisions on individual and civil rights and decide cases based on his own political agenda.

At the same time, the NAACP Legal Defense and Educational Fund released its report criticizing Bork's opposition to major civil rights advances of the last 30 years, including abolition of the poll tax and enactment of public accommodations laws.

NEWSDAY 9-15-87

Friend of the Court or Partisan?

By Lincoln Caplan

THE INTENSE POLITICAL debate about Robert Bork's nomination to the Supreme Court can be explained by many factors, but one of the most significant is the changing nature of the court's business.

During the past generation especially, the court has increasingly resolved constitutional questions dealing with social policy matters like abortion and affirmative action, which often divide the nation along partisan lines.

A little-known but vital measure of the changing nature of the court's docket is the growing use of friend-of-the-court, or *amicus curiae*, briefs.

Since 1823, when the justices let Henry Clay argue as an amicus, the Supreme Court has allowed lawyers to present the positions of clients who are not parties to a suit. The main requirement of friends of the court is that they present relevant facts and law not well addressed by the parties.

During the past three decades, the use of amicus briefs has increased with the number of policy cases on the court's docket. In the dozen years from 1969 to 1981, nonprofit liberal groups like the American Civil Liberties Union and the NAACP Legal Defense and Educational Fund Inc. took part in over 40 percent of the cases decided by the Supreme Court either as parties or as friends of the court. In that period, while liberal participation stayed relatively steady, the percentage of appearances by conservative groups tripled, with conservative groups entering nearly half of civil rights cases by 1981.

The most frequent litigant in the Supreme Court is the United States government. During the presidency of Theodore Roosevelt, beginning in 1907, Attorney General Charles Bonaparte entered fifty-six cases before the Supreme Court to urge an increase in the rights of blacks. This was the first attempt by the government to spur social change as a friend of the court.

Until the '60s, however, the subject of amicus filings was largely academic to the government. In 1956, for example, the government was an amicus in only two of the 97 cases argued before the justices.

From 1961 through 1966, during the administrations of Presidents John Kennedy and Lyndon Johnson, the number of amicus filings by the government began to climb. One-fifth of the government's appearance in cases argued before the court were as amicus curiae. The percentage of the government's amicus filings leveled off until President Richard Nixon's administration (Robert Bork was then the government's chief lawyer), when the figure jumped to 30 percent. It leaped once more under President Ronald Reagan — a president committed ostensibly to judicial restraint — to an average of almost 40 percent.

The increase in the government's amicus filings in the past three decades can be explained by several factors: the growth in the number of federal statutes; the "constitutionalization" of the law, and the tendency by the government, private lawyers and citizens alike to view the courts, and the Supreme Court in particular, as a proper forum for addessing social issues.

The solicitor general, the government's chief lawyer, is responsible for deciding whether the government should file an amicus brief. Archibald Cox, solicitor general during the Kennedy administration, has described the standards he followed in deciding which cases to enter as an amicus.

First, the question had to be important to constitutional law. Next, a large number of people had to be affected. The case had to have an impact on the government's "more direct interests." Finally, Cox asked, "Can we help the court?"

Cox didn't raise issues that were doomed to fail, because he thought it was the solicitor general's duty not to waste the Supreme Court's time. He didn't raise issues not raised by the parties to the suit, or inject new issues not raised at trial.

Solicitor General Charles Fried, who now represents the Reagan administration, takes a very different approach. His widely publicized 1985 amicus brief in an abortion case is a good example.

As amicus, Fried asked the Supreme Court to overturn the landmark holding of Roe v. Wade. No party for either side had raised the issue. Fried has regularly filed court papers to put the administration on record on questions of law, even when the government had no direct interest in a case and the argument he made was unlikely to succeed.

Burt Neuborne, a professor at the New York University of Law who was then legal director for the American Civil Liberties Union, said in 1986 that the Reagan administration has "demoted the solicitor general's office to our level, the level of an ideological interest group, a salesman for a partisan line just like the ACLU is."

The administration explains that its amicus filings are intended to present "an important and pervasive view of the law or the Constitution," but, as in the current debate about the Bork nomination to the court, those legal matters now often seem indistinguishable from politics.

Lincoln Caplan is the author of the forthcoming book "The Tenth Justice: The Solicitor General and the Rule of Law" (Alfred Knopf).

The Washington Times

DATE: 9-16-87

PAGE: A4

PRUDEN ON POLITICS
By Wesley Pruden

Learning the law from Judge Bork

The reactionaries, who had promised to come out smoking, came out a little scared instead.

It was a day for making almost nice.

Teddy Kennedy, his meaty jowls barely quivering, seemed anxious not to rough up Robert Bork on the first day. Joe Biden, running more than a little scared, played Gaston to Judge Bork's Alphonse, assuring him several times that he could talk as long as he liked anytime he liked.

"Time limits are for senators," Mr. Biden said, "but not for you." He pointed to Judge Bork and then to the senators, just so the judge would know exactly who he was talking about.

Teddy was his usual self-righteous self, wrapping himself in unctuous concern for the blacks, the poor, the women, and stray dogs and cats. Particularly women. There's just something about a woman that brings out the protective instinct in the senator from Massachusetts.

Judge Bork was called on to explain several finer points of constitutional law to him, which demonstrated mostly why Teddy had so much trouble with law school.

"The people," Teddy said, want the principle of one man-one vote used to determine the size of legislative districts. But "the people," he said, dripping sarcasm, "are not burdened with a law-school education."

The judge, who is the nominee for a job that most of "the people" probably believe *should* be filled by someone burdened with a good law-school education, attempted to introduce Teddy to the Constitution. Alas, Teddy isn't always an A student.

Edward Kennedy

Judge Bork, the senator from Massachusetts replied, should be sensitive to the poor and not just to "legal technicalities." It was an odd remark from someone passing on the fitness of a nominee for the Supreme Court. Several times Mr. Bork tried to make him understand that judges, unlike senators, are not supposed to decide great constitutional issues by leaning out the window to take a show of hands in the mob.

But it was women, as usual, who occupied Teddy most. He just can't abide a man who abuses women. Said the senator, bitterly: "You would have, evidently, the Supreme Court roll back the clock as it refers to women."

What seemed to anger Teddy most was Judge Bork's assertion that no special rights accrue to women in the Fourteenth Amendment just because they're female. In Judge Bork's view, women are actually "persons," and have the same rights as any other "persons" specified in the language of the amendment. The idea that a woman is also a person is a doctrine the senator seemed to have trouble puzzling out.

Teddy was obviously the point man for the Democratic reactionaries, attempting to hang the judge for views discarded years ago. "Your clock on civil rights seems to have stopped in 1954," he told him. He chided Judge Bork's opposition a quarter of a century ago to legislation forbidding discrimination against blacks in public accommodations.

Judge Bork repeated, for the *n*th time, that he long ago changed his mind about such legislation, and agrees now that such laws "do much more good than harm" and in fact have helped "bring the nation together." He correctly noted that the Congress itself sanctioned discrimination in 1963 when it wrote an exception to the public-accommodations law that enabled boarding-house mistresses — the fictional "Mrs. Murphy," in the language of that debate — to turn away blacks.

But Teddy, like his seat and soul mate Joe Biden, is obsessed with the notion that the Supreme Court should be populated by judges who will guarantee results, like an IBM computer programmed with ACLU software. Judge Bork, poor fellow, is afflicted with the old-fogey view that good ends should be achieved by good law, rather than the good intentions of certified Good People.

Teddy and Joe want to keep Robert Bork off the court for reasons having to do only with politics, which is certainly their right. They know this could be costly when the public starts paying attention long enough to understand what's going on, so they dreamed up a phony "principle" of "balance."

It's shameless, but there's nothing in the Constitution that says Massachusetts and Delaware can't send shameless senators to Washington. It's a state's right that even Teddy understands.

CHRISTIAN SCIENCE MONITOR
MELVIN MADDOCKS
DATE: 9-16-87
PAGE: 4

In search of justice – and a justice

ROBERT BORK has become *the* issue personified for liberals and conservatives to argue over in September, just as Oliver North polarized the liberal-conservative debate in July.

Whether they liked or disliked him, Colonel North persuaded his viewers to put on his well-decorated uniform, as it were, and play out his dilemma of the Good Soldier along with him. Now both Judge Bork's defenders and critics seem to be shrugging themselves into invisible robes and adopting a judicial stance, as if they were saying: "Let us examine the record dispassionately, let us play the Good Judge, without partisan politics – certainly without reference to personality!"

Nice try. The attraction to Ollie North, and now, it appears, his rejection, has everything to do with the public perception of his personality, his character. Whatever happens to Robert Bork, it seems that he, too, is destined to see his life's record staged as a kind of play. Beyond his judicial opinions, he will also be judged as a human being on the basis of the scope and depth of his sympathies for other human beings and the stretch of his imagination when confronted with yearning words like "liberty" and "rights."

We are in the realm of political dialectics, of professional standards, but we are also in the realm of moral drama, of theater. And who is to say that this is not a suitable way to judge a judge?

Yet who does not recognize as well that a profound change is being signaled here, not only in the way we think about judges but all figures of authority?

We demand, at the least, access to authority rather than remoteness, dialogue rather than monologue from on high. And in some cases, those in authority [illegible] this, too.

It can be no mere cultural coincidence that the week before Judge Bork's congressional scrutiny began, Supreme Court Justice Thurgood Marshall, in effect, shucked off his robe and became one opinionated citizen speaking to other opinionated citizens. In a notably candid interview he ranked Presidents according to their contributions to civil rights. Ronald Reagan finished last – no surprise; Lyndon Johnson finished first – a small surprise.

But the big surprise was that one of the Supreme Court justices – known mainly for not being known, for drawing their black robes collectively about them and speaking only through their written opinions – had met an interviewer informally and declared himself as an individual, and a passionate one at that.

Justice Marshall's openness – stepping down from the bench into the forum – suggests by reverse implication that Judge Bork should not step up to the bench without disclosing himself equally candidly to that other court: public opinion.

One thinks of other formerly unquestioned figures of authority being questioned. It is not a facetious bracketing – it merely measures the range of this questioning – to point out that, as Judge Bork prepared for his cross-examination, both the umpires at the US Open in Flushing Meadow and the Pope, arriving in the United States, were subjected to rude questioning unprecedented in the worlds of tennis and American Catholicism.

It is as if the anti-authority mood of the '60s revives selectively to pull tennis umpires off their chairs, Supreme Court justices off their benches, and even the Pope off his papal throne, challenging them to justify their rulings rather than simply pronounce them.

Yet if young contemporaries are not as given to obedience as their parents were – or as their parents like to think they were – still they have conspicuously backed off from the revolution of the '60s, too.

Public sentiment seems mixed, if not confused. Some of the people who began the summer by admiring Ollie North for saluting and charging up the hill are the same people who are ending the summer by telling Time magazine pollsters that they believe in accepting the orders of the Pope only when they happen to agree with him – an overwhelming 93 percent of the American Roman Catholics surveyed.

The old labels of liberal and conservative have something to do with all this, but the issues, it seems, are not the only issue. The muddled heart as well as the muddled head is trying to cast its vote here.

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Even in the conservative taste for stricter punishment – including the death penalty – there is an emotional longing for something more. The conservative's love affair with Ollie North was inspired not only by squared shoulders and can-do toughness but also by the tear in the eye of the Good Soldier. In the same way, Robert Bork may be confirmed on the grounds of professional competence.

But though the community seems to value law and order especially at this moment, that is only half of what we want and need. Without a sense of caring, without a degree of compassion, law and order are nothing – for Robert Bork, for the rest of us. This is the second truism tugging at us.

The specific search for a justice is one thing. The endless search for justice is another, and in this search what we are all looking for is the authority that resides only in a whole human being.

WASHINGTON POST
9-16-87

'Saturday Night Massacre' Remains Controversial

ABA Panelists Questioned Whether Bork Has Been Candid About His Role

By Ruth Marcus
Washington Post Staff Writer

Nearly 14 years after Robert H. Bork fired Watergate special prosecutor Archibald Cox, Bork's actions during the "Saturday Night Massacre" and its aftermath, and his subsequent descriptions of his conduct, remain a controversy almost certain to be explored in more depth at his confirmation hearings.

Some members of an American Bar Association's screening committee, which last week in a split decision gave Bork its highest rating of "well qualified" for the Supreme Court, expressed concern that he had not been candid with the Senate Judiciary Committee about his role in Watergate during his 1982 confirmation hearings for the federal appeals court, according to sources.

Likewise, Judiciary Committee members have said they think that Bork's conduct during Watergate or his accounts of what happened will become an issue during his current confirmation hearings.

"A federal court found that his firing of Archibald Cox on President Nixon's order was was illegal . . . ," Sen. Howard Metzenbaum (D-Ohio) said yesterday. "It is important to explore these matters—for what message does it convey if the Senate confirms for the highest court of the land someone who has violated the law?"

Accompanying Bork to the hearing, Gerald R. Ford, who became president when Richard M. Nixon resigned because of the Watergate scandal, said Bork "acted with integrity to preserve the continuity of both the Justice Department and special prosecutor's investigation" when he fired Cox.

Attorney General Elliot L. Richardson and Deputy Attorney General William D. Ruckelshaus resigned on Oct. 20, 1973, rather than fire Cox, whose independence they had promised to protect. Bork, who as solicitor general was the third-highest-ranking official at the Justice Department and who had not made a similar pledge to the Senate, then carried out Nixon's order.

Some of the questions surrounding the events of that Saturday night and Bork include:

- Did Bork accurately testify in 1982 that after firing Cox he guaranteed that Cox's staff would have "complete independence" and be free to go after the White House tapes that had been the cause of Cox's firing?

Bork in 1982 described a tense meeting during the confused period following Cox's firing. The meeting was with Cox's deputies, Henry S. Ruth Jr. and Philip A. Lacovara, and Henry E. Petersen, head of the Justice Department's criminal division.

". . . I told them that I wanted them to continue as before with their investigations and with their prosecutions, that they would have complete independence and that I would guard that independence, including their right to go to court to get the White House tapes or any other evidence they wanted," Bork said.

Lacovara and Ruth say Bork instructed them to continue with their investigation under Petersen's direction. Before Cox's appointment, Petersen had been criticized for not pursuing the Watergate investigation aggressively.

"We were instructed to proceed and report to Henry Petersen," said Ruth, whose recollection of that meeting differs from Bork's and who may testify.

At the meeting, said Lacovara, "I spent a fair amount of time explaining to Bob Bork why I thought it was critically important that there be a special prosecutor who was autonomous and not a part of the regular Justice Department hierarchy." He noted that a number of current or former Justice Department and White House officials were being investigated.

Lacovara said he does not find Bork's 1982 testimony troubling and that Bork seemed receptive to this argument.

Although Bork testified that he assured Ruth and Lacovara that they would be able to seek the tapes, both said they did not recall the tapes being discussed at that meeting, which took place on the Sunday or Monday following the firing. (Cox had been fired after a court ordered Nixon to turn over tapes he had subpoenaed.)

On the "ultimate question of would Nixon turn over the tapes and would we be able to subpoena future tapes, that was all left open . . . ," Ruth said.

"What was going to happen when the White House said 'no' the next time?" Ruth asked. "Archie Cox had just been fired for going to court for the tapes . . . . Why is it different Monday than Saturday? We never got to that at the meeting."

Ruth and other lawyers in the office said Bork could not have guaranteed their right to seek the tapes because Nixon did not decide until Tuesday to comply with the court's order.

Lacovara's recollection of the meeting is in line with Bork's account. "Both of them [Bork and Petersen] left me and, I think, Hank, with the impression that if we could explain to them why evidence wherever it might lie was important to the truth-finding process, they would pursue the evidence or they would themselves go the way of Richardson," he said.

"The impression that I took out of that meeting was yes, our independence was going to be protected, as long as he and Petersen had any role in the matter . . . ," Lacovara said. "I was there. I do not regard his testimony as betraying a lack of credibility or candor or honor."

During yesterday's hearing, Bork referred to the conflicting accounts

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of the meeting in response to a question from Sen. Strom Thurmond (R-S.C.). "As I understand the difference in recollection, it is whether or not tapes were specifically mentioned at that meeting," he said. "It was my recollection they were; the others say not.

"But I think there is a common recollection . . . that I said they were to go forward as before and that if we were interfered with, we would all resign. That seems to me to include tapes, whether or not they were specifically mentioned, as I thought they had been."

■ Did Bork take adequate measures to assure the investigation's independence by seeking appointment of a new prosecutor?

"There was never any possibility that that discharge of the special prosecutor would in any way hamper the investigation or the prosecutions of the special prosecutor's office," Bork testified in 1982.

A White House briefing book prepared as part of Bork's confirmation battle states that, "Immediately after carrying out the president's instruction to discharge Cox, Bork acted to safeguard the Watergate investigation and its independence. He promptly established a new special prosecutor's office, giving it authority to pursue the investgiation without interference."

However, Bork on the first working day after the firing, Tuesday, issued an order, retroactive to Sunday, abolishing the office of the Watergate special prosecution.

Bork did not mention the possiblity of appointing a new special prosecutor during a meeting Tuesday with Cox's staff or in a news conference that week. It was not until Friday, after the White House had been deluged by telegrams and Congress was weighing impeachment measures and legislation to establish a special prosecutor under its control, that Nixon agreed to appoint a new special prosecutor.

■ Did Bork violate a Justice Department regulation in firing Cox?

U.S. District Court Judge Gerhard A. Gesell, ruling in a lawsuit seeking to have Cox reinstated, found that Bork's action violated a Justice Department regulation prohibiting Cox from being fired "except for extraordinary improprieties." The firing of Cox, abolition of the special prosecutor's office and reinstatement of the office three weeks later "was simply a ruse to permit the discharge of Mr. Cox," Gesell wrote.

He later vacated the order on the grounds that the issue was moot.

A Justice Department report released last Saturday assailed the Gesell ruling as "wholly without support in law."

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WASHINGTON POST
PG. A-1
9-16-87

Bork Lays Out Philosophy

'Neither Liberal Nor Conservative,' Court Nominee Testifies

By Al Kamen and Edward Walsh
Washington Post Staff Writers

Judge Robert H. Bork forcefully expounded his conservative legal philosophy yesterday to the Senate Judiciary Committee during four hours of sometimes sharp but generally polite questioning over his fitness to serve on the Supreme Court.

Bork, pressed by committee liberals on whether he would attempt to overturn prior court rulings on civil rights and civil liberties, said "a judge must give great respect to precedent." Bork said his controversial writings on those issues and others did not mean that he would necessarily overturn those rulings.

The questioning at times focused on esoteric legal theories, but Bork's opponents and supporters on the committee carefully staked out their essential political strategies in a battle that could shape the future of the high court for years to come.

Bork's supporters want to emphasize that the federal appeals court judge and former Yale Law School professor appointed by President Reagan to fill the seat of retired justice Lewis F. Powell Jr. is not the right-wing activist liberals have accused him of being, but rather in the mainstream of accepted legal reasoning.

But Sen. Edward M. Kennedy (D-Mass.), Bork's most outspoken critic on the Judiciary Committee, said he "has harshly opposed—and is publicly itching to overrule—many of the great decisions of the Supreme Court that seek to fulfill the promise of justice for all Americans."

Bork, in his opening statement and in response to questioning from committee members, said his "philosophy of judging is neither liberal nor conservative," and that his view of judicial restraint meant that unelected judges should not "deprive the people of their liberty . . . to set their own social agenda."

He said his controversial criticism of numerous Supreme Court decisions was often not based on the outcomes of those cases but on the legal reasoning the court used in reaching its decisions.

For example, Bork said he opposed laws requiring sterilization of certain criminals and enforcing racially restrictive housing covenants

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BORK, From A1

even though he criticized Supreme Court decisions striking down those laws.

But Bork, under questioning by committee Chairman Joseph R. Biden Jr. (D-Del.) and Kennedy, did not back away from his controversial positions against Supreme Court rulings involving abortion, affirmative action or one-man, one vote or the right to privacy in general.

"I still think I was right," Bork said of his criticism of the Supreme Court's "one-man, one-vote" ruling that forced legislative bodies to redraw their districts based on population.

Asked about the court's landmark 1973 ruling legalizing abortion, Bork said the decision "contains almost no legal reasoning." But he said he did not know how he would rule if an abortion case came before him.

He said the only position he has taken was in criticizing the court's legal reasoning in concluding there is a constitutional right to abortion.

This and other exchanges during the hearing were generally polite and often couched in technical legal terms. But Bork's opponents were cheered that Bork, while an affable witness, stuck to some of his more controversial views.

"To the extent that the White House thought Bork would portray himself as a flexible moderate, those hopes were dashed," said a senior political aide to Biden, a candidate for the 1988 Democratic presidential nomination. "Bork betrayed himself as Bork today."

Committee Republicans, however, heaped praise on Bork, who sat impassively through the lengthy opening statements of committee members that took up the morning session and spilled into the afternoon and answered questions in a relaxed, conversational tone.

"I don't see how anyone watching this can doubt that you are an eminent scholar, with a great mind, in the judicial mainstream of the country," Sen. Orrin G. Hatch (R-Utah) told Bork.

Biden went out of his way to assure Bork that the hearings would be fair but did not attempt to conceal his announced opposition to the nomination. Following Bork's opening statement, Biden, the first questioner, attempted to pin him down on the issue of privacy.

Bork has repeatedly criticized a 1965 ruling, *Griswold v. Connecticut*, in which the Supreme Court struck down a state law prohibiting married couples from using contraceptives. The court said the law violated a constitutional right to privacy.

Bork, who has described the Connecticut law as "nutty," said there might be some legal grounds on which to strike down the law but that there was no general right to privacy contained in the Constitution.

Biden countered by citing a 1971 article and a 1982 speech in Washington by Bork in which he said the result in the Griswold case could not be justified under any legal reasoning.

Under questioning by Kennedy, Bork acknowledged, as he had in his 1973 confirmation hearing for the post of solicitor general at the Justice Department, that he was wrong in opposing passage of the public accommodations section of the 1964 civil rights law. But he defended his criticism of a Supreme Court decision striking down a Virginia poll tax and his stand on the "one-man, one-vote" case.

Bork also defended his assertion that the court had improperly extended the equal-protection clause of the 14th Amendment to cover sex-discrimination claims.

"Your views would take us back to the days when women were second-class citizens," Kennedy said.

Asked about his opposition to the Equal Rights Amendment, Bork said:

"I never said anything about the ERA except it seemed to me odd to put all the decisions dealing with women in the hands of judges. I didn't campaign against it; I just dropped a footnote some place."

In their questioning, Bork's supporters gave the Supreme Court nominee a chance to expound his philosophy and respond to questions that have been raised about his record.

In response to Sen. Strom Thurmond (R-S.C.), Bork dismissed as "preposterous" an allegation by a federal judge charging

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(2)

that while on an appeals court panel he had improperly attempted to substitute his own views for the reasoning agreed on by the two other judges. The charge was made in a letter to the Judiciary Committee from U.S. District Court Judge James F. Gordon of Kentucky.

"There's nothing to the charge," Bork said. "The memories of the people involved, the documentation, and the practicalities of the circumstances indicate it's just—I don't know what it is, but it's certainly a misunderstanding."

As the Judicary Committee hearings began, The Cleveland Plain Dealer reported that a confidential Federal Bureau of Investigation background investigation had discovered two incidents, on Dec. 21 and Dec. 23, 1983, when Bork was rushed to Sibley Memorial Hospital in Northwest Washington after falling down.

The paper said that during the second visit to the hospital's emergency room a test showed the level of alcohol in Bork's blood was .09, considered enough to impair driving ability. Bork was taken to the hospital by ambulance, the report said.

The Plain Dealer said Bork's account of the incidents was that on Dec. 21 he slipped on an icy walkway and broke his arm. Two days later at a Christmas party at his house, with his arm in a sling, Bork said he tripped on a stairway, the paper said.

Democratic sources on the Judiciary Committee said Biden "does not feel there is substance" to the reports of the incidents "and does not intend to pursue it."

In their opening statements before Bork's testimony, the committee's eight Democrats and six Republicans laid out the cases for and against Bork that have been building over the summer. Every committee Republican except Sen. Arlen Specter (Pa.) strongly defended Bork and attacked what Hatch called "the impending ideological inquisition" the judge faces.

Sens. Specter, Dennis DeConcini (D-Ariz.) and Howell T. Heflin (D-Ala.) are considered the swing votes who will decide whether the committee endorses the nomination. Each voiced concern about Bork's approach to several issues centering on questions of whether he would deal with court cases with an "open mind."

"I must be satisfied that in the guise of what you represent and what Attorney General [Edwin] Meese calls 'judicial restraint,' you are not a conservative judicial activist bent on imposing his own political philosophy on the court and the nation," DeConcini said.

Heflin said Bork will improve his chances of confirmation if he can show that he "will balance society's need for law and order with individual rights and personal freedoms" and that "you do not have a proclivity for activism.

"However," Heflin continued, "if the evidence shows that you are intelligent but an ideologue, a zealot, that you are principled but prejudiced, that you are competent but closed-minded, then there is considerable doubt as to whether you will be confirmed by the Senate."

Bork was accompanied to the hearings by his wife and three children, who sat behind him as he testified, and by a group of Republican supporters headed by former president Gerald R. Ford and Senate Minority Leader Robert J. Dole (R-Kan.).

Formally introducing Bork to the committee, Ford said he "may well be the most qualified nominee to the Supreme Court in more than half a century."

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WASHINGTON POST
9-16-87

Excerpts From Opening Statements and Testimony at Senate Hearing on Bork

From the opening statement of Sen. Edward M. Kennedy (D-Mass.):

. . . Time and again, in his public record over more than a quarter of a century, Robert Bork has shown that he is hostile to the rule of law and the role of the courts in protecting individual liberty. He has harshly opposed, and in public, [has been] itching to overrule many of the great decisions of the Supreme Court that seek to fulfill the promise of the justice for all Americans . . . .

It is easy to conclude from the public record of Mr. Bork's published views that he believes women and blacks are second-class citizens under the Constitution. He even believes that in the relation to the executive, that members of Congress are second-class citizens. Yet, he is asking the Senate to confirm him . . . .

In Robert Bork's America, there is no room at the inn for blacks and no place in the Constitution for women; and, in our America, there should be no seat on the Supreme Court for Robert Bork . . . .

Rather than selecting a real judicial conservative to fill Justice [Lewis F.] Powell's vacancy, the president has sought to appoint an activist of the right, whose agenda would turn us back to the battles of a bitterly divided America, reopening issues long thought to be settled and wounds long thought to be healed . . . .

From the opening statement of Judge Robert H. Bork:

The judge's authority derives entirely from the fact that he is applying the law and not his own personal values. That is why the American public accepts the decisions of its courts . . . even decisions that nullify laws a majority of the electorate or of their representatives voted for . . . .

How should a judge go about finding the law? . . . . The intentions of the lawmakers govern, whether the lawmakers are the Congress . . . enacting a statute or those who ratified our Constitution and its various amendments.

Where the words are precise and the facts simple, that is a relatively easy task. Where the words are general, as . . . with some of the most profound protections of our liberties . . . the task is far more complex . . . to find the principle or value that was intended to be protected and see that it is protected. As I wrote in an opinion, the judge's responsibility "is to discern how the framers' values, defined in the context of the world they knew, apply in the world we know."

If a judge abandons intentions as his guide, there is no law available to him and he begins to legislate a social agenda for the American people. That goes well beyond his legitimate authority . . . .

That is why I agree with Judge Learned Hand, one of the great jurists in our history. He wrote that the judge's "authority and his immunity depend upon the assumption that he speaks with the mouth of others . . . ." To state that another way, the judge must speak with the authority of the past and yet accommodate that past to the present.

The past, however, includes not only the intentions of those who first made the law, it also includes those past judges who interpreted and applied it in prior cases. That is why a judge must give great respect to precedent. It is one thing as a legal theorist to criticize the reasoning of a prior decision, even to criticize it severely, as I have done. It is another and more serious thing altogether for a judge to ignore or overturn a prior decision. That requires much careful thought.

Times come, of course, when even a venerable precedent can and should be overruled. The primary example of a proper overruling is *Brown v. Board of Education* . . . which outlawed racial segregation accomplished by government action. Brown overturned the rule of separate-but-equal laid down 58 years before in *Plessy v. Ferguson*. Yet *Brown*, delivered with the authority of a unanimous court, was clearly correct and represents perhaps the greatest moral achievement of our constitutional law . . . .

That does not mean that constitutional law is static. It will evolve as judges modify doctrine to meet new circumstances and new technologies . . . .

I can put the matter no better than I did in an opinion on my present court. Speaking of the judge's duty, I said:

"The important thing, the ultimate consideration, is the constitutional freedom . . . given into our keeping. A judge who refuses to see new threats to an established constitutional value, and hence provides a crabbed interpretation that robs a provision of its full, fair and reasonable meaning, fails in his judicial duty . . . to ensure that the powers and freedoms the framers specified are made effective in today's circumstances."

But . . . when a judge goes beyond this and reads entirely new values into the Constitution . . . he deprives the people of their liberty . . . to set their own social agenda through the processes of democracy . . . .

My philosophy of judging is neither liberal nor conservative. It is simply a philosophy of judging which gives the Constitution a full and fair interpretation but, where the Constitution is silent, leaves the policy struggles to Congress, the president, the legislatures and executives of the 50 states and to the American people . . . .

I am quite willing to discuss with you my judicial philosophy and the approach I take to deciding cases with this committee. I cannot, of course, commit myself as to how I might vote on any particular case, and I know you would not wish me to do that . . . .

From the exchange between Kennedy and Bork:

I believe that in your world, the individuals have precious few rights to protect them against the majority, and I think this is . . . what the Bill of Rights is all about, that there are some things in America where no majority can do to the minority or to the individuals . . . .

. . . I have the greatest respect for the Bill of Rights, and I will enforce the Bill of Rights. I have enforced the Bill of Rights. What we were talking about here was a generalized, undefined right of privacy, which . . . is not in the Bill of Rights . . . .

. . . I appreciate your support for the school segregation decision in 1954. But I am troubled, because I believe that your clock on civil rights seems to have stopped in 1954 . . . . When did you first publicly change your position on the Civil Rights Act?

One has also to know that as solicitor general, I enforced the rights of racial minorities in court, often further than the Supreme Court was willing to go . . . . On my present court, I have frequently voted for black plaintiffs in . . . civil rights or voting rights cases . . . .

At a time when men and women in the South and North, Republicans and Democrats, recognized that race discrimination had to be outlawed . . . you strongly and publicly opposed civil rights legislation, calling its underlying principle one of "unsurpassed ugliness," and it wasn't until 10 years later, when you were nominated to be solicitor general, that you publicly repudiated those views . . . .

I don't usually keep issuing my new opinions every time I change my mind . . . . I don't keep issuing loose-leaf services about my latest state of mind . . . .

I'm just wondering if you've changed your view that the Supreme Court was wrong . . . to hold that poll taxes are unconstitutional?

I think it was . . . . I have no desire to bring poll taxes back into existence . . . . But if that had been a poll tax applied in a discriminatory fashion, it would have clearly been unconstitutional. It was not . . . .

You indicated June 10 of this year . . . "I think this court stepped beyond its allowable boundaries when it imposed one-man, one-vote under the equal protection clause" . . . . The people of this country accept the fundamental principle . . . even though they are not burdened with a law school education.

. . . They can enact it anytime they want to. I have no desire to go running around trying to overturn that decision. But as an original matter, it doesn't come out of anything in the Constitution . . . .

WASHINGTON POST
9/16/87

Toned-Down Nominee Has Conciliatory Manner, but Strong Words

By Dale Russakoff
Washington Post Staff Writer

With 23 spotlights trained on his oft-caricatured face, Robert H. Bork sat alone and expressionless at the long witness table as his chief opponent branded him "an activist of the right" and "hostile to the rule of law." He cracked only the most modest of smiles when an ardent supporter lauded him as "an eminent scholar with a brilliant mind."

NEWS ANALYSIS

This impassive figure clad in a dark suit hardly appeared a person whose nomination to the Supreme Court could touch off a colossal clash between forces trying to shape American society. Nor did he seem a man whose writings had roared like a lion in the conservative legal world for almost 25 years.

In his opening day of confirmation hearings before the Senate Judiciary Committee, the Robert H. Bork seen yesterday by millions of American television viewers was toned down even in appearance. His gray hair, a longtime trademark often likened to a Brillo pad, and his wispy, white beard had been trimmed, as had his imposing girth. An unreconstructed chain-smoker for years, he took not a puff as he sat through seven hours of often-grueling questioning and pointed speechmaking by committee members.

Even the biting sense of humor—the one that moved him to characterize a colleague's thinking as a cross between "Edmund Burke and 'Fiddler on the Roof'"—was in check. Only once did Bork let loose a scornful quip—saying a certain brand of extremist judges "really ought to be accompanied by a guardian rather than sitting on a bench."

But if the anticipated "championship fight" between Bork and his critics failed to produce many fireworks, the opening day of hearings nonetheless appeared to stir the passions of Americans outside the hearing room. A survey of committee members' offices produced reports of a storm of telephone calls from constituents—particularly to offices of members who have said they are undecided on how to vote.

Sen. Arlen Specter (R-Pa.) installed two extra telephone lines and received 2,000 calls in his Washington office and 1,000 in his Pennsylvania offices in the first four hours of hearings—almost evenly divided for and against Bork's confirmation, according to a senior Specter aide.

So many calls to Specter's Washington office were on the subject of Bork that receptionists began answering the phone: "Sen. Arlen Specter's office. Are you calling about the Bork nomination? Are you for or against?"

The hearings opened with Bork flanked by luminaries including former president Gerald R. Ford and Senate Minority Leader Robert J. Dole (R-Kan.), recruited by the White House to introduce him. But those men exited after their prepared speeches, and Bork was left alone at the long, green-felt-covered witness table—a stark reminder that when all is said and done, it is Bork's performance alone that likely will most sway the outcome of his nomination.

For all the feeling in the heartland, the hearings drew only a modest turnout of citizens attempting to get seats in the marbled Senate Caucus Room. By 8 a.m., fewer than 25 men and women had lined up outside the Senate Russell Office Building, although those desiring seats were advised to be there by 6 a.m.

At least half of those interviewed shortly before 10 a.m., when the line had grown to about 100, said they had come as tourists who happened to be in Washington and wanted to see their government at work. "In all honesty, it's the Constitution's birthday, and this is a great way to watch it in action," said Mark Hanson, a Miami lawyer who identified himself as a Bork opponent.

Yet while Bork's demeanor was conciliatory, many of his words were not. He presented himself as an unyielding exponent of what he calls "judicial restraint," overriding majority will to guarantee individual rights only in cases co ered clearly by the Constitution or egislation.

"If a judge abandons intention [of the Constitution's fra ers] as his guide, there is no law available to him and he begins to l gislate a social agenda for the A nerican people," Bork said in an o ening statement. "He or she th n diminishes liberty, rather than enh ncing it."

In response to pum meling questions by Sen. Edward M. Kennedy (D-Mass.), his most impassioned opponent on the com mittee, Bork acknowledged that t is approach had led him to oppo e such landmark Supreme Court opinions as one-man, one-vote, a right to privacy, abolition of a st te's poll tax and others. And he said he still faults the reasoning—if not the results—of those opinio s.

"It doesn't come out of anything in the Constitution," Bork said of the one-man, one-vote ruling. "And if the people of the country want it, they can adopt [it as a law, rather than relying on the high court] anytime they want to."

"With all your ability, I just wish you'd devoted even a little bit of your talent to advancing equal rights rather than criticizing so many decisions protecting rights and liberties," Kennedy said as he ended his questions.

Bork, known for his combative teaching style as a professor at Yale Law School for more than a decade, absorbed critical questions from committee Chairman Joseph R. Biden Jr. (D-Del.) like a scholar in a legalistic discussion.

As Biden sought to nail Bork for opposing privacy rights, the former professor said he had nothing against privacy; what he criticized, he said, was the reasoning used by the Supreme Court to enshrine it as a right.

When Kennedy posed the hypothetical case of a state legislature voting for compulsory abortion or sterilization—something he described as a gross violation of individidual rights—Bork responded: "It is not up to Judge Bork to look behind [overrule] that unless he has got law to apply."

WASHINGTON POST
9/16/87

All Bork And No Bite

A Slow Opener to the Hearings, Punctuated by Kennedy's Sparks

By Tom Shales
Washington Post Staff Writer

Talk about your pillow fights. Talk about your anticlimaxes. Senate hearings on the nomination of Judge Robert H. Bork to the Supreme Court made for slow going and sluggish television yesterday, all the advance hype about fireworks and histrionics notwithstanding.

Joseph Biden (D-Del.), chairman of the Senate Judiciary Committee, does not run a tight ship. Maybe it will get tighter as the hearings proceed. But you could almost hear the network news departments twiddling their thumbs not long after they signed on at 2:30 p.m., having forgone a largely ceremonial morning session.

That hothead liberal Biden was so sweet and polite to that wildcat conservative Bork that a ballyhooed sparring session came off more like a waltz. When Bork began his opening statement by asking to introduce his family, Biden groveled and toadied and said, oh but of course, I meant to invite you to do that, please proceed, by all means, our casa is su casa, blah blah blah.

Thank goodness for Edward Kennedy (D-Mass.). Teddy delivered a "scathing" greeting to Bork in the morning, Dan Rather reported; unfortunately, CBS declined to air it, or to reprise it prior to the afternoon session. Then, finally, at about 5 p.m., it was Kennedy's turn to question Bork, and he did so skillfully and relentlessly, at times even threatening to fluster the assured and articulate nominee.

Kennedy grilled Bork on his record and jostled Bork to the point where Bork was willing to admit having made "an intellectual mistake" when he wrote articles attacking civil rights legislation for The New Republic and the Chicago Tribune. The give-and-take was electric and instructive. This was what, it seemed, a confirmation hearing should be.

Kennedy was by far, as the TV camera revealed, the best-dressed and the best-coiffed person on the committee. Bork, for all his erudition and renown, looks scraggly and rumpled. If he can't grow a better

Cont...

WASHINGTON POST
9/16/87

The Bland Bork Session

ON THE AIR, From D1

beard than that, one wonders, why does he wear one at all? Ah well. Yale professors are entitled to their eccentricities.

Other than Kennedy's interrogation, the only other real highlight was a recurring colloquy—practically a fixation—on the relationship of jurisprudence to the use of contraceptives by married couples behind closed bedroom doors. Bork, in his response to Biden's probing about a Connecticut sex law that the Supreme Court overturned, made a reference to "competing gratification," which was about as graphic as the imagery got.

As soon as Kennedy finished, administration patsy Orrin Hatch (R-Utah) came forward, and the networks shot out of that hearing room in a flash. ABC News had already ended its coverage; CBS and NBC bolted when Hatch began his lavish Bork defense, singing the same tune he did at the Rehnquist hearings, claiming that Bork's "record is being distorted" by "unfair" opponents using "inflammatory rhetoric" and other satanic ploys.

Hatch rattled on about Bork being limited to "30-second bites" for answers to complex legal questions, prompting Biden to interrupt and ask Bork if he felt he'd been restricted in any way. Bork said no, but added that he did feel an obligation to a questioner "not to bog him down with long answers."

"Go ahead and bog him down," said Biden. He told Bork he could take an hour to answer a single question if he wanted to. "Do not feel at all constrained," Biden said. "Use as much time as you want," he continued.

Biden did everything but rush over to Bork's water glass with a an ice-cold refill.

When it comes to bogging down, of course, senators don't need any help. Hatch, whose spiel proceeded on CNN and PBS (both offering complete coverage), plunged forward with his defensive and slightly pixilated crusade.

"As a matter of fact," Hatch said to Bork, after a string of encomiums to his judicial majesty, "I don't see how anybody watching this could doubt that you're an eminent scholar with a brilliant mind, who is in the mainstream of judicial life, who in sitting in more than 400 cases on the Circuit Court of Appeals for the District of Columbia has never been reversed, who has been within the mainstream with his liberal colleagues on the courts, if that's an appropriate term, as you have with your conservative colleagues and. . ."

On it went on from there, twisting and turning and doubling back. It may be going on still. But Hatch didn't have a monopoly on talking much and saying little. Sen. Robert Byrd (D-W.Va.), in a so-called opening statement, did so much strenuous meandering as to lose even the most adoringly attentive listener. It seemed only a matter of moments before he absent-mindedly lapsed into French like Melvyn Douglas in "The Seduction of Joe Tynan."

Perhaps the real contest of the long day was, who could be slipperier, Biden or Bork? And who could be more unctuous to the other? "Bork and Biden" was a kind of TV successor to "Mork and Mindy." Maybe the gloves will come off as the hearings go on. But Biden is running for president and against his image as a loose cannon. So instead of Ali and Fraser, one gets Alphonse and Gaston.

The networks were appalled. They had billed this as the biggest battle since Oliver North met Arthur Liman. Correspondent Deborah Potter on

Cont. . .

WA POST 9/16/87

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UNITED PRESS INTERNATIONAL

Judge Robert Bork is sworn in at his confirmation hearing yesterday.

CBS, interviewing senators during a break, noted that the hearings had been "a little dull" and "a little dry." Even Rather, normally tireless in his enthusiasms, allowed later as how there'd been "very extended dull periods in the afternoon."

Rather also told correspondent Bruce Morton, earlier, that the participants in the hearings had been "throwing case names around like confetti," but CBS News, and some others, thoughtfully provided slides summarizing cases and popped them up when they were mentioned in testimony.

How much time the networks will give the rest of the hearings is up in the air. Biden in his zeal to look reasonable and fair (after publicly prejudging Bork) has taken much of the expected drama out of the hearings, and drama is what TV wants, and what it has led the audience to expect. However he's doing as an "eminent scholar" and a convincing nominee to the court, as a new continuing character in television's pantheon of superstars, Bork's balked.

WASHINGTON TIMES
9-16-87

Bork cites support for equal rights laws

By Gene Grabowski
THE WASHINGTON TIMES

Supreme Court nominee Robert H. Bork said yesterday he supports equal rights for blacks and women and hasn't decided whether he would vote as a justice to overturn the 1973 ruling establishing a constitutional right to an abortion.

He repeatedly cited his agreements in the law with past giants of the court, such as Justices Hugo Black and John Marshall Harlan, positioning himself in the American judicial mainstream.

Defending himself publicly for the first time against attacks on his judicial record and legal scholarship, Judge Bork told the Senate Judiciary Committee he would be cautious in overturning legal precedents.

"Overruling should be done sparingly and cautiously," he told the panel of eight Democrats and six Republicans, which opened hearings yesterday on the fiercely contested nomination. "Respect for precedent is part of the great tradition of our law, just as is fidelity to the intent of those who ratified the Constitution and enacted our statutes."

Judge Bork said that as a Supreme Court justice he would look differently on past court rulings than he has as a scholar.

"It is one thing as a legal theorist to criticize the reasoning of a prior decision, even to criticize it severely, as I have done," he said. "It is another and more serious thing altogether for a judge to ignore or overturn a prior decision. That requires much careful thought."

Judge Bork, 60, said in response to a question from Sen. Orrin Hatch, Utah Republican, that he doesn't know whether he would vote to overturn the Supreme Court's 1973 Roe vs. Wade decision that prohibited states from prohibiting by law abortion in the first three months of a woman's pregnancy. Subsequent rulings established a virtually unlimited right to an abortion.

"Is it safe to say you haven't made up your mind on that?" Mr. Hatch asked.

"That's true," replied Judge Bork, who sat alone at the witness table with his wife, two sons, a daughter, the widow of Justice Potter Stewart

Sen. Kennedy goes to a law seminar. Pruden on Politics, Page A4.

Bork's "interpretivism" considered time-honored; excerpts from judge's opening statement. Page A5

—CONTINUED—

and a few aides seated behind him. Throughout the long day, the judge, who is a chain smoker, did not light a cigarette.

He was introduced on the nationally televised hearings by former President Gerald Ford.

Under aggressive questioning from Sen. Edward M. Kennedy, Massachusetts Democrat, Judge Bork defended the changing of his mind on civil rights laws.

The former Yale law professor and U.S. solicitor general said he experienced an "evolution of thinking" that led him to support civil rights legislation for minorities after initially opposing it solely on constitutional grounds in the early 1960s.

"At that time, I believed that before the government could coerce anybody [into obeying civil rights laws], it would have to have a general constitutional principle to base it on," Judge Bork said.

He was influenced by libertarian thinking on economics, he said, but found the flaw in such reasoning to be that, in social policy, there was no discipline of the marketplace to regulate behavior. He did not then believe the government had the power to coerce behavior.

"Weren't you concerned about coercion of blacks, Mr. Bork?" Mr. Kennedy asked, rousing Judge Bork's ire for the only time during the day.

"You can read my decisions from beginning to end, senator, and never find any hostility to blacks, women and minorities," Judge Bork shot back.

Asked about his views on affirmative action to remedy present effects of past discrimination, Judge Bork said he supports programs that portunities and that he "wouldn't have minded preferential treatment for a time to bring blacks and other minorities into the mainstream."

But he worries that affirmative action may become permanent and encourage individuals to blame racism or sexism for failures that are a result of their own shortcomings.

Judge Bork testified that he believes the 14th Amendment's equal protection clause "applies to women — it applies to every person," but that application by sex "depends upon the particular issue," especially if physical differences are involved.

For example, he said, the decision of whether to send women into combat could turn on physical differences.

The nominee told Committee Chairman Joseph Biden, Delaware Democrat and candidate for his party's 1988 presidential nomination, that cases involving freedom of the press would be another area where "it is too late" for major changes in Supreme Court rulings. He said, however, he thinks those cases have been decided correctly.

"I don't know if other cases are up for grabs or not."

Among court decisions Judge Bork has criticized is a 1965 ruling that a Connecticut couple's right of privacy should not have been breached by a state law preventing their using a condom.

Judge Bork said he still disagrees with the way the late Justice William O. Douglas derived "this unstructured, undefined right" that was used to strike down state laws.

When Sen. Hatch asked whether he personally had anything against contraception, he replied emphatically: "Nothing whatsoever!" He testified that "a lot of people," including Supreme Court justices, criticized the reasoning of Justice may be other rationales" for reaching the same outcome.

"I think the Connecticut law was an outrage and it would have been more of an outrage if they had ever enforced it against an individual," Judge Bork said.

Judge Bork's nomination, which Mr. Biden has said he opposes, is widely seen as a test of President Reagan's right to appoint whom he wants on the high court as long as the nominee is qualified.

Liberal opponents of the Bork nomination argue that the president considered political ideology in selecting Judge Bork so they may reject him on that basis.

"My philosophy of judging is neither liberal nor conservative," said Judge Bork, a member of the U.S. Court of Appeals who was nominated July 1 to replace retired Justice Lewis Powell.

"It is simply a philosophy of judging which gives the Constitution a full and fair interpretation, but where the Constitution is silent leaves the policy struggles to Congress, the president, legislatures and executives of the 50 states and to the American people."

Judge Bork said judges who impose their own values, rather than interpret the Constitution, deprive the American people of liberty.

"That liberty, which the Constitution clearly envisions, is the liberty of the people to set their own social agenda though the processes of democracy," he said.

Mr. Biden said he was concerned over Judge Bork's apparent rejection of what Mr. Biden believes to be a constitutional right of privacy to protect marital relations or, in another case, to prevent states from sterilizing convicted criminals.

"It seems to me there are basic rights they [legislatures] can't touch," Mr. Biden said.

several times that the arguments in the cases cited did not raise a constitutional basis for the decisions

The leadoff witness at the hearings was Mr. Ford, who said Judge Bork properly performed his duties as U.S. solicitor general during the Watergate crisis in 1973 when he followed then-President Nixon's orders to fire special prosecutor Archibald Cox.

"Judge Bork, when thrust into a difficult situation, acted with integrity to preserve both the Justice Department and the special prosecutor's investigation," Mr. Ford said. "I think in retrospect that history has shown that his performance was in the nation's interest."

Mr. Ford pointed out that the Senate had unanimously confirmed Judge Bork to be solicitor general in 1973 and, later, to be a judge on the U.S. Circuit Court of Appeals in 1982.

Under questioning from Sen. Dennis DeConcini, Arizona Democrat, the former president said he has read only "synopses prepared by others" of the nominee's decisions and articles.

Sen. Alan K. Simpson, Wyoming Republican, presented what was perhaps the most impassioned defense of Judge Bork, characterizing opposition to the confirmation as appeals to "emotion, fear, guilt and racism."

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NEW YORK TIMES
9/16/87
(A-1)

BORK TELLS PANEL OF HIS PHILOSOPHY AS HEARING OPENS

PARTISAN DIVISION CLEAR

Court Nominee Tells Senators He is Neither Liberal Nor Conservative Thinker

By STUART TAYLOR Jr.
Special to The New York Times

WASHINGTON, Sept. 15 — Judge Robert H. Bork, stressing his "great respect for precedent," today sought to assure members of the Senate Judiciary Committee who fear he would press for major change in settled law or pursue a conservative agenda if confirmed to the Supreme Court.

"My philosophy is neither liberal nor conservative," the judge said as the momentous Senate hearing opened.

The nationally televised proceeding was jammed with reporters, lobbyists and others. It brought the three branches of government together in a rare fusion of political power with high constitutional principle, as Senators fenced on how much deference was due to President Reagan's choice of an intellectually powerful conservative nominee who could tip the ideological balance on the Court and thereby shape the law for decades to come.

Partisan Split on Panel

The partisan split on the committee was clear in opening remarks from several members. Senator Orrin G. Hatch, Republican of Utah, a leading supporter of Judge Bork, greeted him as "one of the most qualified individuals ever nominated to serve on the Supreme Court."

Senator Edward M. Kennedy, Democrat of Massachusetts, the most vocal opponent, said Judge Bork "has harshly opposed — and is publicly itching to overrule — many of the great decisions of the Supreme Court that seek to fulfill the promise of justice for all Americans." [Excerpts from hearing, pages A27-28.]

But much of the attention was focused on the four undecided members of the panel — Arlen Specter of Pennsylvania, a Republican, and Dennis DeConcini of Arizona, Robert C. Byrd of West Virginia, and Howell Heflin of Alabama, all Democrats.

Possible Dilemma for Bork

Their positions, combined with the adversarial questioning by other Democrats including Senator Joseph R. Biden Jr., the committee chairman, a Bork opponent whose Presidential campaign could hinge on his performance in the hearings, created a problem for Judge Bork: If he stands by all his previous positions, he risks rejection for being inflexible and for having a preconceived agenda, but some opponents have already begun accusing him of slipperiness and lack of candor for backing away from things he has said.

Those four undecided members said their votes could depend on his ability to allay their concerns about some of his past writings and decisions, in particular, his wide-ranging and often acerbic denunciations of dozens of decisions expanding individual rights over more than 40 years.

The hearing brought together one former President, Gerald R. Ford, who introduced Judge Bork and praised him as "perhaps the most qualified nominee to the Supreme Court in more than half a century," and three would-be Presidents: Senators Biden of Dela-

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The hearing brought together one former President, Gerald R. Ford, who introduced Judge Bork and praised him as "perhaps the most qualified nominee to the Supreme Court in more than half a century," and three would-be Presidents: Senators Biden of Delaware and Paul Simon of Illinois, who are seeking the Democratic nomination, and Senator Bob Dole of Kansas,

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Bork, at Hearings, Stresses Respect for Precedent

Continued From Page A1

the minority leader, who seeks the Republican nomination. He also helped introduce Judge Bork.

Judge Bork repeatedly qualified some past statements assailing Supreme Court decisions, while standing by others. He declined to enumerate decisions that should be overruled, but stressed that he would be far more reluctant to overrule settled precedent as a Justice than he was to criticize them as a Yale law professor and speechmaker.

"In a classroom, nobody gets hurt," Judge Bork said. "In a courtroom, someone always gets hurt, which calls for a great deal more caution and introspection."

Philosophy on Privacy

Judge Bork testified, for example, that he still believed that the Supreme Court was wrong to recognize a general right to family and sexual privacy in a 1965 decision that struck down a Connecticut law, which he himself has called "nutty," banning use of contraceptives even by married couples.

But in contrast to his broad, unqualified attacks on that decision, Griswold v., Connecticut, in published statements in 1971, 1982 and again in 1985, Judge Bork said today that his basic complaint was with the Court's creation of "a new constitutional right" to privacy, and that perhaps the result could be justified "in some other way" that was not apparent to him.

He steadfastly defended his denunciations of the Court's use of a "one man, one vote" test for state legislative apportionment, and said that the Court's 1973 decision recognizing a constitutional right to abortion "contains almost no reasoning."

But he stressed that, if asked as a Supreme Court Justice to overrule the abortion decision, or other decisions he has criticized, he would carefully consider any new arguments that might be raised in defense of those decisions, and the need not to upset "long-settled" precedents simply because they may have been wrong in the first place.

Judge Bork, making it clear that his legal positions often go against his policy preferences, said his philosophy holds that judges should ordinarily defer to policies set by elected officials and the intentions of the framers of the Constitution rather than inventing constitutional rights.

Partisan split on committee is very clear.

"If a judge abandons intention as his guide, there is no law available to him and he begins to legislate a social agenda for the American people," he said in an opening statement. "That goes well beyond his legitimate authority. He or she diminishes liberty instead of enhancing it."

At the same time, Judge Bork said, the courts must vigorously enforce those constitutional rights that are explicitly enumerated in the Constitution, such as the freedom of speech and of the press.

Much of the 60-year-old nominee's testimony, which began about 3 P.M., consisted of detailed cross-examination by Senator Biden and other committee Democrats designed to spell out for the national audience and explore Judge Bork's record of wide-ranging, often acerbic attacks on dozens of decisions by what he has called "the modern, activist, liberal Supreme Court." He has made these attacks both as a Yale law professor from 1962 until 1981, except for service as Solicitor General from 1973 to 1977, and as a Federal appellate judge since 1982.

Eminence as Scholar Stressed

Republican supporters of the nomination like Senator Hatch of Utah and Strom Thurmond of South Carolina, on the other hand, stressed Judge Bork's acknowledged eminence as a legal thinker and scholar, distinguished record of public service and five years as a judge who has written more than 100 majority opinions without ever being reversed by the Supreme Court.

Senator Heflin, a conservative Southern Democrat and respected former Chief Justice of the Alabama Supreme Court, told Judge Bork he would fare well "if the Senate is convinced that you will balance society's need for law and order with individual rights and personal freedoms."

But he also stressed: "If the evidence shows that you are intelligent; but an ideologue — a zealot; that you are principled, but prejudiced; that you are competent, but close-minded — then there is considerable doubt as to whether you will be confirmed by the Senate."

Senator Heflin and other undecided Senators placed special stress on concern about whether Judge Bork would seek to overrule the many precedents he has assailed.

And while Judge Bork sought to reassure them, he avoided giving categorical answers, saying that he would want to consider the arguments in specific cases carefully, and that "I cannot, of course, commit myself as to how I might vote in any particular case."

Attitude on Precedents

Senator Biden, in questioning the nominee, quoted several statements he has made in the past that seemed to suggest greater willingness to overrule precedents than his testimony today.

In a speech in January, for example, Judge Bork said that a judge who shares his "originalist" philosophy "would have no problem whatever in overruling a nonoriginalist precedent, because that precedent, by the very basis of his philosophy, has no legitimacy."

While Senator Hatch and other Bork supporters assailed what they called selective and out-of-context of his past statements and character assassination by his opponents, Senator Kennedy, challenging the nominee to explain his opposition to many civil rights gains over the past 25 years, finally said, "we have to be sensitive to the realities, not just legal technicalities."

Judge Bork, for his part, forcefully asserted his record of support for some other civil rights gains, and said, "You will read my writings from beginning to end and you'll never find a hint of racial or ethnic hostility."

He said, for example, that his denunciation of the Supreme Court's 1948 decision in Shelley v. Kraemer, holding racially restrictive deed covenants unconstitutiopnnal, was based on a concern widely shared by other legal scholars about whether such private action should be subject to the constitutional restraints on government action He stressed that he personally opposes such racist measures.

(2)

WALL STREET
9-16-87

Bork Seeks to Reassure Senate Panel That He Respects High Court Precedents

By STEPHEN WERMIEL
Staff Reporter of THE WALL STREET JOURNAL

WASHINGTON — Judge Robert Bork tried to reassure the Senate Judiciary Committee that he respects the value of Supreme Court precedents, but some senators remained unconvinced that he accepts basic principles established by the high court.

In the first day of hearings on President Reagan's nomination of Judge Bork to the Supreme Court, much of the questioning centered on the nominee's frequent and vigorous criticism of Supreme Court decisions that found a constitutional right to privacy implied, although not specifically mentioned, in the Bill of Rights.

The right to privacy is a lightning rod for debate over the nomination because many important Supreme Court principles are built on it. These include a right to sexual privacy for married couples, recognized in a 1965 ruling, and the right to abortion, recognized by the high court in 1973.

Judge Bork said his criticism of the right to privacy is based on the means by which the high court explained it in 1965. He called it a "free-floating right not found in the Constitution." He said the right is "undefined . . . . We don't know what it is. We don't know what it covers."

Uncertainty on Abortion Rights

When Sen. Orrin Hatch (R., Utah) suggested that the nominee is uncertain as to how he would rule on the right to an abortion, Judge Bork replied, "That is true." He added that he would have to consider whether some basis could be found in the Constitution for protecting the right to abortion, and whether the expectations of society and government have come to rely on that right.

The right to privacy and a number of other Supreme Court doctrines conflict with his basic view of the role of the courts, Judge Bork said. "The judge's authority," he said in an opening statement, "derives entirely from the fact that he is applying the law and not his personal views."

The hearing was an unusual one for Congress, often resembling a law school class more than a confirmation session.

The 60-year-old Mr. Bork, a federal appeals court judge in Washington and a former Yale Law School professor, remained low-key. Although he occasionally appeared defensive, he didn't back away from his views. Instead, he painstakingly explained the complex legal ideas that form his views, pointing out whenever possible that other constitutional scholars or Supreme Court justices share his criticisms.

Balance of Views

The opening statements of committee members shed new light on the balance of views on the panel. Five conservative Republicans support the nomination, while five liberal Democrats oppose it. One moderate Republican and three conservative Democrats remain undecided, and their decisions are likely to be influential with other Senate members when the nomination is sent to the floor, probably in mid-October.

All four of the undecided senators, however, raised surprisingly strong concerns, in effect placing the burden on Judge Bork to convince them that his views are within the mainstream of legal thought.

After listening to Judge Bork's responses, one of the undecided Democrats, Dennis DeConcini of Arizona, told reporters he wasn't satisified the judge would find "a way in the Constitution to protect" privacy.

Democratic senators, led by Joseph Biden of Delaware, the committee chairman, and Edward Kennedy of Massachusetts, greeted Judge Bork's scholarly explanations with more down-to-earth illustrations of why they think his views are too conservative to be acceptable in a Supreme Court nominee.

Judge Bork, for example, has criticized a 1942 Supreme Court decision that struck down an Oklahoma law requiring sterilization of habitual criminals. Judge Bork yesterday repeated his view that the high court's decision wasn't based on any right in the Constitution. But while the judge's answers focused on the constitutional theory he said was lacking, Sen. Biden repeatedly reduced the issue to one of whether a state legislature can pass a law requiring sterilization.

Challenge From Kennedy

And while Judge Bork explained his privacy view in academic terms, Sen. Kennedy argued hypothetically that it could lead Judge Bork to uphold a state law requiring compulsory abortions for women.

In trying to counter critics who say he would overrule many important civil liberties precedents, Judge Bork said, "It is one thing as a legal theorist to criticize the reasoning of a prior decision, even to criticize it severely, as I have done. It is another and more serious thing altogether for a judge to ignore or overturn a prior decision. That requires much careful thought."

Mr. Bork's testimony will continue today, and the hearings are due to last some two weeks, as witnesses attack and defend his record. Yesterday, he was introduced to the committee by former President Gerald Ford, who called him "uniquely qualified."

But Sen. Kennedy criticized the judge as "hostile to the rule of law and the role of the courts in protecting individual liberty." Sen. Kennedy also accused Judge Bork of insensitivity to civil rights, and said, "Your clock on civil rights seems to have stopped in 1954," the year the Supreme Court ordered school desegregation.

In other testimony, Judge Bork defended his criticism of the Supreme Court's principle of "one-person-one-vote," saying state legislatures should be able to apportion districts their own way, as long as they are rational. He said the high court erred in striking down a poll tax that was applied to all voters.

Judge Bork said he has opposed the Equal Rights Amendment because it would require the courts, rather than legislatures, to be the focal point for enforcing equal rights. And he said he supports affirmative action policies that would allow private companies "to inform minorities that opportunities exist" and to identify qualified job applicants, but he opposes numerical quotas or permanent use of statistical guidelines.

CHRISTIAN SCIENCE MONITOR 9-16-87

Bork explains his judicial philosophy

By Peter Osterlund
Staff writer of
The Christian Science Monitor

Washington

Five weeks after a gavel rapped the last session of the Iran-contra hearings to a close, the Senate caucus chamber was jammed again as US Circuit Court of Appeals Judge Robert Bork stood in the glare of television lights and swore to tell the truth.

Thus began the long-anticipated Senate Judiciary Committee hearing on his nomination to the United States Supreme Court.

"My philosophy of judging is neither liberal nor conservative," Judge Bork told the senators in his opening statement. "It is simply a philosophy of judging which gives the Constitution a full and fair interpretation but, where the Constitution is silent, leaves the policy struggles to the Congress, the president, the legislatures and executives of the 50 states, and to the American people."

During the next few weeks, the Judiciary Committee will hear a veritable army of witnesses recommend that the Senate consent to, or reject, President Reagan's nomination of Bork to the high court.

For the rest of this week, Bork will personally explain his judicial philosophy to committee members, at least half of whom have expressed opposition to his appointment. What he says and how he says it may settle the minds of the senators who have not already decided how they will vote on theBork nomination.

"I'm not going to make up my mind until I've heard Judge Bork speak," said committee member Dennis DeConcini (D) of Arizona, before the start of the hearings yesterday. As Senator DeConcini goes, so might the nomination. After the hearings' conclusion, committee members will vote on whether to approve, disapprove, or send Bork's nomination to the Senate floor without a recommendation. However the committee decides, Bork's appointment is likely to be decided only after a hard-fought Senate floor debate. Senate majority leader Robert Byrd (D) of West Virginia, who has promised a vote of the full Senate on Bork, said, "I can assure that the nomination won't be killed by the Judiciary Committee, no matter how many senators vote against the nomination [in committee]."

Still, the committee may turn out to be a microcosm of the full Senate. Of its 14 members, 5 have indicated they will support Bork's nomination and 5 that they will oppose it. The 4 undecided senators are potential bellwethers of the Bork nomina-

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tion's fate.

Among undecided committee Democrats, Senator DeConcini, a conservative, is joined by Sen. Howell Heflin of Alabama, also a conservative, and Senator Byrd. The other undecided, Sen. Arlen Specter, is regarded as one of the most liberal and independent Republican senators. Observers predict Senator Byrd will vote against Bork if the overwhelming majority of Democrats oppose him and to support Bork if the opposition is largely confined to a score of the most liberal Democrats.

All of them express admiration for Bork's résumé and seem impressed by his writings and speeches.

But they express concerns about the controversial positions Bork has advocated and harbor fears that he may seek to incorporate these views into future Supreme Court decisions.

"I'm basically a conservative, so I'm inclined to be sympathetic to what [Bork] has to say, particularly on matters of judicial restraint and so forth," says Senator Heflin. "I just want to make sure that he doesn't hold views that are anathema to the concept of *stare decisis*" – adherence to legal precedent.

Senators DeConcini and Specter say they are particularly interested in Bork's views on how the 14th Amendment's guarantees of due process relate to sex discrimination. In the past, Bork has argued that the 14th Amendment grants the federal government power to prevent discrimination based on race only. DeConcini says he plans to question Bork closely about his views on privacy rights – specifically, whether the Supreme Court has the right to overturn state laws which infringe on the privacy of individuals.

In a 1971 article, Bork argued that the Supreme Court overstepped its jurisdiction in a landmark decision that laid the foundation for a host of later privacy-related decisions, including Roe v. Wade, the 1973 decision that legalized abortions throughout the US. Bork has since partly recanted those views, but DeConcini says he wants "to hear once and for all what Judge Bork has to say on the subject." Candor is important, the senators say. "If Judge Bork answers the question put to him, that will work in his favor," says Senator Specter. "If he does what those guys did, those who are truly not committed will be turned off."

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LOS ANGELES TIMES
9/16/87

Bork Assures Senators He Respects Precedent

Testifies He Was Acting as 'Theorist' in Criticizing High Court Decisions; Unsure on Abortion Issue

By RONALD J. OSTROW and DAVID LAUTER, *Times Staff Writers*

WASHINGTON—Judge Robert H. Bork, testifying as hearings opened on his Supreme Court nomination, said Tuesday that he had been acting as "legal theorist" in his criticisms of key high court decisions—free of the "great respect to precedent" he pledged would guide him if the Senate confirms his nomination.

In seeking to reassure critics who contend that his confirmation would lead to wholesale overturning of Supreme Court rulings on abortion and civil rights, Bork told the Senate Judiciary Committee that "a judge must give great respect to precedent . . . overruling should be done sparingly and cautiously."

Precedents 'Embedded'

When asked specifically about abortion, Bork said he did not know whether he would vote to overturn the high court's landmark 1973 decision making the procedure legal in the nation. He believes the decision was wrong, he said, but he recognizes that some precedents become "so deeply embedded" in the law that they cannot be undone.

But, for the most part, Bork, accompanied by members of his family and Administration officials, refused to soften his severe assessments of court rulings as he parried the pointed questions of committee members.

His statements failed to mollify critics, who repeatedly pointed out his strong objections to the "right to privacy" that courts have interpreted in the Constitution. Such decisions on the issue of privacy are "utterly inadequate," Bork told the senators, and the abortion decision, in particular, "contains almost no legal reasoning."

At the same time, Bork's responses to the questions so far—all asked by senators who already have taken positions for or against him—appeared not to have swayed the undecided members of the committee, who hold the key to the nomination's fate.

"He didn't go deeply enough," said Sen. Dennis DeConcini (D-Ariz.), one of the uncommitted senators.

"He's giving good answers," said another, Sen. Howell Heflin (D-Ala.). But, he added: "We've got a lot of concerns."

DeConcini's Position

Earlier, summarizing the views of the other undecided members of the committee, DeConcini said in his opening statement that, before voting for Bork, "I must be satisfied that in the guise of what you represent . . . judicial restraint, that you, Judge Bork, are not a conservative judicial activist, bent on imposing your own political philosophy on the court and on this nation."

Both Bork's supporters and opponents on the panel stressed the "historical" nature of the nomination, which many believe could change the ideological balance of the court for decades.

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LOS ANGELES TIMES
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The high stakes were illustrated by the appearance of former President Gerald R. Ford, who broke with precedent to introduce the nominee in the jammed Senate Caucus Room—scene of the Iran-*contra* hearings this summer and the Senate Watergate hearings in 1973.

'Uniquely Qualified'

Ford said that his Administration and the nation "benefited enormously" from Bork's service as solicitor general during his presidency, and he added that Bork "is uniquely qualified to sit on the U.S. Supreme Court."

Bork, seldom smiling, responded to the senators' questions without notes and seemed fully in control as he explained his controversial statements as a lawyer and Yale University professor.

But, even before he began what is expected to be at least three days of testimony, some of his sharpest critics on the committee made clear in opening statements that their opposition is unyielding.

"The strongest case against this nomination is made by the words of Mr. Bork himself," Sen. Edward M. Kennedy (D-Mass.) said. "In Robert Bork's America, there is no room at the inn for blacks and no place in the Constitution for women. And, in our America, there should be no seat on the Supreme Court for Robert Bork."

Sen. Howard M. Metzenbaum (D-Ohio) was equally disapproving, saying that Bork "categorically rejects any constitutional right of privacy. He believes the government has a right to regulate the family life—and the sex life—of every American. He believes the government can make it a crime for married adults to use birth control."

Sonorous Tones

Bork, speaking in deep, sonorous tones, repeatedly sought to distinguish between his role as a teacher of law, when he made some of his most caustic comments about court rulings, and his role as a jurist.

"In a classroom, nobody gets hurt," Bork said in an exchange with Sen. Strom Thurmond (R-S.C.), one of his supporters. "In a courtroom, somebody always gets hurt."

He tried also to stress the distinction between his disagreement with the legal reasoning used by the court in reaching a decision and the results of that decision.

For example, Bork said, "I have never been for racially restrictive covenants."

In responding to a question by committee Chairman Joseph R. Biden Jr. (D-Del.) about his criticism of the high court's 1948 ruling on such covenants in housing, he said that he was only following the Constitution. The Constitution forbids only discrimination by government, not by private individuals, but the court in that case said that the constitutional protections applied because state officials would have had to enforce the covenants. That interpretation, although it might have beneficial social effects, extended constitutional protections too far, Bork said.

"In that way, any contract action, any tort action can be turned into a constitutional case," he said.

He added: "Some have suggested my reasoning about these cases is eccentric. It is not." Many noted commentators on the Constitution, like Herbert Weschler of Columbia Law School, have disagreed with the court's reasoning in the restrictive covenant case, he said.

Similarly, he said, he does not believe government should restrict an individual's use of birth control devices, as some states did until the Supreme Court struck down such laws in the early 1960s.

But, he said, in striking down those laws, the high court justices did not explain where in the Constitution they found the "right to privacy" that they cited. Unless the Constitution does specifically protect a right, "the judge may not chose" which social values to protect, he said.

Nevertheless, Bork said, "It is one thing as a legal theorist to criticize the reasoning of a prior decision, even to criticize it severely, as I have done. It is another and more serious thing altogether for a judge to ignore or overturn a prior decision. That requires much careful thought."

The intensity of the confirmation proceedings was illustrated by the unusually sharp and personal comments that some of Bork's Senate supporters directed at their opponents on the committee.

LA TIMES 9/16/87

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Sen. Gordon J. Humphrey (R-N.H.), a staunch Bork backer, for example, said that the dispute has involved "the worst infestation of politics this senator has ever seen" and questioned whether Bork's opponents are "just a bunch of racists or extremists themselves."

And Sen. Charles E. Grassley (R-Iowa) told the hearing: "Some members of the Senate have outflanked each other for the 'honor' of taking the most extreme position—before the first day of hearings."

Bork broke with the precedent of Supreme Court confirmation hearings in which nominees generally are reluctant to discuss their judicial philosophy or to explain how they came to a legal conclusion, contending that it might prejudice their participation in similar cases in the future.

He and his advisers, led by veteran Republican lobbyist Tom Korologos, have indicated that they believe exceptional openness is needed to deal with the unprecedented opposition campaign mounted by civil liberties, women's rights and civil rights organizations.

Bork, in his opening statement, sought to explain how he reasons as a judge.

"The judge's authority derives entirely from the fact that he is applying the law and not his personal values," Bork said. "That is why the American public accepts the decisions of its courts, accepts even decisions that nullify the laws a majority of the electorate or of their representatives voted for . . . . No one, including the judge, can be above the law."

"The only legitimate way" to find the law, Bork said, "is by attempting to discern what those who made the law intended. . . . Where the words are precise and the facts simple, that is a relatively easy task. Where the words are general, as is the case with some of the most profound protections of our liberties in the Bill of Rights and in the Civil War amendments, the task is far more complex."

'Diminishes Liberty'

Bork said that, "if a judge abandons intention as his guide, there is no law available to him and he begins to legislate a social agenda for the American people. That goes well beyond his legitimate authority. He or she diminishes liberty instead of enhancing it."

Although Bork stuck to many of the past statements that have made his nomination controversial, he reiterated to the senators that he long ago abandoned his 1963 opposition to a landmark civil rights law that forbade discrimination in hotels, restaurants and other public accommodations.

His opposition at the time was based "on a not uncommon intellectual mistake" of carrying free market ideas into social policy, he told Kennedy.

Bork noted also that he no longer believes, as he wrote in 1971, that the First Amendment's protections of free speech and the press should be limited only to explicitly "political" speech. Science, literature and other forms of "moral discourse" are equally deserving of constitutional protection, he testified.

Although saying that he believes previous court rulings should be respected highly, Bork cited the Supreme Court's 1954 ruling in Brown vs. Board of Education—which overturned an 1896 ruling and banned racial segregation in public schools—as an example of when "a venerable precedent can and should be overruled."

The 1896 ruling allowed "separate but equal" schools. Reversing it, he said, "was clearly correct and represents perhaps the greatest moral achievement of our constitutional law."

Constitutional law "will evolve as judges modify doctrine to meet new circumstances and new technologies," Bork said. As a result, the First Amendment's guarantee of freedom of the press is today applied to radio and television and the Fourth Amendment's protection against unreasonable searches is applied to electronic surveillance, he said.

CHICAGO TRIBUNE
9-16-87

Bork spurns political label at 1st hearing

From Chicago Tribune wires

WASHINGTON—U.S. Supreme Court nominee Robert Bork, denying that his judicial philosophy is either liberal or conservative, said Tuesday that judges must be dedicated to restraint and respect for democratic processes.

The federal appeals court judge, in an opening statement to the Senate Judiciary Committee considering his nomination, said:

"My philosophy of judging is neither liberal nor conservative. It is simply a philosophy of judging which gives the Constitution a full and fair interpretation, but where the Constitution is silent leaves the policy struggles to Congress, the president, legislatures and executives of the 50 states and to the American people."

Meeting head-on some of the attacks of liberal critics, Bork said he values judicial precedent and singled out for special praise the 1954 Supreme Court ruling that outlawed school segregation.

That ruling, Brown vs. Board of Education, "represents perhaps the greatest moral achievement of our constitutional law," Bork said.

He also said that as a Supreme Court justice he would look differently on past court rulings than he has done as a scholar earlier in his career.

"It is one thing as a legal theorist to criticize the reasoning of a prior decision, even to criticize it severely, as I have done," he said. "It is another and more serious thing altogether for a judge to ignore or overturn a prior decision. That requires much careful thought."

Bork said judges who impose their own values rather than interpret the Constitution deprive the American people of liberty.

"That liberty, which the Constitution clearly envisions, is the liberty of the people to set their own social agenda though the processes of democracy," he said.

Bork, 60, made his statement after sitting silently through a long morning committee session at which his appointment was alternately praised and condemned in unusually strong terms.

Former President Gerald Ford, introducing Bork at the start of the hearing, praised him as "uniquely qualified" for the Supreme Court and said his "record has been exemplary" since he took a place on the U.S. Circuit Court of Appeals five years ago.

Ford added that Bork acted "with integrity" in 1973 when he carried out then-President Richard Nixon's order to fire Watergate special prosecutor Archibald Cox in the so-called "Saturday Night Massacre."

But Sen. Edward Kennedy (D., Mass.), countering at the nationally televised hearings, said: "In Robert Bork's America there is no room at the inn for blacks and no place in the Constitution for women. And in our America, there should be no seat on the Supreme Court for Robert Bork."

Kennedy did not say what decisions he believes Bork is eager to overturn. But he said, Bork has "shown that he is hostile to the rule of law and the role of the courts in protecting individual liberty. He is instinctively biased against the claims of the average citizen and in favor of concentrations of power, whether that power is governmental or private."

Bork seemed to address Kennedy's allegation about wanting to overturn precedent when he declared, "Overruling should be done sparingly and cautiously. Respect for precedent is part of the great tradition of our law."

But, he added, "that does not mean that constitutional law is static. It will evolve as judges modify doctrine to meet new circumstances and new technologies."

Questions about Bork's qualifications were raised by three uncommitted members of the committee, [illegible] divided on whether to recommend confirmation.

However, Senate Majority Leader Robert Byrd (D., W. Va.) repeated his intention to have the full Senate vote on the nomination. "I can assure that the nomination won't be killed by the Judiciary Committee, no matter how many senators vote against the nomination," he said.

Sen. Howard Metzenbaum (D., Ohio), a Bork critic, said it is clear Reagan is trying to revise the Constitution through his Supreme Court appointments.

"No one would question the President's right to attempt to amend the Constitution," Metzenbaum said. "But in the Senate, we have every right—and duty—to challenge his attempt to amend it by the back door."

Sen. Orrin Hatch (R., Utah) sprang to Bork's defense.

"Judge Bork is experiencing the kind of innuendo and intrigue that usually accompanies a campaign for the Senate," Hatch said. "Federal judges are not politicians and ought not be judged like politicians."

Sen. Dennis DeConcini (D., Ariz.), one of the undecided committee members, said Bork has many questions to answer.

"I am concerned about Judge Bork's past statements on civil rights and equal protection," DeConcini said. "In addition, there are questions about his integrity that must be answered," he said, citing the "Saturday Night Massacre."

Two other uncommitted Judiciary Committee members, Senators [illegible] Specter (R., Pa.), also said they have reservations about Bork.

Heflin, apparently reflecting concerns raised by some of his Alabama constituents, also said, "There are those who charge that Judge Bork is an agnostic or a nonbeliever." But Heflin said Bork's religious beliefs should be off-limits.

USA TODAY
9/16/87

Bork backers: Some critics playing dirty

By Tony Mauro
USA TODAY

Pro-Bork forces said Tuesday that news reports that Supreme Court nominee Robert Bork may have had a "drinking problem" were part of a last-ditch "whisper campaign" by liberals opposing him.

"They know they can't beat him on the merits, so they have to resort to character assassination," said Jeffery Troutt of the conservative Institute for Government and Politics.

The White House also dismissed the reports, asserting if background checks had detected a serious problem, he would not have been nominated for the court post.

The (Cleveland) *Plain Dealer*, quoting unidentified sources, said a confidential FBI report prepared routinely for the Senate Judiciary Committee contained information about two visits by Bork to a local Washington hospital emergency room in December 1983 for injuries suffered in falls.

In one visit, the newspaper reported, Bork's blood alcohol level was .09, just short of the .10 level used for assessing drunken driving.

He was not driving in either incident. Bork, who reportedly broke an arm and sprained a wrist, said he slipped on icy walkways.

Panel member Sen. Dennis DeConcini, D-Ariz., mentioned alcohol as a possible problem for Bork in a published interview last week.

By Tim Dillon, USA TODAY

LEAHY: Has not seen FBI background report on Bork

Another member, Sen. Patrick Leahy, D-Vt., reportedly wrote Bork about the issue and may raise it in public, though he said Tuesday he had not seen the FBI report.

FBI reports on court nominees are normally held closely by the committee, available only to senators and a handful of top committee aides.

Press profiles of Bork often mention that he enjoys martinis. Friends say he has moderated both drinking and smoking in recent months.

Anti-Bork groups reacted to the reports gingerly, insisting they did not leak the report. "Something like this has to be handled so delicately," said Nan Aron of the liberal Alliance for Justice.

USA TODAY
9/10/87

White House pins hopes on Bork performance

By Jessica Lee
USA TODAY

Judge Robert Bork returns to the confirmation hot seat today carrying the weight for the Reagan administration's domestic agenda.

President Reagan has invested his personal prestige in Bork's confirmation, citing it as a key goal in the final 16 months of his presidency.

But Bork, the White House says, must seize the offensive from liberal critics by refocusing the debate from hype to hard issues.

The White House is depending on Bork — viewed as a brilliant, restrained and articulate jurist — to deliver a performance powerful enough to persuade the Senate and an apathetic public that he would be a credit to the high court.

The White House hopes that Bork, speaking in his most ponderous professorial tones, will demonstrate that he is a law interpreter, not a lawmaker.

To achieve that goal, the White House has counseled Bork to spotlight his views on criminal justice. Bork has received high marks from law enforcement professionals for his papers and rulings on criminal justice issues.

Reagan groused to GOP leaders Tuesday that Bork's overwhelming support in the law enforcement community has received too little publicity.

Republicans on the Judiciary Committee can be expected to bring out those views when they question Bork and other witnesses.

The White House has recruited an array of legal luminaries — six former attorneys general and an ex-Supreme Court chief justice — to back up Bork on the firing line. And Reagan will keep lobbying with public statements and coaching privately from the sidelines.

But Bork is the best representative of his thinking, goes the White House line. The administration hopes he'll direct attention away from fears that he would be an activist justice seeking to reverse landmark civil rights, women's rights and privacy rulings.

Bork: Round One, 1A

USA TODAY
9-16-87

Bork panel to aim for 'specifics'

By Tony Mauro
and Richard Wolf
USA TODAY

WASHINGTON — The high stakes battle over Supreme Court nominee Robert Bork is expected to zero in today on his views on race and privacy.

Opening day Tuesday found Bork vigorously defending his views before the Senate Judiciary Committee, and denying he's eager to overturn rulings.

"It is one thing as a legal theorist to criticize the reasoning of a prior decision ... as I have done. It is another and more serious thing to ignore or overturn a prior decision."

"My judicial philosophy is neither liberal nor conservative," insisted Bork.

But Sen. Patrick Leahy, D-Vt., said at day's end, "I think we will go on to a lot more specifics" on Wednesday.

Likely topics: Bork's written attacks on Supreme Court rulings favoring First Amendment, abortion and minorities.

CNN and PBS begin coverage today at 10 a.m. EDT.

The first day of hearings, in the same high-ceilinged room used for the summer's Iran-contra sessions, did not change minds: "I am still in an unequivocal state of indecision," said Sen. Howell Heflin, D-Ala.

Sen. Ted Kennedy, D-Mass., led the attack: "In Bork's America there is no room at the inn for blacks, and no place in the Constitution for women."

Bork was not without allies:

■ Former President Gerald Ford introduced Bork to the committee, an unprecedented move: "Judge Bork is uniquely qualified."

■ Sen. Alan Simpson, R-Wyo., welcomed Bork to the 4-H Club: "Hype, hoorah, hysteria and hubris."

Bork's Business Views Eyed

NEW YORK (AP) _ Supreme Court nominee Robert H. Bork's critical view of antitrust laws is expected to be scrutinized at his confirmation hearings because of concerns that he would favor big business at the consumers' expense.

No official position on the U.S. appellate judge has been taken by the National Association of Manufacturers or U.S. Chamber of Commerce, two of the most important business lobbying concerns in Washington. Spokesmen for both groups said it was standard policy not to comment on presidential appointees.

But to Bork's critics, including the American Civil Liberties Union, New York Bar Association and the AFL-CIO, big-business support for him was obvious from an accolade published last month in the Wall Street Journal.

It was written by Roger B. Smith, chairman of General Motors, the largest U.S. industrial company and a longtime opponent of business regulation.

"From what I know about him and from what I have read about his view of judicial life, I believe Judge Bork has an enduring commitment to the rule of law," Smith wrote.

Although GM spokesman Donald Postma said Smith was only expressing a personal opinion, the column was widely criticized, even within the auto industry.

"Roger Smith was saying that with Bork, the big guy wins," said Alan B. Morrison, a member of the Public Citizen Litigation Group, a Ralph Nader organization that has written a critical study of Bork's judicial history. "Smith may be the only one who's going to say it. Maybe the rest of them don't want to make it known."

Automotive News, a major trade publication, said that in writing such a column for a national business daily,

"Smith clearly stepped beyond speaking as an individual citizen."

The critics contend that as a federal appellate judge, Bork frequently has sided with companies, in one case ruling an employer was justified in ordering female factory employees to be sterilized or face dismissal.

Bork also upheld a company's right to fire workers distributing union signup cards. He also strongly dissented from a significant ruling that a victim of sexual harassment by her supervisor was entitled to sue her employer for sex discrimination.

The Public Citizen Litigation Group said in its study of Bork that in split cases in which the government was a party, he "voted against consumers, environmental groups and workers almost 100 percent of the time and for business in every such case."

Bork's antitrust writings, his academic specialty as a Yale Law School professor, sharply contrast with the philosophy of judicial restraint and respect for legislative decisions that he has advocated in other areas.

Beginning with the Sherman Act of 1890, antitrust laws have played a significant role in the U.S. economy by preventing mergers and other collusive practices, such as price-fixing and market-sharing agreements, that suppress competition and hurt consumers.

In a 1978 book "The Antitrust Paradox: A Policy at War with Itself," Bork wrote that most antitrust laws passed by Congress, and Supreme Court decisions on antitrust issues are incorrect, counterproductive and economically inefficient.

Some business groups also have reservations about Bork, especially lobbyists representing small companies that historically have relied on antitrust enforcement to survive.

"We have expressed our interest to the Senate committee to at least ask Judge Bork about his position on antitrust and small business," said John Satagaj, president of the Small Business Legislative Council, a Washington-based coalition of 90 trade associations. "There are at least some questions because of his book."

AP-NY-09-16-87 0739EDT

Report Biden Used RFK Quote

LOS ANGELES (AP) _ Presidential aspirant Sen. Joseph Biden gave conflicting information about how he acquired material that was reportedly was lifted from a British politician's speech, according to a newspaper Wednesday.

A published report Tuesday, meanwhile, said Biden quoted or closely paraphrased Robert Kennedy without attribution during an address.

The Delaware Democrat has been criticized for using material from speeches by British Labor Party leader Neil Kinnock without credit during an Aug. 23 debate at the Iowa State Fair. Biden spokesmen have said the lack of attribution in that speech was unintentional.

In an speech nine days earlier, Biden, bidding to establish his foreign affairs credentials, said "a leader of another country" had given him a tape of the Kinnock commercial in which the passages appeared, the Los Angeles Times reported Wednesday.

But Biden since has said he was given the tape by William Schneider, a fellow at the American Enterprise Institute in Washington and political analyst for the Times.

The paper said Biden also used Kinnock's material without attribution a second time, during an Aug. 26 interview with the National Education Association.

In its report, the San Jose Mercury News said the Kennedy references were used without attribution during a February speech in Sacramento to Democrats.

"I'm not going to engage in text analysis," Biden spokesman Larry Rasky said Monday about comparisons to Kennedy speeches. "This is getting pretty frivolous."

In the speech, Biden said:

"This standard ... doesn't measure the beauty of our poetry, the strength of our marriages, the intelligence of our public debate, the integrity of our public offices. It counts neither our wit nor our wisdom, neither our compassion nor our devotion to our country."

Kennedy, in a March 1968 speech at the University of Kansas, said:

"The gross national product ... does not include the beauty of our poetry or the strength of our marriages, the intelligence of our public debate or the integrity of our public officials.

"It measures neither our wit nor our courage, neither our wisdom nor our learning, neither our compassion nor our devotion to our country."

Although Biden did not attribute the remarks to Kennedy during the speech, the statement was attributed to the late New York senator in the text of the speech given to reporters.

The Times said reporters noticed the discrepancy regarding the source of the Kinnock remarks when Biden's campaign officials played a videotape of an Aug. 14 speech showing that Biden did credit Kinnock.

Biden has insisted that he neglected to credit Kinnock only once, during the Iowa State Fair debate. But the Times said he again failed to credit Kinnock in an Aug. 26th interview taped by the National Education Association.

Biden, in the NEA tape, said "I was thinking to myself why was it that I was first person, the first Biden to in probably a thousand generations to get to go to university and to law school. ... Was it because our mothers and fathers were not as smart as we were?."

In his passage, Kinnock asked, "Why am I the first Kinnock in a thousand generations to be able to get to university ... was it because our predecessors were so thick?"

Biden, chairman of the Senate Judiciary Committee, presided Tuesday over Senate hearings on the nomination of Judge Robert Bork to the Supreme Court, and could not be reached for comment, a spokesman for his campaign said.

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Bork Faces Further Questioning

WASHINGTON (AP) _ Robert H. Bork, answering senators who would deny him a Supreme Court seat, says his critics shouldn't assume that he would reject privacy claims, rule against minorities or end a woman's right to an abortion.

Bork's message Tuesday, the first day of his confirmation hearings, was that he's neither liberal nor conservative, but predictable only in his belief that judges should not create new law.

The nominee was peppered, by friend and foe alike, with questions that ranged like a roadmap over his writings as a Yale Law School professor and his decisions as a judge on the U.S. Court of Appeals in Washington. When he returns Wednesday, Bork will be asked to return to those subjects in greater detail.

Bork repeatedly made the point that he often opposed court decisions on civil rights, privacy, women's rights and even abortion on grounds that justices created new rights without any constitutional basis.

"I am not be any means alone" in that view, he insisted, denying that he opposed basic civil rights and civil liberties.

And Bork said he would give "much careful thought" before overturning Supreme Court precedent, because "it is one thing as a legal theorist to criticize the reasoning of a prior decision. ... It is another and more serious thing altogether for a judge to ignore or overturn a prior decision."

He told a supportor, Sen. Strom Thurmond, R-S.C., "The law should not be ... shifting every time the personnel of the Supreme Court changes."

Women's groups fear Bork would become the swing vote in overturning Roe vs. Wade, the ruling that permitted a woman to have an abortion.

But when Sen. Orrin Hatch, R-Utah, a Bork supporter, suggested to the judge that it is not certain he would vote to overturn the decision, the witness replied, "That is true."

Bork told Hatch that before ruling he would first want to know whether a right of privacy can be derived "in some principled fashion from the Constitution."

If not, Bork said, he would ask
"whether this is the kind of case that should or should not be overruled."

Bork testified at the televised hearings from a table that faced the committee's 14 senators. Sitting in a row of chairs behind him were Bork's wife, his daughter, his two sons and a neighbor, Mary Ann Stewart, the widow of former Justice Potter Stewart.

The session was held in the Senate Caucus Room, where bright television lights reflected off the glass chandeliers, and where lobbyists stood along the marble columns. The same room hosted the hearings into the Watergate scandal and the recent investigation into the Iran-Contra affair.

Bork had his roughest moments with Sen. Edward M. Kennedy, D-Mass., the two of them sparing over civil rights, privacy, sex discrimination and one-man, one-vote.

"Your clock on civil rights seems to have stopped in 1954," Kennedy said. He noted Bork's opposition in 1963 to portions of the landmark civil rights law that passed the next year.

Bork said he has long since changed his mind about the legislation and feels now that the civil rights laws

"do much more good than harm. They have helped bring the nation together."

Bork also acknowledged his criticism of a Supreme Court ruling invalidating poll taxes, a device critics said was used to exclude blacks from voting. He said there was insufficient evidence in that case that the poll tax "was applied discriminatorily."

AP-NY-09-16-87 0543EDT

Bork Testimony Excerpts

WASHINGTON (AP) _ Here are excerpts from the testimony Tuesday at Senate Judiciary Committee confirmation hearings on President Reagan's nomination of appeals court Judge Robert H. Bork to fill a vacancy on the Supreme Court:

FORMER PRESIDENT GERALD R. FORD, who introduced Bork: ... I have known Judge Bork since the mid 1960s when he was a distinguished faculty member of the Yale University Law School, my alma mater. ...

My friendship with Robert Bork expanded during his service as solicitor general (1973-1977) while I was Republican leader in the House of Representatives, vice president and president. For the record, he was unanimously confirmed as solicitor general.

Just months into the job as solicitor general, Robert Bork was faced with a crisis not of his making. President Nixon, during the Watergate investigation, ordered the dismissal of Special Prosecutor Archibald Cox. Judge Bork, when thrust into a difficult situation, acted with integrity to preserve the continuity of both the Justice Department and special prosecutor's investigation. I think in retrospect that history has shown that his performance was in the nation's interest.

When I became president Aug. 9, 1974, I requested that he stay on as solicitor general and he distinguished himself as the principal government advocate before the Supreme Court during my administration. ...

I was especially pleased that President Reagan nominated Robert Bork for judge on the U.S. Circuit Court of Appeals for the District of Columbia. ... In my opinion, Judge Bork's record on the bench has been exemplary. ...

SEN. EDWARD KENNEDY, D-Mass.: ... Time and again, in his public record over more than a quarter of a century, Robert Bork has shown that he is hostile to the rule of law and the role of the courts in protecting individual liberty. He has harshly opposed, and in public, itching to overrule many of the great decisions of the Supreme Court that seek to fulfill the promise of the justice for all Americans.

He is instinctively biased against the claims of the average citizen, and in favor of concentrations of power, whether that is governmental or private. And in conflicts between the legislative and executive branches of government, he has repeatedly expressed a clear contempt for Congress, and an unbridled trust in the power of the president. ...

It is easy to conclude from the public record of Mr. Bork's published views that he believes women and blacks are second-class citizens under the Constitution. He even believes that in the relation to the executive, that members of Congress are second-class citizens. Yet, he is asking the Senate to confirm him. ...

In Robert Bork's America, there is no room at the inn for blacks, and no place in the Constitution for women; and in our America, there should be no seat on the Supreme Court for Robert Bork. ...

Rather than selecting a real judicial conservative to fill Justice (Lewis) Powell's vacancy, the president has sought to appoint an activist of the right, whose agenda would turn us back to the battles of a bitterly divided America, re-opening issues long thought to be settled and wounds long thought to be healed. ...

I believe the American people strongly reject the administration's invitation to roll back the clock and relive the more troubled times of the past. And I urge the committee and the Senate to reject the nomination of Mr. Bork.

SEN. ORRIN HATCH, R-Utah: ... I feel honored to welcome to the committee one of the most qualified individuals ever nominated to be _ to serve on the United States Supreme Court. His resume _ outstanding law student, successful trial practioner, leading law professor, esteemed author and lecturer, excellenct solicitor general, and respected judge on the District of Columbia Circuit (Court) _ speaks for itself. ...

In light of these remarkable credentials, it is hard to understand why your nomination would generate controversy. The answer is found in one word, which is tragic in this judicial context, and that word is "politics." Judge Bork is experiencing the kind of innuendo and intrigue that usually accompanies the campaign for the United States Senate. ... Federal judges are not politicians and ought not to be judged like politicians.

Despite the lessons of Senate precedent and the Constitution, and in spite of the political damage to the independence and integrity of the judiciary, we are likely to witness a bruising political campaign before your nomination comes to a final vote in the Senate. ...

We have heard too much recently about the so-called Saturday night massacre. In fact, this was one of your finest hours. You were not the cause of Watergate, but you were part of the solution. As a precondition of carrying out the president's order, you gained a commitment that the investigation would go forth without further interference. ... Even then, you had to be convinced by Attorney General (Elliott) Richardson not to resign. But the evidence that your decision was correct is history, because you preserved the investigation, the president was later forced to resign and several others were prosecuted. And the performance that you gave, it seems to me, deserves commendation, not criticism. ...

SEN. DENNIS DECONCINI, R-Ariz.: ... I must be satisfied that in the guise of what you represent, and Attorney-General (Edwin) Meese called judicial restraint, that you, Judge Bork, are not a conservative judicial activist, bent on imposing your own political philosophy on the court and on this nation.

It is obvious, Judge Bork, that you have an extreme intellect. Your experience as a lawyer, solicitor-general, as a law professor, and as a circuit court judge is very impressive to anyone. ... The question is not whether I agree with you, Judge Bork, more often than I disagree. I will not prepare a scorecard of your decisions and vote according to the previous hit and misses that you and I make. ... This is not a game. There's no next-day for the loser in the Supreme Court.

The question that I will ask myself at the end of these confirmation hearings is whether I'm comfortable with the approach that you take in applying the Constitution and federal laws with the facts presented to you. Do I believe that, faced with the difficult decisions with wide-ranging implications, that you, Judge Bork, will listen carefully to the arguments on both sides and then apply the appropriate law in an objective and unbiased way? Or will you find an intellectually supportable and highly articulated way to decide the case as you see fit and you feel it should come out? In my opinion, we have had too many result-oriented Supreme Court justices. ...

The ultimate question I must decide is whether I feel secure putting our individual liberties, freedoms, and the future of our country in your hands. ...

SEN. JOSEPH BIDEN, D-Del., chairman of the Senate Judiciary Committee: ... The unique importance of this nomination is, in part, because of the moment in history in which comes. For I believe that a greater question transcends the issue of this nomination. And that question is: Will we retreat from our tradition of progress, or will we move forward, continuing to expand and envelope the rights of individuals in a changing world which is bound _ bound to impact upon those individuals' sense of who they are and what they can do. ...

In the passing on this nomination to the Supreme Court, we must also pass judgment on whether or not your particular philosophy is an appropriate one, at this time in our history. And you are no ordinary nominee, judge, to your great credit. ...

As I made clear when Senator (now White House Chief of Staff Howard) Baker contacted me, and when he and Attorney General Meese came to see me prior to your selection, ... that as a matter of principle, I continued to be deeply troubled by many of the things you had written. I would have been less than honest then or now to pretend otherwise. ...

(Following the opening statments, Biden began the questioning)

BIDEN: ... Now, while you were living in Connecticut, that state had a law that made ... it a crime for anyone, even a married couple, to use birth control. And you indicated that you thought that law was "nutty." ... Nevertheless, Connecticut, under that nutty law, prosecuted and convicted a doctor, and the case finally reached the Supreme Court. The court said that the law violated a married couple's constitutional right to privacy.

Now, you criticized this opinion in numerous articles and speeches beginning in 1971 and as recently as July 26th of this year. In your 1971 article, "Neutral Principles and Some First Amendment Problems," you said that the right of married couples to have sexual relations without fear of unwanted children is no more worthy of constitutional protection by the courts than the right of public utilities to be free of pollution control laws. ...

It appears to me that you're saying that the government has as much right to control a married couple's decision about choosing to have a child or not as that government has a right to control the public utiltity's right to pollute the air. Am I misstating your rationale here?

BORK: With due respect, Mr. Chairman, I think you are. ... I was making the point that, where the Constitution does not speak _ there's no provision in the Constitution that applies to the case _ then a judge may not say, "I place a higher value on a marital relationship than I do upon an economic freedom." ... Once the judge begins to say economic rights are more important than marital rights or vice versa and there's nothing in the ... Constitution, the judge is enforcing his own moral values, which I have objected to. ... All I'm saying is that the judge has no way to prefer one to the other, and the matter should be left to the legislatures who will then decide which competing gratification or freedom should be placed higher. ...

Opening statement by SENATE MAJORITY LEADER ROBERT BYRD, D-W.Va.: ...

As I have stated so many times in the past, the Senate has both the right and the duty to scrutinize as carefully as possible the individuals who are nominated to serve on the Supreme Court of the United States. Unlike the case when we consider legislation, the Senate has no second chance in passing on lifetime appointments.

As an equal partner with the president in making these appointments, the Senate should consider the nominee's integrity, candor, temperament, experience, education, and judicial philosophy. ...

I am not troubled that you are a conservative. ... I think that courts should be conservative. I happen to believe that the body in our constitutional system that should be liberal, if at all, is the legislative body in which I serve. ...

I am interested in your apparent belief in the concept of judicial restraint. ... You have called for judges to defer to the will of the people, as expressed through their elected representatives. This makes good sense. ...

(Y)ou testified in 1973 against legislation to establish an independent special prosecutor, despite the fact that experience shows that trusting the Executive to investigate itself is a resounding reaffirmation of the fable of the fox guarding the chicken coop. And in a case decided only this year, I believe you suggested that is what is commonly referred to as executive privilege may be delegated by the President to others.

I am interested in knowing more about just how far your views go as to such delegation, because of a fear that such a view could have had a devasting impact on the public's right to know, and the public's right to discover the abuses of Watergate and the Iran-contra affair. ...

SEN. STROM THURMOND (R-SC): ... Would you please comment on what criteria you think important in deciding whether to reexamine past Supreme Court decisions.

JUDGE BORK: ... I think precedent is important. As I've explained it, anybody with a philosophy of original intent requires a theory of precedent. What would I look at? Well, I think I'd look and be absolutely sure that the prior decision was incorrectly decided. That is necessary. ...

SEN. THURMOND: ... Do you feel a distinction should be drawn between your private writings and any responsibility you would have as a Supreme Court justice?

JUDGE BORK: As a professor, I felt free to, and indeed was encouraged to, engage in theoretical discussion. ... As a judge, you don't _ you cannot be as speculative ...

SEN. THURMOND: ... Would you briefly explain to the committee what you believe is the role of a judge in interpreting the Constitution and the laws of this country?

JUDGE BORK: ... I think the obligation is to do the will of the lawmaker, if the lawmaker is Congress writing a statute or whether the lawmaker are the ratifying conventions of the Constitution. ...

SEN. THURMOND: ... (C)ould you give me an example of a constitutional decision that you would not be willing to overrule, even if you concluded that decision was wrong?

JUDGE BORK: Well, I have to include some decisions that I don't think are wrong, but I wouldn't consider overruling them. I gave the example already of the enormous scope of the commerce clause. I think it's much too late to overrule any of that. ...

I think I also gave the example of the legal tender cases, about paper money. But for example, there have been Bill of Rights cases which have the freedom of the press cases.

A whole industry is built up around an understanding of the freedom of the press. It is too late to try to _ even if one wanted to, and I have no desire to, I think those cases are correct _ even if one wanted to, one simply could not go back and tear up the communications industry of this country. ...

Highlights of Bork testimony

WASHINGTON (UPI) _ Here are some highlights from Supreme Court nominee Robert Bork's testimony in his first day of confirmation hearings before the Senate Judiciary Committee:

—On abortion:

Bork said he believed the Supreme Court's historic 1973 Roe vs. Wade decision that legalized abortion had no legal basis, but he said he does not know what he would do if faced with the issue as a member of the nation's highest bench.

—On birth control and privacy:

Bork said he believed the Supreme Court used faulty rationale in striking down a Connecticut law in 1965 barring married couples from using birth control. He said there is no constitutional right to privacy that protects a couple's right to contraceptives.

—On the 'one man, one vote' principle:

Bork said he has criticized the Supreme Court decision that every citizen's vote be counted equally on grounds that a state should be free to apportion as it sees fit as long as it is rational and can be changed.

— On poll taxes:

Bork said he thinks the Supreme Court erred in striking down a $1.50 poll tax that was not applied in a discriminatory fashion. He said it is a "decision that is hard to square with our constitutional history."

—On the Equal Rights Amendment:

Bork said he opposes the ERA because he believes legislatures, not courts, should enforce equal rights and the amendment would give judges too much power to make decisions that should be left to elected state bodies.

—On racial discrimination:

Bork said as solicitor general in the early 1970s he enforced the rights of racial minorities in court and as a judge he has voted frequently for black plaintiffs. He said he has changed his position on some of his early writings that opposed civil rights legislation in the 1960s.

—On affirmative action:

Bork said he supports traditional affirmative action that allows private instutitions to "reach out to inform minorities that opportunities exist" and to identify qualified minorities for jobs, but he opposes affirmative action programs that require certain guidelines or that are made permanent.

—On overturning precedents:

Bork assured senators he thinks prior rulings should be overturned only after careful thought. "A judge must give great respect to precedent," he said.

upi 09-16-87 08:03 aed

Bork criticizes Supreme Court ruling on abortion

WASHINGTON (UPI) Supreme Court nominee Robert Bork, issuing a sharp criticism of the landmark ruling that established a constitutional right, called the 1973 Roe vs. Wade decision nearly devoid of "legal reasoning."

In his first round of confirmation testimony before the Senate Judiciary Committee Tuesday, Bork said he did not know how he would rule on an abortion case if it came before him on the nation's highest bench. He nonetheless reiterated his previous blunt criticism of the historic ruling.

"Roe vs. Wade contains almost no legal reasoning," he said in response to a question from Sen. Orrin Hatch, R-Utah, a conservative ally and abortion foe.

Bork, a former Yale University law professor who now sits on the U.S. Circuit Court of Appeals for the District of Columbia, is a longtime critic of Roe vs. Wade, and abortion advocates have argued that his ascension to the high court could provide the crucial vote to return the power to regulate abortion to the states, which widely banned the procedure before 1973.

Bork asserted he has not taken a public social or moral position on abortion, choosing strictly to weigh the legal aspects of the question. Yet while saying he does not know how he would rule on the issue, he laid out an elaborate plan Tuesday to question an attorney defending Roe vs. Wade.

Bork said he would first ask the lawyer to find a right to privacy, the underpinning of the 1973 decision, in the Constitution. If unable to satisfy that request, he then would ask the attorney to find a right to abortion.

If unable to satisfy that requirement, Bork said he then would request arguments on why the ruling, even though wrong, should not be overturned.

Under questioning from Sens. Joseph Biden, D-Del., and Edward Kennedy, D-Mass., Bork also rapped the Supreme Court's ruling legalizing birth control.

The 60-year-old jurist said he believed the court used faulty rationale in striking down a Connecticut law in 1965 barring married couples from using birth control. He again said there is no constitutional right to privacy that would protect a couple's right to contraceptives.

Bork refused to make a statement about whether the rulings he finds faulty should be struck down. He assured senators that he believes prior decisions should be overturned only after careful consideration.

"A judge must give great respect to precedent," he said.

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Ex-president supports an old friend By JOHN HANRAHAN

WASHINGTON (UPI) _ In an extraordinary appearance by a former president on behalf of a Supreme Court nominee, Gerald Ford urged the Senate Judiciary Committee to approve his old friend Robert Bork for a seat on the high bench.

Speaking with scarcely a smile and in the flat Midwestern tones familiar to millions of Americans, Ford said Tuesday he agreed with the assessment of retired Chief Justice Warrren Burger that the conservative Bork, now a judge on the U.S. Circuit Court of Appeals for the District of Columbia, may be "the most qualified nominee for the Supreme Court in more than half a century."

Ford, who established many precedents when he succeeded a vice president and then a president who resigned in disgrace, is the first ex-chief executive ever to introduce a Supreme Court nominee to a Senate committee, according to Senate historian Richard Baker.

His appearance at the outset of Bork's confirmation proceedings indicated the extent to which Republicans are pushing the nomination in the face of bitter political arguments over the judge's views on civil rights and other issues.

Ford, 74, generally has been out of the political spotlight since his defeat by Democrat Jimmy Carter in 1976 _ a defeat blamed in part on his pardoning of his predecessor, Richard Nixon, for any possible Watergate crimes.

"We miss you here in Washington. ... Both sides of the aisle miss you," said Judiciary Committee Chairman Joseph Biden, D-Del., in welcoming the witness.

Ford, who spent 25 years in the House and rose to the position of Republican leader before serving as president pro tem of the Senate by virture of his vice presidential role, returned the compliment, saying, "I developed warm and treasured friendships with members of the Senate on both sides of the aisle."

In his introduction, Ford recounted that he first met Bork in the 1960s when the nominee was a law professor at Yale University, "my alma mater." Ford said he grew to know Bork as a friend when he became vice president and Bork became the Justice Department's solicitor general.

In that role, Bork followed Nixon's order to fire Archibald Cox as Watergate special prosecutor after Attorney General Elliot Richardson and his deputy, William Ruckelshaus, quit rather than do so in what came to be known as the 1973 "Saturday Night Massacre."

Recognizing the issue as something sure to come up at Bork's confirmation hearings, Ford termed the matter Tuesday "a crisis not of his making."

"Judge Bork, when pressed into a difficult situation, acted with integrity to preserve the continuity of both the Justice Department and the special prosecutor's investigation," he declared. "I think, in retrospect, that history has shown his peformance was in the national interest."

Ford has experience in Supreme Court controversy. As a congressman after the Senate's 1970 rejection of Nixon's nominee G. Harrold Carswell, he led an unsuccessful effort to impeach the liberal Justice William O. Douglas.

When Sen. Dennis DeConcini, D-Ariz., asked Ford briefly Tuesday about his familiarity with Bork's legal views, Ford said he had read some of the judge's decisions and synopses of his published articles by supporters and opponents.

Although the former president twice suggested he could stay to answer more questions or otherwise contribute to the proceedings, Biden dismissed him by responding that he must have a busy schedule.

Ford attained the vice presidency when Spiro Agnew resigned after pleading no contest in October 1973 to a tax charge stemming from a federal bribery investigation. When the Watergate scandal led to Nixon's resignation Aug. 9, 1974, the Nebraska native found himself the nation's 38th president.

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Senate gets right down to business with Bork By JUDI HASSON

WASHINGTON (UPI) Senators have wasted little time in reaching the heart of Robert Bork's politically charged confirmation hearings, grilling the Supreme Court nominee on issues such as abortion, race and the right to privacy.

In what has shaped up as the biggest battle in years over a prospective member of the nation's highest court, Bork already has been called to defend his 25-year record as an arch-conservative legal scholar and federal judge.

The 60-year-old jurist was summoned today for a second round of testimony before the Senate Judiciary Committee, where his opponents challenged him ferociously in an opening session that drew a large crowd and live television.

Today Sen. Howard Metzenbaum, D-Ohio, was expected to question Bork's role as President Nixon's solicitor general who fired Watergate special prosecutor Archibald Cox in the 1973 "Saturday Night Massacre," but Tuesday, questions focused firmly on judicial areas in which opponents say his views are extreme.

Responding to such concerns, Bork assured those who fear he would try to overturn key civil rights rulings that he would not seek to reject prior court decisions without considering the consequences seriously.

"It is one thing as a legal theorist to criticize the reasoning of a prior decision, even to criticize it severely, as I have done," he said. "It is another and more serious thing altogether for a judge to ignore or overturn a prior decision. That requires much careful thought."

At the same time, Bork repeated his view that the Supreme Court's historic 1973 Roe v. Wade ruling legalizing abortion was wrongly decided, though he said he did not know what he would do if faced with the issue as one of the nine justices. Opponents maintain Bork would vote to overturn the ruling.

"Roe vs. Wade contains almost no legal reasoning," Bork asserted in response to questions from conservative Sen. Orrin Hatch, R-Utah, an abortion foe.

In other bold declarations, Bork said the Supreme Court wrongly decided cases that abolished the poll tax and imposed a "one-man, one-vote" theory requiring every American's vote to be counted equally. He also reiterated his opposition to the Equal Rights Amendment on grounds that it places decision-making power with judges instead of with state legislatures.

Bork said he has changed his position of the 1960s, however, in which he opposed civil rights legislation arguing that government should not impose such will on individuals.

Committee Chairman Joseph Biden of Delaware, a Bork opponent whose handling of the confirmation process is hanging over his 1988 Democratic presidential campaign, opened Tuesday's hearing by noting Bork was "no ordinary nominee" and promising a thorough review of the judge's record.

Biden began by focusing on a 1965 Supreme Court decision that struck down Connecticut's law barring married couples from obtaining contraceptives.

Bork contends the high court used improper reasoning in deciding that a right to privacy protects a couple's right to birth control, and though he conceded Tuesday he did not know what argument he would have used, "I am by no means alone; a lot of people, including justices, have criticized this opinion."

Sen. Edward Kennedy, D-Mass., another Bork opponent, lambasted Bork in an opening statement, saying the former Yale University law professor who has sat for five years on the U.S. Circuit Court of Appeals for the District of Columbia "is publicly itching to overrule many of the great decisions of the Supreme Court that seek to fulfill the promise of justice for all Americans."

"In Robert Bork's America, there is no room at the inn for blacks and no place in the Constitution for women," Kennedy said, meeting Bork's impassive stare. "And in our America, there should be no seat on the Supreme Court for Robert Bork."

Supporters, including Hatch, immediately accused opponents such as Kennedy of politicizing the process. Sen. Gordon Humphrey, R-N.H., said, "The charges against Judge Bork are the worst infestation of politics I have seen."

At a social event Tuesday night, President Reagan told Justice Byron White that Bork was doing fine but was "up against a bunch of bush-leaguers."

Ralph Neas, director of the Leadership Conference on Civil Rights, defended the opposing senators, saying they had let Bork "speak for himself" Tuesday.

"What they are doing is dramatizing the real-life consequences if Robert Bork is confirmed and how we would reopen all of these decisions which most Americans think are settled law," Neas said.

Bork was introduced to the Senate committee Tuesday by Gerald Ford in an unprecedented appearance by a former president on behalf of a Supreme Court nominee, indicating the strong Republican desire to win confirmation.

Ford told the panel that Bork, as solicitor general, was "faced with a crisis not of his making" when Nixon ordered him to fire Cox Oct. 20, 1973. Attorney General Elliot Richardson and his deputy, William Ruckelshaus, had resigned rather than do so, but Richardson recently spoke out in defense of Bork.

"Judge Bork, when thrust into a difficult situation, acted with integrity to preserve the continuity of both the Justice Department and the special prosecutor's investigation," declared Ford. "I think in retrospect that history has shown that his performance was in the nation's interest."

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Wed 16-Sep-87 8:31 EDT
Subject: BORK
Mail Id: Rodota

Mississippians protest Bork confirmation
By United Press International

State Rep. Robert Clark of Ebenezer joined small groups of legislators, ministers, and civil rights leaders across the state Tuesday in protesting the confirmation of Judge Robert Bork to the Supreme Court.

Clark, the first black seated in the Legislature since Reconstruction, wondered "what would happen to this country if this man is seated on the U.S. Supreme Court?

"He is anti-human. He does not believe the courts should do anything to help human beings," Clark charged during a small protest in front of the federal courthouse in downtown Jackson.

Similar protests were scheduled at federal courthouses in Greenville, Hattiesburg, Meridian, Clarksdale, Biloxi, Aberdeen, and Oxford. The protests were called to coincide with the Senate Judiciary Committee's opening of confirmation hearings.

Rims Barber, state project director for the Children's Defense Fund, called Bork the "most uniquely unqualified" choice for the nation's highest court.

Hilary Chiz, executive director of the American Civil Liberties Union in Mississippi, said most of those who attended the Jackson rally were representatives of natioinal organizations opposing Bork's confirmation.

The group operates loosely under the name National Alliance for Justice, he said.

The group called on Sens. John Stennis and Thad Cochran to oppose Bork's confirmation. Stennis said has said he is undecided, while Cochran says he will side with President Reagan's nomination.

About 13 people gathered at Oxford, held hands, prayed and sang "We Shall Overcome."

Leonard McClellan, an attorney with North Mississippi Rural Legal Services, said Bork's nomination would be devastating to Mississippians.

"His views have been well laid out," McClellan said. "He's made no beef about the fact that he does not believe in individual rights."

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Wed 16-Sep-87 1:55 EDT
Subject: BORK
Mail Id: Rodota

Groups mount campaign in support of Bork

DES MOINES, Iowa (UPI) _ Saying Supreme Court nominee Robert Bork has been unfairly criticized as a "right wing lunatic" , an anti abortion group joined members of a Des Moines evangelical church to lobby for his confirmation.

Sarah Leslie, president of the Iowa Right to Life Committee, and Richard Hardy, business administrator of the First Assembly of God, announced Tuesday they will urge Iowa Sens. Charles Grassley and Tom Harkin to keep an open mind on the appointment of the District of Columbia appeals court judge.

The Senate Judiciary Committee Tuesday began hearings on the Bork appointment to succeed retiring Justice Lewis Powell.

Opponents charge Bork's ideology goes against the mainstream of public opinion and his confirmation should be denied because it would have a devastating effect on civil liberties.

Hardy said he will urge the Iowa senators and the Senate panel to "refrain from setting the precedent of confirming a justice based on partisan politics and political ideologies."

He said he believes comments made Monday in Des Moines by the Iowa Women's Political Caucus and representatives of 16 other groups were unfair.

"Discussions as have been presented in yesterday's press conference and through the media, which present Judge Bork as some sort of right wing lunatic on the fringes of legal thought are totally out of order and have no basis of fact," Hardy told a Des Moines news conference. "He is extremely well qualified."

"Why was such a man so eminently qualified in 1982 to sit on the Court of Appeals and yet so unqualified to sit on the Supreme Court in 1987?," he asked. "No one to date has stated why Robert Bork is unqualified."

Leslie said her anti-abortion group does not know what Bork's position is on abortion, but it supports his confirmation because he has "demonstrated a restrained judicial philosophy based on the bedrock of the Constitution, rather than the winds of public opinion."

"We can assume that Judge Bork will give an objective and reasonable interpretation of the law on any abortion question that comes before him," Leslie said. "Judge Bork is an eminently qualified jurist of the highest caliber."

Grassley and Harkin Monday said they will remain neutral on the Bork appointment and will wait until after the Senate hearings to decide whether he should be confirmed.

However, Grassley, member of the Judiciary Committee, has also said unless there is evidence Bork has violated judicial ethics, he will probably support him.

Wed 16-Sep-87 0:42 EDT
Subject: BORK
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(ariz)
DeConcini uncertain on Bork and privacy, downplays alcohol-abuse angle
By PHILIP J. GARCIA

WASHINGTON (UPI) _ Sen. Dennis DeConcini, D-Ariz., undecided on supporting Supreme Court nominee Judge Robert Bork, said Tuesday that while Bork presented himself "fairly well," his initial appearance did not erase serious questions.

DeConcini, in a brief interview during an afternoon break on the first day of confirmation hearings before the Senate Judiciary Committee, also said he did not intend to question Bork about an alleged drinking problem.

On Monday, the Phoenix Gazette quoted DeConcini saying that he might bring up the issue during the hearings. On Tuesday, the Cleveland Plain Dealer reported that a confidential FBI report on Bork raised questions about alcohol consumption.

"I'm satisfied that, based on the FBI analysis, that the rumor, or the inference that came to my attention, was certainly one that was an exception," DeConcini said in a sunlit hallway away from the glare of klieg lights in the nearby Senate Caucus Room.

"At this time, I don't intend to ask any questions about it," DeConcini added. In his opening statement, DeConcini told Bork that he would base his decision on "your ability, your experience, your temperment, your integrity." But he warned Bork that he must not be a "conservative judicial activist" if he hoped to sit on the high court.

"I must be satisfied that, in the guise of what you represent and Attorney General (Edwin) Meese (III) calls judicial restraint, that you, Judge Bork, are not a conservative judicial activist, bent on imposing your own political philosophy on the court and on this nation," DeConcini said.

DeConcini said he'd be opposed to any nominee who sought "to ignore the precedents of the court and lead it in a radically new direction."

In his closing remark, DeConcini said, "The ultimate question that I must decide is whether I feel secure putting our individual liberties, freedoms, and the future of our country, in your hands."

Bork, in his opening statement Tuesday afternoon, sought to assure committee members that he was a mainstream thinker on American jurisprudence.

He said a judge "must give great respect to precedent." He said it was one thing to criticize the reasoning of a prior court decision but "another and more serious thing altogether for a judge to ignore or overturn a prior decision."

DeConcini, along with Sens. Howell Heflin, D-Ala., and Arlen Specter, R-Pa., are widely considered as the uncommitted members of the 14-member Senate Judiciary panel.

"Well, I think he's presented himself fairly well _ I was not satisfied by any means with his response to Sen. (Joseph) Biden's questions on privacy and I intend to pursue them if other Senators don't," DeConcini said.

"But it's early in and I still have a lot of questions. I haven't concluded how I'm going to vote," DeConcini added.

Biden, D-Del., is chairman of the committee and is presiding over the hearings, which are expected to continue for several days.

While Democratic leaders have said the nomination will be forwarded to the Senate floor no matter how the committee votes, the Judiciary panel's vote is expected to influence floor debate.

Democrats, who control the Senate, have an 8-6 advantage on the panel.

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Robertson to declare candidacy
By PAT SCALES
CHESAPEAKE, Va. (UPI) _ Television evangelist Pat Robertson, armed with a mountain of petitions urging him to campaign for the White House, says that next month he'll officially enter the race for the 1988 Republican presidential nomination.

...He did not say whether he supported the confirmation of Judge Robert Bork to the Supreme Court, but noted, "I think the people who are supporting me are quite concerned about judicial activism."

Robertson suggested his followers would likely prefer someone who is a "strict constitutional constructionist" as Bork is perceived to be. Congressional hearings began Tuesday on Bork's nomination.

By HENRY J. RESKE UPI Supreme Court Reporter

WASHINGTON (UPI) _ Supreme Court nominee Robert Bork, seeking to quell fears he would upset decades of Supreme Court rulings, said Tuesday he would not vote lightly to overturn decisions, but he sharply criticized rulings establishing a right to abortion.

Opening what could be a titanic struggle over the meaning and practice of the Constitution, Bork, 60, said in his opening statement to the Senate Judiciary Committee's confirmation hearings that a judge "must give great respect to precedent."

"It is one thing as a legal theorist to criticize the reasoning of a prior decision, even to criticize it severely, as I have done," he said. "It is another and more serious thing altogether for a judge to ignore or overturn a prior decision."

Nonetheless, under questioning Bork defended his criticism of Supreme Court rulings establishing a right to privacy, the basis of a woman's right to abortion established in the historic 1973 Roe vs. Wade case and the right of citizens to have access to birth control.

"Roe vs. Wade contains almost no legal reasoning," he said in response to questions. Opponents have charged Bork would vote to overturn the ruling, but Bork said he did not know what he would do if in that position.

The opening statement from the federal appeals court judge and former Yale Law School professor, delivered in his deep professorial tones, came after committee members praised and attacked Bork in words that ensured a bruising examination of his conservative views.

The stakes in the nomination for the Reagan administration are so high that in an unprecedented move, former President Gerald Ford presented Bork to the committee with high praise. Bork is scheduled to return Wednesday.

However, Sen. Sam Nunn, D-Ga., frustrated by a GOP-led filibuster on a defense bill, threatened Tuesday night to refuse to block continuation of the confirmation hearings unless the filibuster ended. Senate Republicans reached an agreement on the dispute late Tuesday night, clearing the way for the hearings to continue uninterrupted.

In his statement, Bork _ whose wife, Mary Ellen, and three adult children sat through the hearings _ stopped short of pledging total adherence to legal precedent, noting that the nation's highest court has overturned rulings in areas such as desegregation, as the court did in the landmark 1954 Brown vs. Board of Education decision.

Bork has been attacked for his criticism of rulings in such areas as abortion rights and affirmative action because he has said the Constitution does not specifically provide the legal foundation for such rights. Tuesday, he said:

"My philosophy of judging is neither liberal nor conservative. It is simply a philosophy of judging which gives the Constitution a full and fair interpretation but, where the Constitution is silent, leaves the policy struggles to Congress, the president, the legislatures and executives of the 50 states and the American people."

Sen. Joseph Biden, D-Del., chairman of the Judiciary Committee and a presidential candidate, told Bork he was "no ordinary nominee" _ an assessment to which the judge nodded slightly and smiled _ and described him as the "leading proponent of a provocative constitutional philosophy."

But Senate Democratic leader Robert Byrd of West Virginia, a committee member who said he still is undecided on the nomination, told Bork, "It doesn't bother me you are a conservative; I'm a conservative."

The first questions, from Biden, focused on a 1965 Supreme Court decision striking down a Connecticut law banning married couples from using birth control. Bork has said, and did so again Tuesday, that the high court used the wrong reasoning in its ruling.

He did not say married couples do not have a constitutional right to use birth control but said the court improperly relied on a right to privacy _ not specifically stated in the Constitution _ to throw out the law.

"What I objected to was the way in which this right to privacy was created," he said.

Biden then asked, "Does a state legislative body or any legislative body have the right to pass a law telling married couples that behind their bedroom door that they can or cannot use birth control?"

Bork _ since 1982 a judge on the U.S. Court of Appeals of the District of Columbia _ responded that he had never decided such a case but declared the right to privacy should not have been used in ruling against the state.

"I am by no means alone. A lot of people, including justices, have criticized this opinion," he said.

Bork also said he did not agree with the Supreme Court's reasoning in a 1943 ruling that threw out an Oklahoma law allowing the sterilization of people convicted of certain crimes _ again because the right to privacy is not a specific part of the Constitution.

The right to privacy theme and Bork's criticism of civil rights laws was picked up by Sen. Edward Kennedy, D-Mass., who suggested that in Bork's world, "Individuals would have precious few rights."

Under questioning from Sen. Orrin Hatch, R-Utah, Bork said he didn't know how he would decide a case dealing with the right to abortion.

President Reagan nominated the conservative jurist on July 1 to replace retired Justice Lewis Powell. Bork, 60, is expected to remain at the green felt-covered witness table until week's end.

Bork's bearded countenance was virtually impassive as committee members described him in their opening statements as a thoughtful, erudite author and judge or hinted darkly that he harbored Mephistophelean intentions for American jurisprudence.

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BORK SAYS HE WON'T TRY WHOLESALE OVERTURN OF PAST COURT DECISIONS
Scripps Howard News Service
Release date: 9-16-87

(First lead writethru; includes later testimony by Bork)

By MARY DEIBEL
Scripps Howard News Service

WASHINGTON _ Supreme Court nominee Robert Bork sought to assure senators Tuesday that, if confirmed, he will not make a wholesale attempt to overturn decisions he has criticized in the past.

''Overruling should be done sparingly and cautiously,'' he told the Senate Judiciary Committee on the first day of the politically charged hearings on his confirmation.

''Respect for precedent is part of the great tradition of our law, just as is fidelity to the intent of those who ratified the Constitution and enacted our statutes,'' he said. ''It simply is too late to go back and tear up'' the body of law built up around broad court interpretations of the Constitution's commerce clause, allowing the federal government to regulate interstate business, he said.

Freedom-of-the-press cases are another area in which he said ''it is too late'' for major changes in Supreme Court rulings. He said he thinks these cases have been decided correctly and _ contrary to his 1971 statement that constitutional protection should be afforded only to ''explicitly political'' speech _ he now believes artistic, literary, scientific and moral thought deserve protection, too.

Asked about other areas of settled precedent, Bork said, ''I don't know if other cases are up for grabs or not.''

Among court decisions Bork has criticized is a 1965 ruling establishing the right of privacy.

Bork said Tuesday he still disagrees with the way the late Justice William O. Douglas derived ''this unstructured, undefined right'' that was used to strike down a Connecticut law making contraception a crime and to underpin the right to abortion.

But Bork said ''a lot of people,'' including Supreme Court justices, have criticized that reasoning and ''there may be other rationales'' for reaching the same outcome.

If an abortion case were to arise calling for broad interpretation, Bork said he would ask the lawyer: ''Can you derive a right of privacy in some principled fashion from the Constitution so I can know where you got it and how to apply it?''

If not, Bork said he would ask if specific constitutional protections exist for abortion or if the landmark 1973 decision making abortion a private choice ''is the kind of case that should not be overruled ...''

Asked about his views on affirmative action to remedy present effects of past discrimination, Bork said he supports programs that reach out and inform minorities of opportunities and that he ''wouldn't have minded preferential treatment for a time to bring blacks and other minorities into the mainstream.''

He added, however, that he ''worries'' if affirmative action becomes permanent.

-Continued-

. . . cont.

He also restated his objections to Supreme Court decisions dating back 40 years that struck down racially restrictive real estate covenants, established the ''one man, one vote'' principle and struck down Virginia's poll tax. In each instance, he said, the Supreme Court used flawed reasoning not properly rooted in the Constitution. Bork also said he believes the 14th Amendment's equal protection clause ''applies to women _ it applies to every person,'' but that application by gender ''depends upon the particular issue,'' especially if physical differences are involved.

Bork also reiterated his opposition to the proposed Equal Rights Amendment and asked whether decisions on the treatment of women should be made by judges.

''My objection to ERA is essentially the same as my objection to a balanced-budget amendment,'' he said. ''I think Congress and the state legislatures should make all the decisions on women in combat (and) unisex toilets.''

Bork, 60, a federal appeals court judge and former Yale law school teacher, appeared relaxed and professorial during more than three hours of questioning. He joked on occasion and answered at length after being assured by Committee Chairman Joe Biden, D-Del., that ''time limits are meant for senators, not for you.'' Bork is widely known in legal circles as a leading conservative theorist whose prolific and provocative writings have been hotly debated for a quarter-century. President Reagan named him July 1 to the vacancy created by the retirement of Justice Lewis Powell, a swing vote on such issues as affirmative action and abortion.

Bork's selection mobilized interest groups across the ideological spectrum and has been the occasion of the first multimillion-dollar lobbying campaign in Supreme Court history. Groups on the right and left have predicted that Bork would be willing to ''roll back the clock'' on scores of Supreme Court decisions.

Bork is to continue testifying Wednesday before the committee, which has set a tentative vote on Oct. 1.

Senate Democratic leader Robert Byrd of West Virginia said regardless of how the Judiciary Committee votes on the Bork nomination, he'll bring it up for consideration by the full Senate.

''That nomination will not be killed by the Judiciary Committee,'' he said. ''I want the Senate to have its say on Judge Bork's nomination.''

(Mary Deibel covers the Supreme Court for Scripps Howard News Service.)

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LaRouche lashes Bork, Biden
By TIM SANDLER

CONCORD, N.H. (UPI) _ Calling the Senate hearings on the nomination of Judge Robert Bork to the U.S. Supreme Court "an abomination," political extremist Lyndon LaRouche Tuesday labeled Bork and his key opponent "two evils."

LaRouche said neither Bork nor Senate Judiciary Chairman Joseph Biden, D-Del., "will ever understand the rights of individual persons."

"In this case you've got two guys fighting each other and neither is the right side. Bork is no good and the people who are attacking him are no good," LaRouche said at a news conference where he announced his strategy for winning the Democratic presidential primary in New Hampshire.

Bork, a U.S. Circuit Court of Appeals judge, is President Reagan's nomination for the replacement of retiring Justice Lewis Powell.

In addition to chairing the Senate committee that is hearing Bork's nomination, Biden is a Democratic presidential candidate. "I think these (Bork and Biden) are two evils of the so called right and left," LaRouche said.

Flanked by body guards and supporters, LaRouche criticized Biden's handling of the hearings, which began Tuesday, by saying the Senate Judiciary Committee lacks the proper focus in its questions of Bork's qualifications for the life-long post.

"They are an abomination," said LaRouche of the Senate hearings. "Bork should be attacked, but he should be attacked from the right standpoint. They (committee members) look for scandal.

"They try to find out if somebody has three sexes, you know ... preferences for men, women and Russians. They want that out there. But they don't go at the question of the philosophy of law," LaRouche said.

While calling Biden a political opportunist, LaRouche said Bork's past legal opinions should not be the premier issue in the hearings.

"He (Bork) is indifferent to our constitutional principles of individual rights," LaRouche said. "I'm not concerned about decisions as much. I'm concerned ... about philosophy and expressed philosophy of the Constitution. By the intent of the Constitution he is unqualified to be a federal judge."

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___ Anti-Bork rally set for Birmingham Saturday

BIRMINGHAM, Ala. (UPI) _ Alabama activists against Judge Robert Bork, who is in confirmation hearings in the Senate are staging a rally and teach-in to lobby against the jurist Saturday in Birmingham.

The activists will target U.S. Sen. Howell Heflin, D-Ala, who is seen as a key vote in the confirmation, said Felicia Fontaine, state National Organization for Woman president.

The rally will focus on encouraging people to write letters to Heflin and U.S. Sen. Richard Shelby to protest Bork's confirmation, which Fontaine said will be more effective than sending form letters.

"One hand-written letter is a very powerful letter," she said.

Fontaine said the noon rally at Kelly Ingram Park is organized by NOW, the Alabama New South Coalition and the Alabama Democratic Conference and as many as 1,000 people from throughout the state are expected.

WASHINGTON POST
(ED.) 9-16-87

The Bork Hearings: Day I

THE FIRST DAY of the Bork hearings was useful—and promising. Once the morning formalities and speeches were concluded the members of the Judiciary Committee jumped in with the right kinds of questions, and Judge Bork gave straightforward and concise answers. Framing the questions and responses when the subject matter was, by and large, the minutiae of constitutional theory was not easy. But the discussion was informative, which is exactly what was wanted. Everybody seemed determined, even painfully determined, not to get into a rigid Iran/contra-hearing-type confrontation.

The senators avoided categorizing Judge Bork's decisions on the court of appeals and making charges based on the number of times, in divided cases, he found in favor of certain classes of plaintiffs or certain business interests. Instead, the questions focused on his understanding of the role of courts in a democratic society and forced him to explain as best he could some of his more baffling and disturbing statements and writings. The nominee was forthright in discussing specific cases and also his philosophy in those areas that are still to be clarified by the Supreme Court.

At the end of the day, some of these matters had been pursued better than others. Judge Bork, we believe, was pretty clear in explaining his positions on one-man, one-vote, the poll tax and the Fourteenth Amendment as it applies to women. Whether or not one agrees with those positions, the nominee's thinking and the reasoning behind his views were fairly well established, though on none was the last word spoken or the subject exhausted. On both the civil rights legislation of 1964 and the concept of privacy, the answers failed to satisfy, in that Judge Bork seems, thus far, almost unaware of what is troubling his serious critics. He has many more questions to answer on these and some as yet unexplored questions.

PHILADELPHIA
DAILY NEWS
9/15/87

Judging Judge Bork

It's not because Judge Robert Bork is a conservative, but because he really *isn't*.

It's not because Bork isn't brilliant, but because he really is.

It's not because Bork isn't a man of conviction, but because his convictions are so troubling.

Troubling because with the U.S. Supreme Court in transition, someone of Bork's stature and intellectual dynamism — on the bench for the rest of his life (he's only 60) — could play a major role in reversing many of the advances of recent years, advances in individual rights, social reform and preservation of human dignity.

That's why he should not be a Supreme Court justice.

This is not a liberal-conservative issue. A true conservative — like Justice Antonin Scalia, for example, whose nomination was *not* opposed by liberal senators — is intent on "conserving" the delicate balance of social and political forces on which a society's well-being rests. Bork's past decisions, public statements and writings reflect a disdain for safeguards which have evolved over years of judicial interpretation of the Constitution, a pattern of supporting the state when it is in conflict with the individual and a willingness to undo many of the decisions which are vital in the continuing struggle for racial and sex equality, freedom of expression, personal privacy and "one-man-one-vote" representation.

All this under the umbrella of something called "original intent," a concept that the courts must hew to what is specifically mentioned in the Constitution. This arrogantly presupposes it's possible to determine exactly the "intent" of those 55 white males who gathered in Philadelphia 200 years ago. It unrealistically assumes that a political document hammered together through a series of compromises, in an effort to preserve a deteriorating union of fractious states — no matter how magnificent an accomplishment it was — can address itself to every issue two centuries later.

The delegates themselves understood this. That's why they kept much of the Constitution deliberately vague and ambiguous. That's why they prescribed an amendment process (which was launched a few years later with the Bill of Rights). And that's why they established an independent judiciary to offset the often wayward whims of the majority, expressed through the legislative and executive branches.

That, in fact, is one reason why the Constitution they drafted includes a requirement that selection of Supreme Court justices by the president be made with "advice and consent" of the Senate. And why it's not only the Senate's right, but its duty, to put Robert Bork's nomination under the most rigorous scrutiny — as it will, beginning today, when the Senate Judiciary Committee opens hearings.

It's quite possible, of course, that the nominee will clarify some positions he has taken, perhaps even back off from them. That's why Pennsylvania's Arlen Specter and the other senators on the Judiciary Committee are obliged to be as open-minded as possible. But at the risk of sounding like hanging judges — "we'll give you a fair trial and then hang you" — we see the Bork nomination as ominous, and hope the senators have the guts to reject it.

The Plain Dealer
9-15-87

What will Bork tell the Senate?

The Bork Nomination

The Politics of Justice

When the confirmation process that begins today reaches its end, the Senate will have made a choice between competing doctrines of constitutional law. If it rejects the nomination of federal Appeals Court Judge Robert H. Bork, it will have said, in essence, that the Constitution deserves the widest possible interpretation. If it affirms Bork, it will have decided that the Constitution should be applied narrowly. Either way, it will have made a political decision. It can't be otherwise. It shouldn't be otherwise.

At least in part, President Reagan nominated Bork because he admires the judge's devotion to the theory of judicial restraint, which serves, handsomely and exclusively, the purposes of a conservative social agenda. Indeed, it's often difficult to know which came first, the political contention that the high court has been too "liberal," or the judicial philosophy that the Constitution is not, in itself, an expansive document. It's safe to assume that Bork's academic rigor would not allow him to embrace a theory for political reasons. But even so, judicial restraint is, ultimately, a political tool. Bork's support of strict restraint makes politics an indisputable part of his confirmation proceedings.

The two major theories regarding the application of the Constitution (restraint and activism) stem from competing theories of "original intent." Those who believe that the Framers meant their work to be specifically limiting think that many modern rulings have been too expansive. A promise of privacy, for example, does not appear in the Constitution. Therefore the states are free to set their own limits of the *privilege* of privacy. Legalizing abortion by overturning state laws is therefore wrongheaded and worse, unconstitutional. Conversely, those who think the Constitution was written as a flexible guideline generally support a wider application. The Constitution guarantees even those freedoms it does not specifically enumerate. Privacy is an indivisible component of freedom; therefore the high court is correct to overturn state laws that intrude on it.

Restraint versus activism: From an academic point of view, it's a pretty fair fight. But in practice, the stakes are imbalanced. A justice with a broad view of the Constitution need not be liberal. Retiring Justice Lewis Powell, who claims to have held *no* constitutional philosophy, is one example. But a justice with a restrictive vision of the Constitution will, inevitably, make rulings that consistently, if not exlusively, satisfy conservative aims. Restraint is not flexible, and thus it cannot accommodate modern constitutional tests. Indeed, by stressing the pre-eminence of "majoritarian" law (that is, the law of elected legislatures), it threatens a tyranny of the majority.

The same cannot be said for its situational opposite. True, judges are appointed, and thus there is conflict between democratic will and judicial authority. But the unavoidable debates between courts and legislatures don't threaten to overthrow democratic rule. Instead, they are both intentional and healthy. Moreover, judicial activism promotes no political overview. To the contrary: the present high court, adjudged activist by its critics, contains seven Republican appointees.

Speaking last March, Bork said: "The American ideal of democracy lives in constant tension with the American ideal of judicial review under the Constitution in the service of individual liberties. ... On its bicentennial, we are still arguing about how courts should apply the Constitution." With the start of Bork's confirmation hearings coming one day before the actual anniversary, the debate is especially apropos. His nomination is a partisan battle, and the Senate is correct to see it in those terms. The crucial question is whether a Bork victory will install a partisan justice. Bork will answer that and many other questions during his confirmation hearings. Whether the Senate accepts his answer will be, either way, the ultimate demonstration of the politics of justice.

WASHINGTON POST
9/16/87

William Raspberry

A 'Moral Consensus' On Abortion

The trouble with the abortion debate is that it pits two irreconcilable ideas against each other. Abortion is either the killing of children or it isn't. Since no compromise is possible, each side presses for total victory.

But suppose that instead of beginning with the irreconcilable, we could start with broad consensus. Wouldn't that civilize the debate and improve the prospects for political cease-fire?

Gary Bauer, President Reagan's assistant for policy development, is convinced that it would. He thinks, moreover, that there may be an intellectual basis for doing it.

Put the issue in its usual form—should it be legal for a woman to choose not to take a pregnancy to term?—and you have philosophical war. But try it this way:

"There is widespread agreement on the moral undesirability of abortion. Everyone believes that abortion is not a good thing. . . . Instead of making the divisive issue of legality the starting point for federal policy toward abortion, why not begin with the consensus on the moral undesirability of abortion?"

That, in summary, is the proposal Dinesh D'Souza, a top aide to Bauer, makes in a recent memorandum.

The proposal raises two questions. First, where, in politically useful terms, could one expect to go from such a starting point? Second, will the proposal be viewed by pro-choice advocates as a useful compromise or primarily as a ploy to gain advantage for the anti-abortion partisans?

Bauer himself seems ambivalent.

On the one hand, he seems genuinely dismayed that the debate has degenerated into a winner-take-all war impinging on policy questions ranging from civil-rights enforcement to the nomination of a Supreme Court justice—particularly since hardly anyone can be fairly described as "pro-abortion."

The D'Souza memo concedes that the pro-choice side has, for now, won the legal battle. But, it argues, "if one looks at other areas of policy, one finds that there are a number of activities which are legal which the government nevertheless acts to discourage because most people believe that they are morally undesirable. Perhaps the best example is smoking. Smoking is legal. One can even talk about a right to smoke. But that is by no means inconsistent with government efforts to discourage people from smoking."

On the other hand, the proposal is a bit like Iran's calling for a cease-fire in the Persian Gulf (where continued attacks on shipping threaten its own interests) while continuing to prosecute the land war (where Iraq is at the disadvantage).

For instance, the memo suggests a number of actions the president could take to discourage abortion, actions ranging from education on the hazards of (and alternatives to) abortion to such heavy-handed tactics as disallowing tax exemptions for abortion-related medical expenses and vetoing bills that provide funding for abortions in the District of Columbia.

The document concedes that the attack on funding would be controversial, but insists that it stands the test of reason. "People have a right to drive, but the government does not provide them with automobiles. . . . One may have an unrestricted right [under the First Amendment] to produce lascivious literature without being able to demand that taxpayers pay for it."

As for the argument that to deny funding for abortion is, for poor women, the same as denying the right to abortion, the memo answers: "It is wrong and perhaps even cruel to induce poor women to have abortions and deprive them of their right to have children by making abortions cheaper and birth relatively more expensive."

"Hardly anyone can be fairly described as 'pro-abortion.' "

Bauer believes that the proposal might appeal to both sides in the abortion debate, in that it takes no position on attempts to overturn *Roe v. Wade*.

"What we are saying is that people can continue to disagree on the human life bill, the Hatch amendment—the jurisprudence. These are separate issues. What we are proposing is that we operate from an existing social consensus, in the short term, to take steps to reduce the number of abortions. That ought to appeal to the pro-life people.

"But it should also appeal to those—possibly the majority of Americans—who say 'I'm personally opposed to it, but I think abortion should be legal.'

"On a scale of 1 to 10, there is an agreement between the pro-life and the pro-choice groups from Point 1 to Point 5. The cleavage opens after that. But social policy is paralyzed at Point 1 right now.

"Where has it gotten us? The abortion rate has not gone down. The legal issues aside, it would be real progress—for both sides—if we could convince fewer women to have abortions."

Now, if Bauer and D'Souza could persuade the administration to do what it can to reduce the number of unwanted pregnancies . . .

WASHINGTON POST
9-16-87

Rowland Evans
And Robert Novak

He Was Not Richard Nixon's Errand Boy

Countering the new image of Judge Robert Bork as a judicial opportunist blinded by ambition, his supporters point to two events in the superheated days of 1973 to defend his integrity.

First, then-solicitor general Bork responded to a plea that he lead President Nixon's legal defense by saying he would require access to the White House tapes and must be permitted to use adverse information against his client. Three months later, Bork agreed with his boss, Attorney General Elliot Richardson, that they would resign if Nixon refused to permit an indictment against Vice President Spiro Agnew.

What do these past inside events of Washington politics have to do with judging whether Bork's finely wrought constitutional philosophy qualifies him for the Supreme Court? Knowing that ideology alone cannot defeat Bork, his opponents have raised questions of character and integrity. Unwittingly, White House strategists have added to the confusion by seeking to pull Bork's right-wing fangs and depict him as a moderate tabby cat.

On NBC's "Meet the Press" last weekend, Sen. Howard M. Metzenbaum, perhaps the toughest Democratic infighter on the Judiciary Committee, described Bork's new problem. His confirmation will turn in part, said Metzenbaum, "on the question of his recanting—changing his position as he comes up for a confirmation hearing." Another Bork critic, Philip Kurland, a professor at the University of Chicago Law School, has suggested "the Senate should not be asked to consent to the appointment of both Dr. Jekyll and Mr. Hyde."

Bork now must prove he is driven neither by right-wing dogmatism nor by blind ambition. Specifically, that questions whether he was delivering Nixon's laundry in 1973. Plenty of witnesses will say Bork agreed to fire Archibald Cox as special prosecutor only after being assured that Cox's staff would continue the investigation. The two earlier incidents that year would bolster him as his own man.

According to well-placed sources, Bork in early June 1973 was asked by White House Chief of Staff Alexander Haig whether he would consider leaving the Justice Department to head Nixon's legal defense.

Bork put forth two requirements: he would need access to the famous White House tapes; since he would not be the normal kind of defense lawyer, he also would need permission to turn adverse evidence against the president. When Haig said he did not think those conditions could be met, the two agreed Bork for the defense was not a good idea. The job then went to Boston lawyer James St. Clair.

In September that year, Bork helped prepare the case against Agnew. According to friends of Bork, he and Richardson agreed they would have to resign if Nixon refused to permit an indictment of his vice president.

The case against Agnew was discussed at the White House by the attorney general, the solicitor general, Haig and the president's lawyers. Agnew as vice president was then considered a bulwark against the impeachment of Nixon. Two people present at that meeting say Nixon's attorneys were wary of the precedent set when Richardson and Bork argued that Agnew could be indicted without being impeached.

As Bork and Richardson left that meeting to walk down the hall to the Oval Office to confer with Nixon, according to friends of the judge, they again discussed the need to resign if the president refused to indict. As it turned out, Nixon agreed.

Richardson is vague on the details and feels there never was really much doubt about Nixon's approval. He told us he could not recall talking to Bork about resigning, but added it is "perfectly possible" the chat took place. As for both of them quitting, Richardson said "that certainly would be the case" if Nixon had not agreed.

A month later, Richardson quit rather than fire Cox, and Bork assumed the attorney general's chair temporarily to perform that chore. His "Saturday Night Massacre" role, more than his judicial philosophy, remains the pivot of the coordinated assault on him by the Democratic establishment.

Fourteen years later, it becomes necessary for supporters of a distinguished jurist and legal scholar to recall acts of independence from the president who appointed him. Contrary to what the White House suggests, Judge Bork is a conservative. Contrary to what his enemies are trying to prove, he never was one of Richard Nixon's errand boys blinded by ambition.

WASHINGTON TIMES
9/16/87

Lloyd N. Cutler

Judge Bork: Well Within the Mainstream

The book against Robert Bork is that he is "outside the mainstream" of contemporary judicial philosophy. To locate the "mainstream" for us, the bookmakers cite such recent and current paragons as Justices Hugo Black, John Harlan, Potter Stewart, Byron White, Lewis Powell and John Paul Stevens. They are portrayed as conservative moderates, in contrast to Bork the ideologue of the extreme right.

But there is something wrong with this picture. It is at odds with the recorded views of these distinguished justices themselves.

Let's start with Justice Stevens. He stated publicly this summer what he had already expressed privately at the request of the American Bar Association's Judicial Selection Committee, namely, that he welcomes Judge Bork's nomination. Stevens went on to say, after quoting from one of Bork's opinions, that Bork's judicial philosophy "is consistent with the philosophy you will find in opinions by Justice Stewart and Justice Powell and some of the things that I have written." This was hardly an off-the-cuff remark. During Stevens' years on the court he has reviewed many Bork opinions and heard him argue many government cases as solicitor general. It cannot be squared with the extravagant characterizations of Bork as a throwback to the era of Simon Legree and Dred Scott.

There is strong judicial evidence to support Stevens' view. Consider this list of the moderate justices, so rightly admired by Bork's present opponents, who dissented from the very Supreme Court opinions that Bork is now being attacked, for having criticized in his days as a law professor. For the most part, Bork's criticisms support what these moderate justices said in their dissents.

"His views were and are widely shared by justices and academics who are in the moderate center."

In *Harper v. Virginia*, the poll tax case, the dissenters included Black, Harlan and Stewart.

In *Griswold v. Connecticut*, the contraceptive right-of-privacy case, the dissenters included Black and Stewart.

In *Roe v. Wade*, which expanded the *Griswold* precedent to cover some abortions, the dissenters included White. Stewart, who wrote a concurring opinion in *Roe*, said he joined the majority only because he bowed to the majority precedent set over his dissent in *Griswold* seven years earlier.

In *Katzenbach v. Morgan*, the Puerto Rico voting rights case, the dissenters included Harlan and Stewart. Powell, who was not appointed until several years later, criticized the *Morgan* majority's rationale in *City of Rome v. United States.*

BY JAMES K.W. ATHERTON — THE WASHINGTON POST

In *Reynolds v. Sims*, the one-man, one-vote apportionment case, the dissenters included Black and Stewart.

In *Regents v. Bakke*, the university racial quota case, the four justices who read Title VI of the Civil Rights Act to exclude race as an admissions factor included Stevens and Stewart. Four years earlier, Justice William O. Douglas (who retired before *Bakke*) had expressed the identical view in *Defunis v. Odegaard.* Two years later, Stewart reiterated the same position in *Fullilove v. Klutznick.*

In *Reitman v. Mulkey*, the state action case invalidating a provision of the California Constitution guaranteeing the freedom to sell property, the dissenters included Black, Harlan and Stewart.

In *Allen v. Wright*, the Supreme Court, with Powell and White concurring, cited Judge Bork's currently criticized dissent on standing to sue in *Vander Jagt v. O'Neill.* As for Bork's criticisms of the rationale of the unanimous 1942 Supreme Court opinion in *Shelley v. Kraemer*, striking down state court enforcement of private racial covenants, his view is similar to that expressed by Prof. Archibald Cox, Prof. Laurence Tribe and many other scholars nowhere near the extreme right.

There are a few instances, of course, where Bork's academic critiques of Supreme Court opinions were not joined either by moderate dissenting justices or by his academic colleagues. But as to most of the holdings he has criticized, his views were and are widely shared by justices and academics who are in the moderate center of the judicial spectrum, not the extreme right.

Judge Bork's views about these cases cannot reasonably be classed as outside the mainstream by the same opponents who put these moderate justices inside the mainstream. While Judge Bork is by no means the mirror image of these distinguished justices (who are by no means the mirror image of one another), neither is he their exact opposite. Whether or not one agrees with his or their views on particular cases, they are all well within the mainstream.

The writer, a Washington attorney, was White House counsel under President Carter.

NEW YORK TIMES
9-16-87

Bork Deserves To Be a Justice

By Stuart A. Smith

In Robert H. Bork, President Reagan has chosen one of the most distinguished legal minds of our generation to serve on the Supreme Court. But instead of accolades, the nomination has provoked a variety of ill-informed reactions.

I served as tax assistant under three different Solicitors General, during both Democratic and Republican administrations, including Judge Bork's tenure from 1973 to 1977. I can attest on the basis of personal observation that his conduct as the Government's chief lawyer before the Supreme Court was marked by intellectual honesty, integrity and a professionalism much appreciated by the Court itself.

Two instances illustrate these qualities. In 1974, a suit was brought by an antiwar group to challenge as improper the practice whereby members of Congress served in the armed forces' reserves. The Solicitor General successfully opposed the suit on various grounds, including "justiciability" — a doctrine that permits the courts to dismiss cases that are not suitable for judicial resolution. Here, the claim of justiciability relied upon the constitutional doctrine of separation of powers — that each house of Congress is to regulate the practices of its members rather than having those practices regulated by a coordinate branch of Government, such as the courts.

'Intellectual honesty, integrity.'

When Mr. Bork advanced the Government's justiciability point before the Court, Justice William O. Douglas, who rarely spoke, challenged the argument. He asked whether, in the Government's view, a suit to recover back pay by a member of Congress who was dismissed from the reserves would also be nonjusticiable, given the fact that suits for back pay are routinely handled by the Federal courts.

Before Mr. Bork could answer, another Justice observed that there was no evidence that a back pay claim had been filed in this particular case. The Solicitor General agreed but rejected this easy way out of what was a difficult question. He went on to state that Justice Douglas's question "properly tests the limits of our theory." He then answered the question.

I no longer recall the substance of the answer, but I do recall the nature of the process: two powerful minds engaging in a demanding exchange in which each rejected a simple solution and acknowledged and responded to an opposing point of view with unfailing candor and courtesy. A man less concerned with the pursuit of truth, less committed to his obligation to help the Court reach the legally correct decision, and more concerned — as sometimes lawyers are — simply with winning a case, would have avoided such a question.

A second episode illustrates in another way his professionalism and integrity. A black man had been convicted in a Southern state of various drug and criminal income tax charges. In his petition for Supreme Court review, the defendant claimed that the Government's principal witness had committed perjury.

As the lawyer responsible for presenting the Government's tax cases to the Supreme Court, I directed that an independent evaluation be made, and concluded that the defendant's claim was factually correct. Accordingly, I recommended to Mr. Bork that the Government confess error and ask the Supreme Court to return the case to the court of appeals to consider whether the conviction should be reversed.

The Solicitor General unhesitatingly agreed with my recommendation. He took this principled action despite the strong protests of the local United States Attorney. As Mr. Bork saw the matter, the Government's criminal prosecutions had to be conducted with the utmost fairness and the Government owed a special obligation to the Supreme Court to admit when the process had been defective, whatever the costs might be. A lesser man, again, would have yielded to institutional pressures and deprived a black man of his rights in order to protect the reputation of another Federal officer.

It is fortunate when a person of Judge Bork's demonstrated ability comes to national prominence. It is even more fortunate when a person of Judge Bork's professionalism does — a professionalism that guides him always, when dealing with the powerful and the powerless, to act with the utmost honesty and responsibility. Judge Bork would enhance, indeed grace, the important work of our nation's highest tribunal. The Senate should act speedily to confirm his nomination.

Stuart A. Smith practices tax law in New York City.

THE EVENING SUN
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Checklist on Bork

Should Robert Bork be confirmed as a justice of the United States Supreme Court? Should the Senate confine its consideration of his nomination exclusively to Bork's professional qualifications? Or is "ideology" a legitimate consideration?

The public opinion polls suggest that the American people are less interested in the political science and more interested in practical results in this impending struggle. According to several polls, the public takes an eminently pragmatic position that the senators should seek to establish some basis for predicting Bork's performance as a justice, then vote for or against his confirmation accordingly.

This will not be an easy task, because the rules of procedure do not permit the senators to ask Bork directly how he would rule on specific cases which might come before him.

But we do know that President Reagan nominated Bork as "my kind of judge," and we know that Reagan has been a tireless critic of court decisions over several decades, and we know that Reagan's attorney general has argued (with little success) for outright reversal of many of those decisions, and we do know that Robert Bork's academic and judicial writings have reflected a far greater affinity for the Reagan position than any present member of the court.

On the basis of this knowledge, it is reasonable to conclude that Bork might vote to reverse many decisions in vast areas which were thought to be settled. We offer a list of the key decisions which might be the targets of either outright reversal or sharp curtailment by Bork:

Engel v. Vitale. This was the original school prayer decision, rendered 25 years ago this year. Often grossly misrepresented, this decision held only that the state of New York could not compose an official prayer and circulate it among the public schools with instructions that it be recited by pupils each day.

Griswold v. Connecticut. This 1965 decision held that a state could not constitutionally make it a criminal offense for married couples to practice contraception in private. This decision in turn became the basis for the intractably controversial decision in *Roe v. Wade*, which established a woman's constitutional right to unrestricted abortion in early pregnancy.

United Steel Workers v. Weber. This landmark decision of 1979 established the right of private industry to establish affirmative action programs to overcome labor force imbalances arising from past discrimination.

Mapp v. Ohio. This 1961 decision, which has been characterized as "infamous" by Atty. Gen. Edwin Meese, held that state courts may not introduce illegally seized evidence in criminal prosecutions — the so-called "exclusionary rule."

Shelley v. Kraemer. This 1948 case, another landmark, held that states could not enforce "restrictive covenants" in deeds which had the effect of prohibiting, into perpetuity, the sale of property to Jews and blacks, even when the owner wished to make such a sale.

Frontiero v. Richardson. This 1973 decision held that the Air Force could not deny to female officers the same fringe benefits, such as housing allowances, that were routinely available to male officers. The decision was subsequently extended, by way of the 14th Amendment, to state-sanctioned discrimination against women.

Marbury v. Madison. This 1803 decision by John Marshall is the foundation of judicial power in the United States. The decision established the power of the courts to declare an act of the legislature unconstitutional, and the power to order executive branch officers not to act in an unconstitutional manner. Without *Marbury*, the American judiciary would resemble the courts of parliamentary systems. It is unlikely that Bork would seek to overrule *Marbury* outright, since such a step would be the equivalent of the pope announcing that he no longer believed in the Immaculate Conception. But it is equally clear that Bork's extreme view of "judicial restraint" represents the most constricted use of that power, the greatest deference to legislative power and, especially, executive power advocated by any Supreme Court nominee in modern times.

This checklist could go on at great length, but the cases discussed here are enough to offer any conscientious citizen a basis on which to consider the Bork nomination. If you believe that the decisions discussed here should be overruled or sharply modified, you should encourage your senator to vote for Bork's confirmation; if you believe that the decisions should be preserved and protected, you should urge a vote against confirmation.

On the other hand

In this squalid, materialistic world, some values endure. Tiffany's is 150 years old.

DAN BERGER

WASHINGTON JOURNALISM REVIEW — SEPTEMBER, 1987

THE PRESS & THE LAW

Is Bork Worse Than His Bite?

By Lyle Denniston

If the Senate approves Judge Robert H. Bork to be a justice of the U.S. Supreme Court, America's press certainly will have a new sympathizer there. It is not as clear, however, that the press also will have in him a dependable constitutional guardian.

Much in Bork's record justifies the press in thinking of him as a devoted protector of its First Amendment rights. But the press should remain wary, because there also is a good deal to his underlying philosophy about the meaning of the First Amendment that, in time, may pose serious problems.

The favorable view much of the press holds about Bork seems to be traceable to a single opinion he wrote as a judge of the U.S. Circuit Court of Appeals for the District of Columbia. His concurring opinion in the 1984 decision in *Ollman v. Evans*, in which the court threw out a libel lawsuit against syndicated columnists Rowland Evans and Robert Novak, is definitely pro-press in its interpretation of the First Amendment free press clause.

Expressing openly his fear of the impact of "a freshening stream of libel actions, which often seem as much designed to punish writers and publications as to recover damages for real injuries," Bork urged judges to throw out more of those lawsuits, without letting them even go to the jury. Noting that in the Evans and Novak case the claim was for $6 million in damages, Bork wrote: "In the field of journalism, these are enormous sums. They are quite capable of silencing political commentators forever."

The press especially likes that opinion because it appears to be a frank call for "judicial activism" in favor of press freedom. Overall, Bork is deeply hostile to what he has called "judicial imperialism," by which he means judges who create new rights out of vague phrases in the Constitution. Bork sought to justify activism in the First Amendment area by saying that judges have been given "stewardship" of a right explicitly named in the Constitution—press freedom—and they thus have a duty to give it new meaning as times change and threats to that freedom take on new and different forms.

He did not suggest (as so many judges do) that the First Amendment should be applied primarily to protect the freedom of the print press, with notably less protection for the broadcast media. Wrote Bork: "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. . . . We must never hesitate to apply old values to new circumstances. . . ."

Another of Bork's Circuit Court opinions, less well known, reinforces his image as a press sympathizer, especially for the broadcast press: his opinion last September in the case of *Telecommunications Research and Action Center v. Federal Communications Commission*, declaring that the "fairness doctrine" is not a binding requirement of federal law, and thus may be discarded by the FCC if it thinks that is "in the public interest." (The FCC has sought to do exactly that, so that the broadcast press would no longer have a legal duty to present a wide variety of views whenever it covers a controversial issue. Congress has been seeking to block that move by the FCC, but so far has not succeeded.)

Bork may seem to be exactly what the press wants in a judge. But there is more evidence to be examined about his views, and it is not so reassuring.

Bork has long held the view that the kind of free expression the First Amendment protects is expression about government. "The core of the First Amendment," he has written, is the protection of "speech [or writing] that is explicitly political. I mean by that criticisms of public officials and policies, proposals for the adoption or repeal of legislation or constitutional provisions, and speech addressed to the conduct of any governmental unit in the country."

In other words, Bork would protect "public-affairs" journalism, and not much else. He has said, in fact, that he sees no First Amendment protection for any subversive expression—that is, calls for the overthrow of the government (even if made with no serious steps to bring it about) and suggestions for violation of any law. He also has said that there is no First Amendment protection for sexually explicit publications or movies. (Although Bork recently has insisted that he has relaxed his restrictive views, there is no indication that he has changed his fundamental position that expression that does not deal somehow with public affairs is beyond First Amendment protection.)

The Bork view implies that he would have no constitutional problem with libel lawsuits that deal with "matters of private concern" (a category the current Supreme Court has created, and for which there is less First Amendment protection against libel). He also would seem to have no problem with invasion-of-privacy lawsuits. He may have no problem at all with a variety of new damage claims, such as those asserting that a story in the press inflicted "emotional distress" or harmed an economic advantage, if the story that was involved had nothing to do with governmental affairs.

It is more than doubtful that Bork would be willing to let the press keep its sources private when their identities are demanded by private individuals suing for libel or invasion of privacy, or when public officials demand their identities for use in a criminal investigation.

Finally, Bork has never given a hint that he thought judges, in interpreting the First Amendment, should find there a right of press access to governmental proceedings. Nothing that he has written suggests he would be prepared to read press freedom in a broad enough way to protect, constitutionally, the process of gathering the news prior to publication.

It thus would take more than a few terms of Bork on the Supreme Court for the press to take his full measure. ●

Lyle Denniston covers the Supreme Court for the Baltimore Sun.