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Last Updated: 04/21/2023

Washington Post Editorial

December 29, 1984

Posters in Metro

"TIRED OF THE Jelly Bean Republic?" asks artist Michael Lebron on an anti-Reagan poster he sought to display in Metro subway stations. The photomontage under this headline shows the president and a number of administration officials seated at a table laden with food and drink. The men are laughing, and the president is pointing to the right side of the poster where another picture of poor people and racial minorities is displayed.

Metro officials, who sell advertising to political and advocacy groups, refused to rent space for this poster on the grounds that it was deceptive. The other day, the U.S. Court of Appeals ruled that Metro had violated Mr. Lebron's right to free speech.

This country, the Supreme Court said 20 years ago, has a "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open." Public agencies allocating public space for the expression of political views have a special obligation to protect these rights.

In this case, Judge Robert Bork wrote, it was easy to see why the censorship was unwarranted. The poster was not deceptive at all; it was a straightforward anti-Reagan statement that made no pretext of objectivity. No reasonable person would have thought the scene portrayed was a single photograph: the lighting was different in the two halves of the picture, the figures were not in proportional sizes and the artist even offered to add a disclaimer stating that the scene was a composite of photographs.

But Judge Bork and Judge Antonin Scalia—two of the court's conservative members—would have reversed Metro's action on even broader grounds if it had been necessary. Both believe that an agency of a political branch of government cannot impose prior restraint on the publication of a political message even if that message is false. Nothing compels Metro to accept political advertising for subway displays, but once the decision is made to accept some of these statements, public officials cannot pick and choose what messages are acceptable on the basis of subjective judgments of what is "derisive, exaggerated, distorted, disceptive or offensive," as the Metro regulation allowed. That is an interference by the government with a citizen's right to engage in free political discourse. The court's message is clear and it is right.

THE WHITE HOUSE

WASHINGTON

August 24, 1987

MEMORANDUM FOR ARTHUR B. CULVAHOUSE, JR.

FROM: PETER D. KEISLER PDK

SUBJECT: Letter to Washington Jewish Week

I have attached a draft letter to respond to the recent article in Washington Jewish Week on Judge Bork. Ken Bialkin would be the ideal signatory. If you call him and he turns you down, we can shop around for someone else.

In order that he might feel comfortable with the assertions made in the letter, I have also attached:

(1) A copy of the August 6, 1987 Washington Jewish Week article which prompted this draft ("Senate Democrats Woo Jews for Anti-Bork Fight").

(2) A copy of the July 28, 1987 Washington Post article which made the original reference to Judge Bork's remarks on school prayer ("Bork's Appetite is Whetted for Place on Supreme Court").

(3) A copy of the letter from Warren Cikins to the Washington Post, which was never published.

(4) A copy of the letter from Rabbi Joshua Haberman to the Washington Post, which was published.

(5) A copy of the July 26, 1987 Washington Post article which recounted the Howard Krane story ("A Trip Across the Political Spectrum").

(6) The text of the Tel-Oren decision which has been the subject of much of the controversy.

Attachment

cc: Max Green

To the Editor:

I read with some dismay the August 6 article entitled "Senate Democrats Woo Jews For Anti-Bork Fight." The article repeated, inadvertently I am sure, several untrue and misleading allegations about Robert Bork's record which unfortunately have been circulating within our community. As Jews, we have always taken justifiable pride in our sense of fairness to others. As a strong supporter of Judge Bork's nomination, I write to set the record straight.

First, your article noted that the Washington Post recently recounted an incident in which Bork, in remarks delivered at the Brookings Institution a few years ago, is reported by one attendee to have endorsed school prayer and made certain insensitive remarks on that subject. When the Post account was described to him, Bork said "I can't believe I would have said that," and every available piece of evidence backs him up. His written remarks contain no mention of school prayer, and the Brookings official who organized (and of course attended) that meeting has come forward to say that the reported statements were never made. Moreover, Rabbi Joshua Haberman, another attendee, stated the following in a letter to the editor published in the Post: "It's a good thing I was there when Judge Robert Bork met with a group of clergy at a Brookings Institution dinner for religious leaders in September 1985, because if I had nothing but the Post's account of that evening, I would draw entirely wrong conclusions about Judge Bork's views on church-and-state issues. The Post's reporter was not present at the meeting. I was. As a rabbi with a strong commitment to the separation of church and state, I would have been greatly alarmed if Judge Bork had expressed any tendency to move away from our constitutional guarantee of religious freedom and equality. I heard nothing of the sort." (Apparently, Rabbi Haberman told this to the Post reporter before the story ran, but no mention was made of his comments in the published account.) The story is demonstrably false by any standard, and it would be irresponsible to spread it any further.

Second, your article made reference to a case in which Judge Bork participated, Tel-Oren v. Libyan Arab Republic, and may have left the impression that Judge Bork's opinion in that case was somehow pro-PLO. That is entirely untrue.

Tel-Oren involved a lawsuit by survivors of a PLO terrorist attack who sought compensation from the PLO and associated entities. The lawsuit was brought under the Alien Tort Statute, a little-known and rarely-used law which was enacted two centuries ago. By its terms, the Alien Tort Statute appears to authorize federal courts to hear at least some cases brought against officials of foreign governments for violations of international law. The precise breadth of this statute has never been clear, and its potentially limitless scope has given many judges and scholars pause.

All four judges who heard this particular case, Judge Bork among them, voted to dismiss the lawsuit. In that narrow sense, the PLO "won." Far more important in the long run, however, were the rationales Judge Bork gave for his decision. For one thing, he noted that as a general rule international law applies only to foreign states, and, under that rule, the PLO could not be made subject to international law in the same way as a genuine government. As Bork explained, its "governmental aspirations" were not sufficient in this regard. This was clearly correct. Plainly, any "victory" in this lawsuit which required enhancing the legitimacy of the PLO would have been thoroughly pyrrhic.

Perhaps more significantly, Bork's holding rested upon his reluctance to read the Alien Tort Statute as authorizing broad and expansive judicial authority to interpret and enforce the often vague and evolving standards of international law against foreign states. Bork expressed the concern that the exercise of such authority would involve the courts in sensitive foreign policy decisions which they are not qualified to make. This is a classic demonstration of judicial restraint, and in an area of law where activism would have been especially ill-advised. Granting broad authority for American judges to enforce international law against foreign states would be at best a double-edged sword which could be used by creative lawyers against Israel as often as against her adversaries. Indeed, more often--since Israel, unlike the PLO, is a state. We are all familiar with the common rhetorical use of international law concepts by opponents of Israel to attack Israeli policies. Had this case gone the other way, critics of Israel would have had a field day in court, and might well have been able to find a judge more willing to assert judicial power, and less disdainful of the legitimacy of the PLO, than Judge Bork.

The case in favor of Bork is a strong one. He is a man of unusual skill and sensitivity, and would become, I am sure, one of the great Justices of this century. One anecdote in particular deserves mention. Soon after Bork began the practice of law as a young associate at a prestigious Chicago law firm, he learned that an applicant for a position in that firm had been passed over because the applicant was Jewish. Bork went with another associate to see several senior partners and said, according to the colleague who accompanied him, "We have a larger stake in the future of this firm than you do. We want this man considered on his merits." The partners agreed to take a second look; the applicant was hired, and he's now one of the managing partners of the firm. This incident reflects the measure of Robert Bork far more accurately than most others that I have heard.

Sincerely,

Senate Democrats Woo Jews for Anti-Bork Fight

BY LARRY COHLER

Three Democratic senators last week urged representatives of the major national Jewish organizations to take a strong stand on the nomination of Judge Robert Bork for the Supreme Court.

At a closed-door meeting last week in the Capitol Hill office of Sen. Alan Cranston (D-Calif.), the senators depicted the Bork nomination as a crucial opportunity for Jewish groups to give the lie to their image as a one-issue lobby.

Sens. Carl Levin (D-Mich.) and Howard Metzenbaum (D-Ohio) joined Cranston in urging the Jewish groups to take a position. Metzenbaum is a member of the Senate Judiciary Committee, which will hold hearings on the nomination in September and then vote on a recommendation to the full Senate.

Michael Pelavin, chairman of the umbrella group encompassing most of the Jewish organizations, said he thought there was a "reasonable chance" the groups would achieve sufficient unity to oppose the nomination.

"We didn't take a position on [Supreme Court Chief Justice William] Rehnquist's nomination," said Pelavin, president of the National Jewish Community Relations Advisory Council (NJCRAC). "But my feeling is that because of the time period involved and the philosophical issues, there is a better chance of us being able to take a position on this than any previous nomination."

Representatives of the American Jewish Committee (AJC) and the Anti-Defamation League of B'nai B'rith (ADL), however, stressed their stand of "no position" on the Bork nomination. Under NJCRAC's governing rules, all of its constituent national organizations must endorse a position before NJCRAC can adopt it on behalf of the Jewish community.

According to several attending the meeting, the senators' appeal represented a major attempt to enlist the Jewish community in the coalition of groups opposing the Bork nomination.

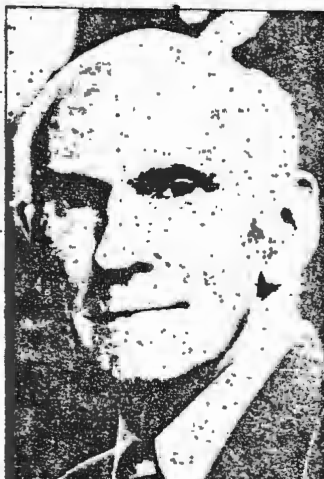
"It was a powerful message to the Jewish community of how important we are in this battle shaping up," said Rabbi David Saperstein, director of the Reform movement's Religious Action Center. The Union of American Hebrew Congregations (UAHC), parent organization of the center, came out against the Bork nomination last week. "If people who represent the mainstream of freedoms and liberties here are not going to make this fight, it can't be won," said Saperstein.

Spokespersons for Cranston and Levin said the senators did not call the meeting to urge the Jewish groups to necessarily oppose the nomination. Rather, they said, they had urged the groups to get involved in the debate, regardless of their position.

But Murray Flander, a Cranston spokesman, conceded that if the Jewish groups were to take any stand, it would certainly be against Bork.

"We're urging Jewish groups to take an active role because there is a mistaken notion that Jewish leaders are outspoken on only the single issue of Israel," said Flander.

Judge Robert Bork


Sen. Alan Cranston

"Here's an issue where other considerations, such as abortion, privacy, church-state separation and civil rights will be at issue.... This is the kind of issue in which so many groups—environmental, civil rights, civil liberties—have taken a stand. So many constituent groups have announced their opposition to Bork; it's bound to affect senators."

Flander suggested that Bork's conservative positions on minority rights and church-state separation offered Jewish and black groups an opportunity to work together, something they were noteed for in the past but have often been unable to do more recently.

The three senators themselves have yet to formally announce a position on the nomination. But those attending the meeting said their inclination to oppose Bork was clear.

Among the groups at the meeting were the AJC, ADL, UAHC, the American Jewish Congress (AJCongress), the National Council of Jewish Women, B'nai B'rith, B'nai B'rith Women, the Jewish Labor Committee, the Synagogue Council of America (representing the three major denominations within Judaism) and New Jewish Agenda. In addition to UAHC, the National Council of Jewish Women, B'nai B'rith Women, the AJCongress and New Jewish Agenda have come out against Bork's nomination. New Jewish Agenda and B'nai B'rith Women are not national members of NJCRAC, though B'nai B'rith Women's associate organization, B'nai B'rith, is.

Pelavin recently sent a letter to NJCRAC's constituent groups urging them to consider Bork's judicial philosophy in deciding their positions. In a letter to Sen. Joseph Biden (D-Del.), chairman of the Senate Judiciary Committee, he urged the committee to do so as well.

Conservative groups, including the National Jewish Coalition, have come out against making judicial philosophy a factor in confirming Bork. In a recent statement, NJC called on critics to allow the president a candidate of his own philosophical choosing.

But Jewish critics of Bork have cited several sources of ideological concern on Bork:

• In a recent *Washington Post* article, a Rochester, N.Y. Baptist minister related telling Bork about his experiences as a teacher in a Florida public school, where school prayer was required. The minister told of pressuring a Jewish boy to read from the New Testament. The minister quoted Bork as saying, "So what? I'm sure he got over it." Bork told the *Post*, "I can't believe I would have said that."

• In a 1971 article for the *Indiana Law Journal*, Bork referred to the Bill of Rights as "a hastily drafted document upon which little thought was expended."

• In a 1984 concurring opinion in *Tel-Oren vs. Libyan Arab Republic*, Bork refused damages to American victims of a PLO terrorist attack in Israel. Among the reasons Bork cited was the PLO's exemption from prosecution under the act-of-state doctrine. Though he conceded the PLO's "apparent lack of international law status as a state," he said that the diplomatic recognition the PLO enjoyed in some 100 countries and its observer status at the UN made the case a foreign policy matter beyond the proper purview of the judiciary.

Marc Pearl, Washington representative of the American Jewish Congress, contended that such emerging information had strongly affected many of the meeting participants.

But David Brody, Washington representative of the ADL, denied Pearl's suggestion that such information had fostered a majority sentiment against Bork at the meeting. "I don't see how anyone can say on the basis of [the majority's] silence that they disapprove [Bork's nomination]," he said.

Brody said that ADL was "reviewing all his writings and decisions. We'll listen to the evidence. But as of the moment we have no position."

David Harris, Washington representative of the AJC, said his group has historically remained neutral in Supreme Court confirmation debates. Nothing that has emerged so far, he said, has altered the sentiment of "a strong majority" of the AJC board for staying neutral this time. He added, "We will watch the hearings with close interest and reserve the right to reconsider our position."

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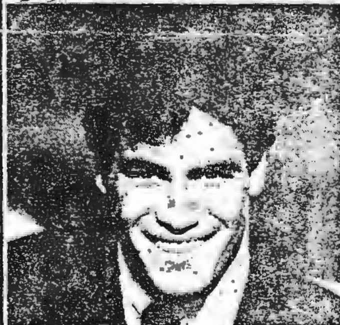

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THE WASHINGTON POST
Tuesday, July 28, 1987

Bork's Appetite Is Whetted For Place on Supreme Court

By Dale Russakoff and Al Kamen
Washington Post Staff Writers

Robert H. Bork's return to Yale in January 1977 was not a happy one. Alexander Bickel, his colleague and closest friend had died three years before. His wife, Claire, was waging a valiant, but losing, battle with cancer. Moreover, he missed Washington, a city that had captivated him like none other.

For perhaps the first period of his life, he was detached—almost biding time, putting aside the credo that Bickel had handed down to him, "Wreak yourself upon the world!"

Many of his colleagues said it was clear that his appetite had been whetted by the prize that eluded him in 1975, the chance to sit on the nation's highest court, to put into practice the theories he had struggled with.

Moreover, academic life had lost much of its appeal. "There were all kinds of people in Washington who were interesting," he said in an interview, "government people, lawyers, judges, journalists, a lot more interesting people than there were in New Haven." Bork was known at

THE SHAPING OF ROBERT H. BORK

Last of three articles

Yale for his remark: "New Haven is the Athens of America—if you like pizza."

In addition, Bork had not gotten over the scorn of many Yale students, and some fellow faculty members, for his role in the Saturday Night Massacre. Many of them signed petitions and telegrams denouncing his actions, without giving

See BORK, A8, Col. 1

THE SHAPING OF ROBERT H. BORK

Return to Washington Put High Court in View

BORK, From A1

him a chance to explain. "Why didn't they call me first?" one former colleague recalls him asking.

Bork said he spent the rest of his time at Yale distracted by his wife's declining health. His pattern was to go to class, teach and return home immediately. Some of his students felt he was no longer engaged in teaching. He seemed to have stopped exploring ideas, and appeared less eager to invite students to act as his sounding board for developing new theories.

A student in his constitutional law class in 1980 recalled Bork arriving in class and declaring: "Today we're going to talk about *Roe v. Wade* [the landmark abortion rights case that he considered unconstitutional]. Who wants to take me on?"

"His return was not a success," said a longtime friend on the faculty. "Bickel was dead and he was back in an environment which had changed. He had become more pragmatic and less theoretical. He had abandoned grand theories [and the search for them] and in its place was a hostility toward the notion of theory."

Bork also finished his only book thus far, "The Antitrust Paradox: A Policy at War with Itself," published in 1978. It advanced his free-market theme that bigness was not necessarily bad, and on the contrary, could increase efficiency and reduce prices for consumers.

It concluded in an embattled tone, with a vehement attack upon liberalism. Bork argued that an "intellectual class" of academics, journalists, lawyers, government officials and "others whose jobs center on ideas and words" had developed an apparent affinity "for expansion of the public sector at the expense of the private sector . . . .

"Intellectuals as a class have distinctive interests and tastes, and are disproportionately able to move law in the direction of their interests and tastes. The intellectuals' preference for government economic regulation is attributed to a desire to shift power and prestige from the business class to themselves," he wrote.

The man who claimed as a scholar to be seeking neutral principles suddenly had adopted the rhetoric of the neoconservative movement—those former liberals who spurned the post-New Deal Democratic Party, many of whom employ the old left's language of class struggle in their fight against their old cause.

Also, for the first time in his life, Bork was making big money as a consultant to major corporations, charging as much as $250 an hour. One client, it was learned, raised Bork's pay to $350 an hour to persuade him to give more attention to the case.

Bork Takes a Stand at Yale

Because of his wife's failing health, Bork declined to travel except when necessary for court appearances. His clients agreed to come to New Haven to get his advice, renting suites in a local hotel. His goal, he said, was to buy a house in the country if his wife recovered.

He continued to maintain a high profile off campus, preserving his political credentials by speaking to conservative groups, becoming an adjunct scholar at the conservative American Enterprise Institute and commenting regularly on issues before the Supreme Court.

When the court issued its landmark 1978 ruling in *Bakke* upholding the use of affirmative action, Bork wrote in The Wall Street Journal that affirmative action "offends both ideas of common justice and the 14th Amendment's guarantee of equal protection to persons, not classes."

The sweeping statement was reminiscent of his 1960s writings on civil rights, when he wrongly predicted massive resistance to enforcement of the laws.

Similarly, in an article published before the *Bakke* ruling, Bork predicted that the court's approval of affirmative action quotas would spur other groups, such as Eastern European ethnics, to insist on preferential treatment. The result would be "racial and ethnic politics with a vengeance," he predicted.

Bork had never been particularly active in campus politics, rarely attending faculty meetings during his first tour of duty in the 1960s and early 1970s. He was even less active upon his return. But one issue in the spring of 1978 lured him into battle—whether Yale should forbid on-campus recruiters from law firms that discriminated against homosexuals.

Bork led the opposition to the proposal, according to a 1978 student newspaper article. In a recent interview, he emphasized that there had been no harassment of homosexuals in the law school, and so he regarded the proposal as a symbolic statement aimed at getting the Yale faculty to approve of homosexuality.

"Contrary to the assertions made, homosexuality is obviously not an unchangeable condition like race or gender," Bork wrote in a letter making his case to the faculty. "Individual choice plays a role in homosexuality; it does not in race or gender; and societies can have very small or very great amounts of homosexual behavior, depending upon the degrees of moral disapproval or tolerance shown."

He continued: "That behavior [homosexuality], it is relevant to observe, is criminal in many states."

"The proposed rule does not relate to educational policy and is therefore beyond the legislative powers of the faculty," Bork said, echoing his judicial philosophy of remaining neutral unless laws specifically call for intervention.

"The proposal before us is simply an attempt to have this faculty ratify homosexuality, to have us state publicly that it is immoral for society to have any preference on the matter. I do not believe it is immoral for society or for individuals in it to have such preferences," he said.

Owen Fiss, the faculty member representing the gay students, countered that it was impossible to be neutral on the issue. "Neutrality is an unattainable ideal in this sphere. What is neutral? To allow people to discriminate is not neutral," Fiss said, according to the student paper.

The proposal, according to Prof. Harry Wellington, then dean of the law school, "won handily" despite opposition from Bork and a number of other professors, liberal and conservative.

Claire Bork died in December 1980, ending an extraordinary partnership that Bork's friends said was essential to his achievements. Soon afterward, Bork decided he needed a change of scene, and began exploring a move to Washington.

"It's tough enough living in New Haven. Imagine doing it as a widower," Bork told his former Marine buddy, Sports Illustrated environmental writer Robert H. Boyle.

Bork talked with Howard Krane, his longtime friend and now the managing partner of the Chicago firm where Bork worked until 1962. Krane persuaded him to return to Kirkland & Ellis, this time in the Washington office. In 1981, Bork purchased a $500,000 house in the Palisades neighborhood on the same street where retired justice Potter Stewart and George Bush—before he was vice president—had homes. He also bought a new BMW—a trapping of wealth commensurate with the substantial salary, apparently in the upper six figures, he was to make at Kirkland & Ellis.

By 1981, with Reagan in the White House, Bork was a strong candidate for a judicial appointment, either to an appeals court or to the Supreme Court. His writings attacking the Warren Court and liberal judicial activism had made him the patron saint of conservatives interested in changing the courts.

Nonetheless, Bork took several positions in this period that displeased conservatives, using his rigorous, constitutional analysis to critique their crusades as well as those of liberals.

In 1979, he wrote a column in The Wall Street Journal, warning against a balanced-budget amendment—a cornerstone then as now of Ronald Reagan's economic program.

Testifying before the Senate in 1981, Bork opposed a bill to declare a fetus a person, a major agenda item of some conservative groups. "I am convinced, as I think most legal scholars are," he said, "that *Roe v. Wade* is, itself, an unconstitutional decision, a serious and wholly unjustifiable judicial usurpation of state legislative authority."

But the bill would permit Congress to tell federal judges how to interpret the Constitution. And that, he said, "proposes a change in our constitutional arrangements no more drastic than that which the judiciary has accomplished over the past 25 years . . . . The deformation of the Constitution is not properly cured by further deformation."

In July 1981, just after Kirkland & Ellis mailed announcements of Bork's arrival, Krane received a call from then-Attorney General William French Smith. According to Krane, Smith said: "The government appreciated the firm giving up Bob for the service of the United States."

So it was that the friend and colleague of 35 years learned Bork's secret: He was to become a judge on the D.C. Circuit Court of Appeals, often called the second-highest court in the land, located just down the hill from the ultimate prize, the Supreme Court.

A 'Burkean' at the Appeals Court

Bork arrived at the appeals court with a fully formed judicial philosophy worked out over 25 years of writing, teaching and wrestling with the law.

Asked how he would describe the philosophy at which he has arrived, Bork called himself "a Burkean," a reference to 18th century British philosopher Edmund Burke.

"Someone will say that is wrong as soon I say it," he said, "so let me explain what I mean by Burkean: highly suspicious of sweeping, abstract principles as a way of organizing society, because they tend to be highly coercive; respect for community, tradition, constitutional structure; a willingness to look at a law and ask, 'Will it do more good than harm?'"

Told that his critics consider him anything but Burkean, even by his own definition, Bork said: "It's not true. If they look at my opinions they'll see that it is not true."

In five years on the appeals court, voting in several hundred cases and writing more than 100 opinions, Bork has created a clear record that is, with some significant exceptions, one of a conservative in the Reagan tradition: a judge inclined to deny judicial help to plaintiffs unless Congress or the Constitution explicitly gives them a right to it.

His opinions defer to the rulings of the executive branch over the pleas of individuals or Congress. When agencies are accused of failing to act—by not enforcing environmental or health and safety laws or not following due process—Bork rarely intervenes. When business is the plaintiff, however, he has been sympathetic to assertions that government regulators have been unfair, or have violated constitutional rights.

If a situation is morally wrong, but not constitutionally wrong, he believes a judge has no cause to remedy it.

Some former clerks at the appeals court accuse him of being closed-minded, saying that he enjoyed debating amiably with lawyers during oral argument but that his mind was made up before the argument began. Bork, in interviews, said he has often changed his mind during or after oral argument and has even done so publicly on occasion.

Once on the appeals court, Bork soon discovered that the intellectual rough-and-tumble that he so enjoyed was lacking, that much of the work involved processing some of the most humdrum regulatory issues. In interviews he has complained that he has had far too little contact with other judges on the court, that none of them has time, given the workload, to reflect on broader issues.

When Bork did not hire clerks last winter for the appeals court's 1988 term, there was widespread speculation that he was planning to quit. When asked why he did not hire clerks, he declined to answer, saying he wanted to remain an "enigma" on that score.

If the court was not the forum he sought, he found an outlet for his ideas in speaking before conservative groups and writing for conservative journals.

It was on the way to one of those speeches in the summer of 1982 that he met Mary Ellen Pohl, a former nun who was active in conservative groups, and a staff member at the Ethics and Public Policy Center, the conservative think tank established by Ernest W. Lefever, whose appointment to be assistant secretary of state for human rights was rejected by the Senate Foreign Relations Committee early in the Reagan administration.

She was the first woman he had gone out with since his wife died. It was a whirlwind romance—they were married five months after they met. She was 40, he was 55. "It was very fast," Bork recalled. "We would have been married faster but we couldn't arrange the church any faster," he recalled.

They were married in a large wedding in October 1982 at St. Matthew's Cathedral. The ushers included liberal D.C. federal appeals court Judge Abner Mikva, a friend from law school days, Antonin Scalia, another appeals judge who worked in the Justice Department when Bork was solicitor general and who is now on the Supreme Court, and columnist George Will, who had known Bork since Will had worked in the Senate in the early 1970s.

On Church and State

In his outside speaking engagements, Bork has expressed himself on an issue he has written nothing about as a professor or judge—the protection of religious freedoms and the separation of church and state. Justice Lewis F. Powell Jr., the man Bork would replace on the court, often provided the critical vote on such cases when they came before the court.

In a 1982 speech at a New York University Law School banquet, Bork criticized decisions in which he said the Supreme Court did not adhere to what he considered a strict interpretation of the words of the Founding Fathers and instead imposed "upper-middle-class elite values" on the country.

One decision he singled out for criticism, according to the written recollections of one who attended, was the court's landmark 1962 ruling in *Engel v. Vitale*. That decision said public school officials may not require students to recite a state-sanctioned prayer at the start of each school day.

When asked, Bork said he has never taken a position on the constitutionality of school prayer.

In a second speech, given at a Brookings Institution dinner for religious leaders in September 1986, several members of the audience said Bork criticized that case and the court's 1985 ruling in *Aguilar v. Felton*, a 5-to-4 decision which, along with a companion case, struck down the use of state or federal funds to pay teachers in religious schools. Powell was the swing vote in both cases.

Bork, asked about those recollections, said he did not think he referred to specific cases in his speech.

One of those who spoke at Brookings in response to Bork said Bork essentially adopted Chief Justice William H. Rehnquist's dissent in an Alabama school prayer case in 1985. In that case, Rehnquist said the Founding Fathers intended only to ensure that one religious sect should not be favored over another, not that the government should be entirely neutral toward religion.

Another member of the audience, the Rev. Kenneth Dean, pastor of the First Baptist Church of Rochester, N.Y., said he told Bork of his experience as a junior high school teacher in Florida, where Bible reading began every school day.

Dean said he told Bork of one occasion where he called upon a Jewish student to read from the New Testament but the boy declined, saying his parents did not want him to. Those who refused to read had the option of standing outside the classroom, he recalled. Dean said he felt he had treated the student badly by singling him out before his peers.

Dean quoted Bork as responding, "So what? I'm sure he got over it."

Bork, asked about Dean's account, said, "I can't believe I would have said that."

His supporters argue that Bork, who has written and trumpeted his bold conservative ideas for a quarter-century, is so complex he can't be categorized—a notion Bork's liberal critics find preposterous.

The Democratic-controlled Senate will decide whether Bork's jurisprudence and character are appropriate for the nation's highest court, whether he is capable, as he contends, of "neutral," value-free reasoning, or whether his claim of neutrality is a way of cloaking a tendency toward conservative activism.

"Bob is a person of total principle, but I think like everybody he sometimes fools himself and sometimes the principle comes to serve his goals," said a longtime Yale professor who expressed admiration for Bork.

Bork apparently does not disagree—at least not entirely.

"To the degree that constitutional intention is somewhat indeterminate or unclear, to some extent the judge participates in making that policy," Bork said in an interview broadcast June 10 by the U.S. Information Agency.

"That doesn't trouble me a great deal," he said. "That's inevitable in any application of written words to modern circumstances. The important question is whether the judge is self-conscious about that and tries to reduce to a minimum the imposition of his own views."

Staff writer Mark Lawrence contributed to this report.

MEMORANDUM FROM YALE LAW SCHOOL

Date: April 27, 1978

To: The Faculty

From: Robert H. Bork

[illegible]

Robert Bork made his case in a memo, above, against a proposal at Yale dealing with discrimination against homosexuals. At right, Bork with second wife Mary Ellen, the former nun he married two years after his first wife's death in 1980.

Bork posed in 1981 with son, Bob, before leaving academic life in New Haven, which he called "the Athens of America—if you like pizza."

Reagan's Power to Make Recess Appointment Is Noted

GOP Leader Dole Makes Point in Effort to Speed Senate Action on Nomination

By Edward Walsh
Washington Post Staff Writer

Senate Minority Leader Robert J. Dole (R-Kan.) accused Democratic leaders yesterday of engaging in an almost unprecedented "stall" in acting on the Supreme Court nomination of Appeals Court Judge Robert H. Bork and suggested that President Reagan might be justified in placing Bork on the court while Congress is in recess.

In a speech to the National Conference of State Legislatures in Indianapolis, Dole noted that the Constitution empowers the president to make temporary "recess appointments" without Senate confirmation to fill court vacancies.

However, he added that he does not favor such a course and called instead for the Senate to "move more quickly" toward a vote on the Bork nomination.

Dole's remarks, which were released by his Senate office, were part of a drumbeat of Republican criticism of the Bork confirmation schedule that has been announced by Judiciary Committee Chairman Joseph R. Biden Jr. (D-Del.). Dole's suggestion of a "recess appointment" of Bork appeared aimed largely at keeping pressure on Biden to expedite the committee hearings, scheduled to begin Sept. 15, and to discourage Democrats from attempting to kill the nomination with a filibuster at the end of Congress' first session.

The speech was also another sign that Dole, an unannounced candidate for the Republican presidential nomination, intends to play a leading role in the Bork confirmation fight, putting him in a highly visible confrontation with Biden, a Democratic presidential contender.

Under a recess appointment between congressional sessions, Bork would be eligible to serve on the court without Senate confirmation through the end of the 100th Congress next year. There have been 15 recess appointments in the court's history, although only five of those justices took their seats on the court before being confirmed.

Dole stressed that he was not advocating a recess appointment but wanted to provide "some food for thought" for Biden. He said Biden "has been trying mightily to stall the Bork nomination or, failing that, to generate opposition to the nomination on the basis of Judge Bork's so-called ideology."

At a news conference in Iowa, Biden dismissed the timing issue and said a recess appointment would only hurt Bork's chances of gaining Senate confirmation. "Dole is playing politics with this," he said, repeating a pledge to hold "thorough, fair and expeditious" hearings.

Biden, who has pledged to lead opposition to Bork, has said he expects the issue to be ready by Oct. 1 for Senate debate, the same target date for floor debate favored by GOP leaders. However, Biden has rejected a Republican demand that hearings begin Aug. 31—during Congress' month-long summer recess—and that his committee vote on the nomination by Sept. 15.

In his speech, Dole said Bork's commitment to "judicial restraint" should be welcomed by elected legislators, "who ought to be allowed to [legislate] without federal judges second-guessing us every time we cast a vote." While the Supreme Court on occasion "has to give the legislative branch a good kick in the pants," over the years legislative bodies have been reformed and improved, Dole argued.

"We are more diverse, better informed and more representative than ever before," he said. "We are, in short, ready—ready to be entrusted with the decisions that affect our constituents most intimately, including decisions on education, criminal justice and social welfare. And that's what Judge Bork is all about."

Bork has publicly criticized the Supreme Court's landmark 1962 "one-man, one-vote" decision, which is widely credited with having forced state legislatures to become more representative.

WASH. POST: 7-26-87

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A Trip Across the Political Spectrum

After Flirting With Socialism, Bork Became a Conservative

By Dale Russakoff and Al Kamen
Washington Post Staff Writers

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"Wreak yourself upon the world!"

Robert H. Bork drew on a cigarette and punched the air for emphasis as he enunciated his life's credo, handed down from a friend and mentor. It calls upon him always to provoke, to be a force in intellectual and political debate—not a cloistered academic, certainly not a faceless judge.

This approach to life has made Bork, President Reagan's choice to fill the Supreme Court vacancy created by the retirement of Justice Lewis F. Powell Jr., the object of a fierce ideological struggle over the role of the nation's highest court. Rarely has one nomination so sharply focused the conflict between forces trying to shape American society.

A liberal Democrat in his college days, Bork was a confirmed conservative by the time he joined the Yale Law School faculty in the early 1960s. His habit of speaking his mind quickly made him the conservative movement's Ivy League voice.

As a young professor, he wrote articles opposing landmark civil-rights legislation, became a Scholar for Goldwater, an Academic for Nixon. In 1973, he puts his ideas into practice, joining the Nixon administration and ending up the "executioner" in the "Saturday Night Massacre"—saying then, as before, that his actions were driven by deeply held convictions about constitutional law.

With the same conviction, Bork said in 1978, he led the opposition to a Yale Law School policy barring from the campus those recruiters whose firms discriminated against homosexuals. "Homosexuality is obviously not an unchangeable condition like race or gender," Bork wrote in a memo at the time. ". . . [Homosexual] behavior, it is relevant to observe, is criminal in many states."

And, in three speeches since 1982, Bork has indicated agreement with the Reagan administration's efforts to promote prayer in public schools and to allow federal aid to religious schools.

As a judge on the U.S. Court of Appeals for the District of Columbia Circuit, Bork, 60, is today an unrelenting voice for "judicial restraint," railing against "imperialistic" liberal judges who have read their values into the Constitution, but saying the same criticism would apply to conservative activists. Bork holds that elected lawmakers, not unelected judges, should control public morality: the death penalty, abortion, affirmative action.

But this most complex person is not the stick figure either side would make him. While his judicial writings are often icy and uncompromising, his friends and foes, in rare agreement, call him a man of uncommon charm, intellect, introspection and emotion, with a wit so sharp that constitutional scholar Alexander Bickel once termed it dangerous, and with a capacity to feel personal loss deeply. Bork has valued mental discipline since his teens, but his professional life recently has been characterized by restlessness; colleagues said he bores easily, is frequently late with his work and is often fighting an addiction to nicotine and a fondness for large meals and martinis.

Between the public and private Bork lie many contradictions. He staked his legal career, when a rising associate in a leading Chicago law firm, on a demand that his partners cease discriminating against Jewish applicants. (They did.) Yet two years ago, at a forum on religion, two participants described him as "callous" to religious minorities who do not share the majority's values.

A 6-foot ex-Marine, a bear of a man who hopes to trim down to 220 pounds by his September confirmation hearings, Bork appears nowadays under enormous pressure. In an interview last week, he chomped for a few minutes on nicotine gum, then spat it out and declared: "I don't care what anybody says, I'm going to have a cigarette." He proceeded to chain-smoke Marlboro Lights for more than an hour.

'There's Never Been Anything Like It'

Bork does not shy away from discussing the pain of the national vilification he experienced after the Saturday Night Massacre, particularly when some of his Yale ex-colleagues joined in. Bork, then solicitor general at the Justice Department, fired the Watergate special prosecutor on orders from President Richard M. Nixon. In that same period, Bork's first wife, Claire, was suffering from terminal cancer.

"There's never been anything like it," he said, as if lost in memories of earlier days. After a pause, he winced, and amended his thought:

"Till now."

With the high court more evenly divided than at any time since the New Deal, Bork's nomination is magnified in importance for those who support and oppose it. Reagan now seeks to institutionalize the conservative social agenda that has eluded him throughout his tenure: authorizing public school prayer, expanding police powers, ending affirmative action and banning abortion.

Liberal leaders fear that Bork will mark the end of 45 years of expanding individual freedoms.

Bork has never dodged an intellectual brawl, and he has not shied from this this fight, either. He has responded not only by making customary courtesy calls to key senators but also—virtually without precedent for a Supreme Court nominee—by granting interviews to numerous news organizations, including this one. The goal, according to one colleague, is to "humanize him, to show he doesn't have horns."

In the interviews, Bork has portrayed himself as flexible and pragmatic, not the ideologue that supporters and opponents are debating. The "humanizing" campaign has caught so many people off guard that it produced a Washington joke that Reagan will withdraw the nomination because he didn't realize Bork was so moderate.

Bork's intellectual strength—and one of his political vulnerabilities—is that he spent his academic life seeking frameworks to explain the society around him. He now concedes that this habit of mind was often misguided, leading him to embrace seamless theories that overlooked human complexities. He has left in his wake a trail of strongly worded speeches and articles that made him a conservative demigod, but have come back to haunt him.

For example, as a libertarian in the 1960s, seeking a society without government intrusion, Bork applied his philosophy to civil rights. He ended up championing the rights of innkeepers to refuse to serve blacks in response to the 1963 Public Accommodations Act, and writing a critique of the constitutionality of the Civil Rights Act for Republican presidential nominee Barry Goldwater in 1964.

In 1971, in his most important academic treatise on constitutional rights, Bork wrote that the First Amendment protected only political speech excluding such forms of expression as science, literature and education. He later conceded that he adopted a far too limited view.

'Original Intent' Should Guide Judges

"I was looking for bright lines," he said. "I've since decided that bright lines aren't available and to impose [them] is to reach a ridiculous result. Reality doesn't work that neatly."

While Bork has often expressed disdain for court precedents with which he disagrees, he portrays himself today as reverent toward tradition, institutions and continuity even if he privately disapproves of some of the underlying reasoning. But he returns often to the idea that only the "original intent" of the Constitution's framers should guide today's judges.

"When a court becomes that active or that imperialistic," he said in 1982 of rulings going beyond rights specifically mentioned in the Constitution, "then I think it engages in judicial legislation, and that seems to me inconsistent with the democratic form of government that we have."

Opponents said Bork's current tones of moderation are window-dressing designed to help his Senate confirmation chances. In their view, he has shed one intellectual straitjacket for another, trading rigorous allegiance to libertarian economics for equally rigorous allegiance to the "original intent" of the Constitution's framers as he reads it.

These opponents ask: Does his narrow view of rights for blacks in the early 1960s differ from his view of homosexual rights at Yale in 1978? His expanded definition of First Amendment protections, encompassing other forms of expression than political speech, remains in the view of critics a narrow reading of those rights. With Bork on the high court, no longer under the institutional constraints he felt on the appeals court, they perceive largely unchecked majority rule.

While at Yale, Bork wrote only one book, putting much of his energy into articles for popular organs that promised a broader audience—The New Republic, Fortune, The Wall Street Journal. Bork reached for that audience largely at the urging of Alexander Bickel, his Yale Law School colleague who became Bork's mentor and closest friend. The dictum to "wreak yourself upon the world" also came from Bickel, who had learned it from Felix Frankfurter, a celebrated scholar and advocate of restraint named to the high court by Franklin D. Roosevelt.

"Try to be a force, an intellectual force," Bork recalls Bickel telling him.

Robert Heron Bork was groomed to argue. Born March 1, 1927, in Pittsburgh, he was the only child of Harry and Elizabeth Bork, a steel-firm purchasing agent and schoolteacher. His mother passed on to him a love of books, raising him as an avid reader of the Saturday Review and other journals of ideas.

"My mother and I used to argue far into the night about all kinds of things," Bork recalled. "My father would yell down at us from the bedroom: 'This is not a debating society. Go to sleep!' "

Asked how she influenced her son, Elizabeth Bork said: "I wouldn't bite that for anything. I could only say good things. But I prefer not to be involved at all because [pause] well, my son can explain everything."

Bork spent most of his youth in the suburb of Ben Avon. The community's social standing was measured by its distance up the hill from the Ohio River: Ben Avon was about two-thirds of the way up.

"There was a handful of Catholic families. I don't remember any Jewish people. And it was very Republican. Maybe three or four registered Democrats," said Virginia Jeffries Sturm, Bork's high school girlfriend. It was also virtually all white.

Perhaps it was clear even then that Bork would not blend in gently with the world around him. As a boy he had an affinity for pet snakes, which rattled his next-door neighbor and childhood friend, William Karns.

To make matters more difficult in Republican Ben Avon, Bork defined himself as a socialist. "Socialism sounded to me like a swell idea, and rebellion sounded like a swell idea, too," he said. Bork said his sentiments came in part from his father, Harry, a successful businessman who was a union sympathizer and who had taken repeated pay cuts during the Depression.

Karns recalled that Bork once talked him into attending a Communist Party meeting downtown. "The nation had just gone through a severe depression, and these ideas were considered appropriate by some people," Karns said. "We weren't concerned about women's rights and abortion, but we wanted to put food on tables and find jobs for people."

Bork also read in earnest as a youth: Aldous Huxley, George Bernard Shaw and Thomas Paine, among others, according to Virginia Sturm. By his second year of high school, he was reading essays by John Strachey, a British Marxist, and discussing those ideas with all who would listen.

"Bob liked to provoke, especially the people who were so self-satisfied, like the people of this borough," Karns said.

Despite his rebelliousness, Bork was very much one of the boys. He was president of his class and editor of the high school paper in his junior year, and like most boys during that time of world war, highly patriotic and determined to fight for his country.

Even in writing about the school chess team, Bork's

enthusiasm for the military and mental rigor come out: "Many people think the game of chess develops mental powers. It is encouraged at West Point because it lays stress on logic, clear thinking and foresight," he wrote in the school paper.

With U.S. participation in World War II at full strength, most of Ben Avon's best teachers joined up in 1943, and Bork transferred to the Hotchkiss School in Lakewood, Conn., for his senior high school year. Most of the Hotchkiss students came from wealthy families, although Bork recalled a number of scholarship students.

It marked a major change for a popular boy from Ben Avon, made more difficult because Hotchkiss had a rule barring first-year students from most activities. Bork managed nonetheless to become a champion boxer.

Beside a pensive, unsmiling Bork in the Hotchkiss yearbook is this "favorite" quotation: "Do you want a contusious [bruised] scab, maybe?"

"You wouldn't expect Bob Bork to give someone an ordinary, nonerudite scab," explained Hotchkiss and Avonworth classmate Richard Gordon.

After graduating from high school in 1944, Bork joined the Marine Corps and studied to be a translator for front-line troops interrogating Japanese prisoners. But the United States dropped two atomic bombs on Japan before he went, and Bork spent the rest of his time in China guarding supply lines for Chiang Kai-shek. Then he entered the University of Chicago.

Bork's Ben Avon high school history teacher, Raymond Kuhl, recalled that Elizabeth Bork had visited him to discuss "a liberal leaning of Bob's that she thought maybe was going extreme." It was Kuhl who sold Bork on going to the University of Chicago, portraying it as one of the world's most intellectual environments, led by Chancellor Robert Maynard Hutchins, a youthful visionary.

Chicago, under Hutchins, was an intensely intellectual world, where professors put a premium on free—even rebellious—thinking. Conformity was for cowards. Bork blossomed there, graduating Phi Beta Kappa and then marrying Claire Davidson, a Chicago undergraduate. (Davidson was raised a Jew and Bork a Protestant, but he said neither dwelled on the religious difference; throughout their marriage the couple did not practice an organized religion.)

Called Back to Duty in the Korean War

Bork then entered the University of Chicago Law School because, he said, a poet-teacher persuaded him that law would allow him to "take philosophy into the marketplace." Ever an admirer of insulting humor, Bork was dazzled by his first professor, Edward H. Levi (later U.S. attorney general and Bork's boss). Bork recalled in an adulatory speech upon Levi's retirement that the professor opened his first lecture on antitrust this way:

"I won't keep you long today. I won't keep you long because you are too ignorant to talk to." Bork said he was won over by the combination of insult and dare.

Although comfortable on a campus, Bork grew homesick for the physical rigor of the Marines and enlisted in the reserves. After his first year of law school, during the Korean war, he was called back to duty.

He returned to Chicago two years later and embarked on what he fervently calls his "conversion" from liberalism to free-market conservatism. Its agent was a Polish-born economist named Aaron Director, who then was developing a powerful critique of government-controlled enterprises.

Director also argued, persuasively to Bork and other then-liberals, that aggressive antitrust enforcement had hampered market forces during the New Deal, often hurting consumers rather than helping them.

Director's ideal was a totally free market, and he held it up as a standard for judging the efficiency of regulation, of antitrust policy and more. "At first, everything he said seemed to me counterintuitive," Bork said. At least through 1952, Bork remained a New Deal liberal; he and Claire campaigned for Democratic presidential nominee Adlai E. Stevenson that year.

But free-market theory began to win him over, and Bork stayed at Chicago for a year after law school to work on a research project led by Director. Bork describes the effect upon him in the language of a religious convert.

"It was a new way of looking at the world, and an enormously rigorous and logical way—a method that seemed to promise further explanations of things if one pursued it," Bork said at a 1981 program on the Chicago school.

Bork and the other researchers occupied dark cubicles in the law school library from morning till night, emerging only when they thought they had a breakthrough idea, which they would share with Director. Bork and the others had frequent lunches, tea-time discussions and beers with Director, and all were captivated by his elegant undressing of conventional economic wisdom. But Director said in an interview that "conversion" was not the word for what was afoot.

"Bob never said he was being converted," said Director, now at Stanford University's Hoover Institution. "If he had, I would have told him he was being emotional about an intellectual issue. If you considered it a conversion every time you learned something, you'd be converted all the time."

Under Director, Bork wrote a 1954 paper arguing that when businesses bought up smaller companies "downstream" in the production process—a practice known as vertical integration—they often were acting not as monopolies, as then believed, but were simply becoming more efficient.

"The dominant opinion at the time was that this was monopolistic behavior," Director said, "but it became clear as we worked on it that it was not that case at all in some industries." The paper won the 27-year-old Bork wide acclaim among antitrust experts.

That year, Bork entered private law practice as an antitrust specialist. He worked first for a New York firm and for the next six years for the Chicago firm now known as Kirkland & Ellis, the city's largest.

Another Director protege, Howard Krane, came to interview at the firm a couple of years later, but was given short shrift. One associate overheard a partner mentioning in the corridor that Krane was passed over because he was Jewish, and reported this to Bork, who had an affinity for Director's students.

Then a star lawyer on his way to becoming a partner, Bork went with this associate to see several senior partners and said, according to his colleague, "We have a larger stake in the future of this firm than you do. We want this man considered on his merits." The partners agreed to take a second look. (Krane is today the managing partner of Kirkland & Ellis.)

Bork confirmed the story, but played down its significance. "You couldn't very well be running a quota system with a Jewish wife," he cracked.

Krane became a close friend of Bork's, possessing the same "dangerous" wit and lightning-fast mind. The two worked antitrust cases together, staying up all night at least three times a month. They also fantasized about writing mysteries—a lifelong passion of Bork's—featuring a detective named Dirk Dork. The first book, never written, was to be about a murder in a law firm.

Bork also became friends at Kirkland with Dallin Oaks, another Chicago-trained lawyer, now a member of the Mormon Church's governing Council of Twelve. The two were instantly compatible, both enamored of law, but both sensing what Oaks called "the lack of fulfillment [in law practice] in the intellectual area."

They talked for three years about their intellectual frustrations. During that time Bork became a partner and moved to Chicago's comfortable northern suburbs with his wife and three children. In 1961, Oaks announced to Bork that he was leaving to join the University of Chicago Law School faculty.

"I know that was a blow to Bob," Oaks recalled. "I was acting on what we'd been discussing."

A year later, in 1962, Bork left his $40,000 a year law partnership and joined the Yale University law faculty for a salary of less than $15,000.

NEXT: A conservative's progress

LETTERS TO THE EDITOR

The Meaning of Murder

Richard Cohen [magazine, July 19] claims that men of the U.S. Army air forces were murderers of civilians from the air. My Webster's New World (1960 edition) defines murder as "the unlawful and malicious or premeditated killing by another." As a pilot of B-24 bombers based in Italy, I flew 30 missions to targets in Austria, Germany, Yugoslavia and northern Italy. Our targets were largely railroad marshaling yards, oil refineries and factories producing war goods. No doubt civilians were killed, but equating these deaths with those in the German death camps, the rape of Nanking, the Bataan death march or other events is absurd. Mr. Cohen has rewritten history and defamed honorable men, living and dead.

SAMUEL F. STREET
Salisbury

'My Cheap Labor'

I am a former farm worker from Florida who has worked in picking citrus fruit and tomatoes. With regard to the article on the Eastern Shore migrant workers [July 25], I basically agree that worker housing in Virginia and other states is a disgrace, but I totally disagree that the taxpayer should have to subsidize agribusinesses with low-interest loans from state funds. Eastern Shore farm workers are the only workers I know of who have had a pay decrease in the last 10 years. We used to get paid 40

The Bork Nomination (Cont'd.)

It's a good thing I was there when Judge Robert Bork met with a group of clergy at a Brookings Institution dinner for religious leaders in September 1985, because if I had nothing but The Post's account of that evening [front page, July 28], I would draw entirely wrong conclusions about Judge Bork's views on church-and- state issues.

The Post's reporter was not present at the meeting. I was. As a rabbi with a strong commitment to the separation of church and state, I would have been greatly alarmed if Judge Bork had expressed any tendency to move away from our constitutional guarantee of religious freedom and equality. I heard nothing of the sort.

In fact, the judge showed great sensitivity to the ambiguities and dilemmas of the First Amendment. During an extraordinarily long exchange with the assembled clergy, Judge Bork was cautious, yet candid and open-minded. He threw back at us as many questions as he answered—a Socratic approach I found most stimulating.

I do not recall the judge's ever stating how he would vote on matters such as prayer in public schools. Rather, I gained the impression that Judge Bork favors a pragmatic approach to the most controversial church-and-state issues, with all sides developing more flexibility. He sees a need to pull back from the growing polarization on these issues, which is highly damaging to the country and to religious bodies. He also sees a need to give some public recognition to the role of religion in our history and national life, short of promoting one or the other religious dogma or ritual under state auspices—a policy that is now advocated even by the staunchly liberal People for the American Way.

JOSHUA O. HABERMAN
Washington

■

The Post is to be commended for what appears to be a surprisingly evenhanded series of articles on Judge Bork by Dale Russakoff and Al Kamen [July 26, 27, 28].

I now understand better why there has been such rabid opposition to Judge Bork's nomination to the Supreme Court. The judge has apparently committed at least two cardinal sins: he kept an open mind as he grew older and matured, and he "converted" from liberalism/socialism/leftism to a philosophy reflected by the pragmatic old cliché: if you're not a socialist at 20, you don't have a heart; if you're still a socialist at 30 (or 40), you don't have a brain.

Judge Bork also apparently believes that if a law or the Constitution doesn't allow, or disallow, an action, then a judge should not give or take away. I find that hard to argue with. But then I have tried to keep my mind from closing.

WALTER M. PICKARD
Alexandria

The Brookings Institution

1775 MASSACHUSETTS AVENUE N.W. / WASHINGTON D.C. 20036 / CABLES: BROOKINST / TELEPHONE: (202) 797-6000

Center for Public Policy Education

July 28, 1987

To the Editor
The Washington Post

Dear Madame:

I am quite concerned about the article of Al Kamen on Thursday, July 28 which made reference to a Brookings Seminar for Religious Leaders which Judge Robert H. Bork addressed on Thursday, September 12, 1985. When Mr. Kamen asked me about the Seminar, I replied that it was my understanding as the Chairman of that meeting that the meeting was off-the-record. Since other attendees have elected to report their recollections of the meeting, I thought, in fairness, that I should also respond to their comments.

Whatever one's views are about Judge Bork's qualifications to serve on the Supreme Court, he certainly is entitled to a thorough and accurate review of his opinions. In examining my notes of that meeting, I find no reference to any specific Supreme Court decision, but only the expression of broad concepts and principles. I find no opinion expressed by the Judge on the issue of school prayer, but only the comment that the current turmoil in constitutional law may force some revisions.

One must remember that the context of this session at Brookings was the airing of a wide range of views on matters of Church and State, in an aura of reconciliation not confrontation. While Judge Bork was challenged frequently by members of the Seminar, he responded with grace and an inquiring mind, and willingly extended the discussion period well beyond its adjournment time.

Let the debate on Judge Bork's confirmation go forward on its merits, in this same aura of the tenacious but gracious pursuit of the truth!

Sincerely,

Warren I. Cikins
Senior Staff Member

BORK NOMINATION

GENERAL OVERVIEW

- Judge Robert Bork is one of the most qualified individuals ever nominated to the Supreme Court. He is one of the preeminent legal scholars of our time; a practitioner who has argued and won numerous cases before the Supreme Court; and a judge who for five years has been writing opinions that faithfully apply law and precedent to the cases that come before him.

- As Lloyd Cutler, President Carter's Counsel, has recently said: "In my view, Judge Bork is neither an idealogue nor an extreme right-winger, either in his judicial philosophy or in his personal position on current social issues....The essence of [his] judicial philosophy is self-restraint." Mr. Cutler, one of the nation's most distinguished lawyers and a self-described "liberal democrat and...advocate of civil rights before the Supreme Court," compared Judge Bork to Justices Holmes, Brandeis, Frankfurter, Stewart, and Powell, as one of the few jurists who rigorously subordinate their personal views to neutral interpretation of the law.

- As a member of the Court of Appeals, Judge Bork has been solidly in the mainstream of American jurisprudence.

  - Not one of his more than 100 majority opinions has been reversed by the Supreme Court. No appellate judge in the United States has a finer record.

  - Indeed, the Supreme Court has never reversed any of the over 400 majority opinions in which Judge Bork has joined.

  - In his five years on the bench, during which Judge Bork heard hundreds of cases, he has written only 9 dissents and 7 partial dissents in those cases. This is despite the fact that when he took his seat on the bench, 7 of his 10 colleagues were Democratic appointees, as are 5 of the 10 now. He has been in the majority in 94 percent of the cases he has heard.

- Moreover, the reasoning of several of his dissents was adopted by the U.S. Supreme Court when it reversed opinions with which he had disagreed. Justice Powell, in particular, has agreed with Judge Bork in 9 of 10 relevant cases that went to the Supreme Court.

- Judge Bork has compiled a balanced record in all areas of the law, including the First Amendment, civil rights, labor law, and criminal law. Indeed, his views on freedom of the press prompted scathing criticism from his more conservative colleague, Judge Scalia.

- Some have expressed the fear that Judge Bork will seek to "roll back" many existing precedents. There is no basis for this view. As a law professor, he often criticized the reasoning of Supreme Court opinions; that is what law professors do. But as a judge, he has faithfully applied the legal precedents of both the Supreme Court and his own Circuit Court. That is why he is almost always in the majority on the Court of Appeals and why he has never been reversed by the Supreme Court. Judge Bork understands that in the American legal system, which places a premium on the orderly development of the law, the mere fact that one may disagree with a prior decision does not mean that that decision ought to be overruled.

- Judge Bork is the leading proponent of "judicial restraint." He believes, in essence, that judges should set aside the decisions of the democratically-elected branches of government only when there is warrant for doing so in the Constitution itself. He further believes that a judge has no authority to create new rights based upon his own personal philosophical views, but must instead rest his judgment solely on the principles set forth in the Constitution.

- His opinions on the Court of Appeals reflect a consistent application of this form of judicial restraint, and he has upheld and enforced "liberal" laws and agency decisions as often as "conservative" ones. What do his opponents in the Senate have to fear? That he will allow <u>them</u> to set policy for the country, and thereby place the responsibility to make political choices where it belongs?

- The rush to judgment against this nominee by several Senators and outside groups is unseemly and unfair. Though the nomination is supposedly so complex and important that hearings on it cannot be held for months, opponents of the nomination waited only days or, in some cases, hours before attacking it. Given

their performance, one of their major complaints is ironic: The nominee is said to lack "an open mind."

- At bottom, this opposition is grounded in nothing more than a fear that Judge Bork will not use his seat on the Court to advance specific policy agendas. Such a politicization of the confirmation process, in which Senators seek to determine how a nominee will vote in the specific cases they care about, detracts from the independence of our judiciary and weakens that central institution of our government.

- Why should this nominee be held to some standard other than the traditional one for evaluating judicial nominees--competence, integrity, and judicial temperment? When Judge Bork has had an opportunity to respond fully to the Senate's questions, we are confident he will demonstrate his overwhelming qualifications to be confirmed as an Associate Justice of the Supreme Court.

QUALIFICATIONS

Any of Judge Robert Bork's four positions in private practice, academia, the Executive Branch and the Judiciary would have been the high point of a brilliant career, but he has managed all of them. As The New York Times stated in 1981, "Mr. Bork is a legal scholar of distinction and principle."

- Professor at Yale Law School for 15 years; holder of two endowed chairs; graduate of the University of Chicago Law School, Phi Beta Kappa and managing editor of the Law Review.

- Arguably the nation's foremost authority on antitrust law and constitutional law. Author of dozens of scholarly works, including The Antitrust Paradox, the leading work on antitrust law.

- Experienced practitioner and partner at Kirkland & Ellis.

- Solicitor General of the United States, 1973-77, representing the United States before the Supreme Court in hundreds of cases.

- Unanimously confirmed for the D.C. Circuit in 1982, after receiving the ABA's highest rating--"exceptionally well qualified"--which is given to only a handful of judicial nominees each year.

> ·pellate judge in America has had a finer record on ...nch: <u>not one of his more than 100 majority ...ions has been reversed by the Supreme Court</u>.

Moreover, the reasoning of several of his dissents was adopted by the Supreme Court when it reversed opinions with which he had disagreed. For example, in <u>Sims v. CIA</u>, Judge Bork criticized a panel opinion which had impermissibly, in his view, narrowed the circumstances under which the identity of confidential intelligence sources could be protected by the government. When the case was appealed, all nine members of the Supreme Court agreed that the panel's definition of "confidential source" was too narrow and voted to reverse.

GENERAL JUDICIAL PHILOSOPHY

Judge Bork has spent more than a quarter of a century developing a powerful and cogent philosophy of law.

- His judicial philosophy begins with the simple proposition that judges must apply the Constitution, the statute, or controlling precedent--not their own moral, political, philosophical or economic preferences.

- He believes in neutral, text-based readings of the Constitution, statutes and cases. This has frequently led him to take positions at odds with those favored by political conservatives. For example, he testified before the Senate Subcommittee on Separation of Powers that he believed the Human Life Bill to be unconstitutional; he has opposed conservative efforts to enact legislation depriving the Supreme Court of jurisdiction over issues like abortion and school prayer; and he has publicly criticized conservatives who wish the courts to take an active role in invalidating economic regulation of business and industry.

- <u>He is not a political judge</u>: He has repeatedly criticized politicized, result-oriented jurisprudence of either the right or the left.

- He has repeatedly rebuked academics and commentators who have urged conservative manipulation of the judicial process as a response to liberal judicial activism.

- Judge Bork believes judges are duty-bound to protect vigorously those rights enshrined in the Constitution. He does not adhere to a rigid conception of "original intent" that would require courts to apply the Constitution only to those matters which the Framers specifically foresaw. To the contrary, he has written that it is the "task of the judge in this generation to discern how the framers' values, defined in the context of the world they knew, apply to the world we know." His opinions applying the First Amendment to modern broadcasting technology and to the changing nature of libel litigation testify to his adherence to this view of the role of the modern judge.

- He believes in abiding by precedent: he testified in 1982 regarding the role of precedent within the Supreme Court:

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

  He also has said that even questionable prior precedent ought not be overturned when it has become part of the political fabric of the nation.

- Robert Bork is the best sort of judge for genuine liberals and conservatives. Neither liberals nor conservatives ought to be relying on the only unelected branch of government to advance their policy agendas. Judge Bork believes that there is a presumption favoring democratic decisionmaking, and he has demonstrated deference to liberal and conservative laws and agency decisions alike. Some of the opponents to this nomination show a disturbing mistrust of what the American people would do without an activist court to restrain them.

- As <u>The New York Times</u> said in endorsing his nomination to our most important appellate court in 1981:

  > Mr. Bork...is a legal scholar of distinction and principle....One may differ heatedly from him on specific issues like abortion, but those are differences of philosophy, not principle. Differences of philosophy are what the 1980 election was about; Robert Bork is, given President Reagan's philosophy, a natural choice for an important judicial vacancy.

  <u>NY Times</u>, 12/10/81.

FIRST AMENDMENT

- During his five years on the bench, Judge Bork has been one of the judiciary's most vigorous defenders of First Amendment values.

- He has taken issue with his colleagues, and reversed lower courts, in order to defend aggressively the rights of free speech and a free press. For example:

  - In Ollman v. Evans and Novak, Judge Bork greatly expanded the constitutional protections courts had been according journalists facing libel suits for political commentary. Judge Bork expressed his concern that a recent and dramatic upsurge in high-dollar libel suits threatened to chill and intimidate the American press, and held that those considerations required an expansive view of First Amendment protection against such suits.

    Judge Bork justified his decision as completely consistent with "a judicial tradition of a continuing evolution of doctrine to serve the central purpose" of the First Amendment. This reference to "evolution of doctrine" provoked a sharp dissent from Judge Scalia, who criticized the weight Judge Bork gave to "changed social circumstances". Judge Bork's response was unyielding: "It is the task of the judge in this generation to discern how the framer's values, defined in the context of the world they knew, apply to the world we know."

    Judge Bork's decision in this case was praised as "extraordinarily thoughtful" in a New York Times column authored by Anthony Lewis. Lewis further described the opinion as "too rich" to be adequately summarized in his column. Libel lawyer Bruce Sanford said, "There hasn't been an opinion more favorable to the press in a decade."

  - In McBride v. Merrell Dow and Pharmaceuticals Inc., Judge Bork stressed the responsibility of trial judges in libel proceedings to ensure that a lawsuit not become a "license to harass" and to take steps to "minimize, so far as practicable, the burden a possibly meritless claim is capable of imposing upon free and vigorous journalism." Judge Bork emphasized that even if a libel plaintiff is not ultimately successful, the burden of defending a libel suit may itself in many cases unconstitutionally constrain a free press. He wrote: "Libel suits, if not carefully handled, can

threaten journalistic independence. Even if many actions fail, the risks and high costs of litigation may lead to undesirable forms of self-censorship. We do not mean to suggest by any means that writers and publications should be free to defame at will, but rather that suits--particularly those bordering on the frivolous--should be controlled so as to minimize their adverse impact upon press freedom."

- In Lebron v. Washington Metropolitan Area Transit Authority, Judge Bork reversed a lower court and held that an individual protestor had been unconstitutionally denied the right to display a poster mocking President Reagan in the Washington subway system. Judge Bork characterized the government's action in this case as a "prior restraint" bearing a "presumption of unconstitutionality." Its decision to deny space to the protestor, Judge Bork said, was "an attempt at censorship," and he therefore struck it down.

- Judge Bork would be a powerful ally of First Amendment values on the Supreme Court. His conservative reputation and formidable powers of persuasion would provide critical support to the American tradition of a free press. Indeed, precisely because of that reputation, his championing of First Amendment values would carry special credibility with those who might not otherwise be sympathetic to vigorous defenses of the First Amendment.

- Judge Bork has been criticized for an article he wrote in 1971 suggesting that the First Amendment is principally concerned with protecting political speech. It has been suggested that this might mean that Bork would seek to protect only political speech. But Judge Bork has repeatedly made his position on this issue crystal clear: in a letter published in the ABA Journal in 1984, for example, he said that "I do not think...that First Amendment protection should apply only to speech that is explicitly political. Even in 1971, I stated that my views were tentative....As the result of the responses of scholars to my article, I have long since concluded that many other forms of discourse, such as moral and scientific debate, are central to democratic government and deserve protection." He also testified before Congress to this effect in 1982. He has made unmistakably clear his view that the First Amendment itself, as well as Supreme Court precedent, requires vigorous protection of non-political speech.

- On the appellate court, Judge Bork has repeatedly issued broad opinions extending First Amendment

protection to non-political speech, such as commercial speech (FTC v. Brown and Williamson Tobacco Corp.), scientific speech (McBride v. Merrell Dow and Pharmaceuticals, Inc.) and cable television programming involving many forms of speech (Quincy Cable Television v. FCC).

CIVIL RIGHTS

- As Solicitor General, Judge Bork was responsible for the government arguing on behalf of the most far-reaching civil rights cases in the Nation's history, sometimes arguing for more expansive interpretations of the law than those ultimately accepted by the Court.

- Among Bork's most important arguments to advance the civil rights of minorities were:

  - Beer v. United States -- Solicitor General Bork urged a broad interpretation of the Voting Rights Act to strike down an electoral plan he believed would dilute black voting strength, but the Court disagreed 5-3.

  - General Electric Co. v. Gilbert -- Bork's amicus brief argued that discrimination on the basis of pregnancy was illegal sex discrimination, but six justices, including Justice Powell, rejected this argument. Congress later changed the law to reflect Bork's view.

  - Washington v. Davis -- The Supreme Court, including Justice Powell, rejected Bork's argument that an employment test with a discriminatory "effect" was unlawful under Title VII.

  - Teamsters v. United States -- The Supreme Court, including Justice Powell, ruled against Bork's argument that even a wholly race-neutral senority system violated Title VII if it perpetuated the effects of prior discrimination.

  - Runyon v. McCrary -- Following Bork's argument, the Court ruled that civil rights laws applied to racially discriminatory private contracts.

  - United Jewish Organization v. Carey -- The Court agreed with Bork that race-conscious redistricting of voting lines to enhance black voting strength was constitutionally permissible.

- Lau v. Nichols -- This case established that a civil rights law prohibited actions that were not intentionally discriminatory, so long as they disproportionately harmed minorities. The Court later overturned this case and narrowed the law to reach only acts motivated by a discriminatory intent.

- As a member for five years of the United States Court of Appeals for the D.C. Circuit, Judge Bork has compiled a balanced and moderate record in the area of civil rights.

- He has often voted to vindicate the rights of civil rights plaintiffs, frequently reversing lower courts in order to do so. For example:

  - In Palmer v. Shultz, he voted to vacate the district court's grant of summary judgment to the government and hold for a group of female foreign service officers alleging State Department discrimination in assignment and promotion.

  - In Ososky v. Wick, he voted to reverse the district court and hold that the Equal Pay Act applies to the Foreign Service's merit system.

  - In Doe v. Weinberger, he voted to reverse the district court and hold that an individual discharged from the National Security Agency for his homosexuality had been illegally denied a right to a hearing.

  - In County Council of Sumter County, South Carolina v. United States, Judge Bork rejected a South Carolina county's claim that its switch to an "at-large" election system did not require preclearance from the Attorney General under the Voting Rights Act. He later held that the County had failed to prove that its new system had "neither the purpose nor effect of denying or abridging the right of black South Carolinians to vote."

  - In Norris v. District of Columbia, Judge Bork voted to reverse a district court in a jail inmate's Section 1983 suit against four guards who allegedly had assaulted him. Judge Bork rejected the district court's reasoning that absent permanent injuries the case must be dismissed; the lawsuit was thus reinstated.

  - In Laffey v. Northwest Airlines, Judge Bork affirmed a lower court decision which found that Northwest

Airlines had discriminated against its female employees.

- In Emory v. Secretary of the Navy, Judge Bork reversed a district court's decision to dismiss a claim of racial discrimination against the United States Navy. The District Court had held that the Navy's decisions on promotion were immune from judicial review. In rejecting the district court's theory, Judge Bork held: "Where it is alleged, as it is here, that the armed forces have trenched upon constitutionally guaranteed rights through the promotion and selection process, the courts are not powerless to act. The military has not been exempted from constitutional provisions that protect the rights of individuals. It is precisely the role of the courts to determine whether those rights have been violated."

• At the same time, however, Judge Bork has rejected claims by civil rights plaintiffs when he has concluded that their arguments were not supported by the law. For example:

  - In Paralyzed Veterans of America v. Civil Aeronautics Board, Judge Bork criticized a panel decision which had held that all the activities of commercial airlines were to be considered federal programs and therefore subject to a statute prohibiting discrimination against the handicapped in federal programs. Judge Bork characterized this position as flatly inconsistent with Supreme Court precedent. On appeal, the Supreme Court adopted Judge Bork's position and reversed the panel in a 6-3 decision authored by Justice Powell.

  - In Vinson v. Taylor, Judge Bork criticized a panel decision in a sexual harassment case, both because of evidentiary rulings with which he disagreed and because the panel had taken the position that employers were automatically liable for an employee's sexual harassment, even if the employer had not known about the incident at issue. The Supreme Court on review adopted positions similar to those of Judge Bork both on the evidentiary issues and on the issue of liability.

  - In Dronenberg v. Zech, Judge Bork rejected a constitutional claim by a cryptographer who was discharged from the Navy because of his homosexuality. Judge Bork held that the Constitution did not confer a right to engage in homosexual acts, and that the court therefore did not have the authority to set aside the Navy's

decision. He wrote: "If the revolution in sexual mores that appellant proclaims is in fact ever to arrive, we think it must arrive through the moral choices of the people and their elected representatives, not through the ukase of this court." The case was never appealed, but last year the Supreme Court adopted this same position in Bowers v. Hardwick--a decision in which Justice Powell concurred.

- In Hohri v. United States, Judge Bork criticized a panel opinion reinstating a claim by Americans of Japanese descent for compensation arising out of their World War II internment. Judge Bork denounced the internment, but pointed out that in his view the Court of Appeals did not have statutory authority to hear the case. He characterized the panel opinion as one in which "compassion displaces law." In a unanimous opinion authored by Justice Powell, the Supreme Court adopted Judge Bork's position and reversed the panel on appeal.

- Judge Bork has never sat on a case involving an affirmative action plan. While a law professor, he wrote an op-ed piece in 1979 for The Wall Street Journal in which he criticized the recently issued Bakke decision. Since then, however, the Supreme Court has issued many other decisions affecting this issue, and Judge Bork has never in any way suggested that he believes this line of cases should be overruled.

- In 1963 Bork wrote an article in the New Republic criticizing proposed public accommodations provisions that eventually became part of the Civil Rights Act as undesirable legislative interference with private business behavior.

  - But ten years later, at his confirmation hearings for the position of Solicitor General, Bork acknowledged that his position had been wrong:

    > I should say that I no longer agree with that article....It seems to me I was on the wrong track altogether. It was my first attempt to write in that field. It seems to me the statute has worked very well and I do not see any problem with the statute, and were that to be proposed today, I would support it.

  - The article was not even raised during his unanimous confirmation to the D.C. Circuit ten years later, in 1982.

- His article itself, like his subsequent career, makes clear his abhorrence of racism: "Of the ugliness of racial discrimination there need be no argument."

LABOR

- Judge Bork's approach to labor cases illustrates his deep commitment to principled decisionmaking. His faithful interpretation of the statutes at issue has resulted in a balanced record on labor issues that defies characterization as either "pro-labor" or "pro-management."

- He has often voted to vindicate the rights of labor unions and individual employees both against private employers and the federal government.

  - In an opinion he authored for the court in United Mine Workers of America v. Mine Safety Health Administration, Judge Bork held on behalf of the union that the Mine Safety and Health Administration could not excuse individual mining companies from compliance with a mandatory safety standard, even on an interim basis, without following particular procedures and ensuring that the miners were made as safe or safer by the exemption from compliance.

  - In concurring with an opinion authored by Judge Wright in Amalgamated Clothing and Textile Workers v. National Labor Relations Board, Judge Bork held that despite evidence that the union, at least in a limited manner, might have engaged in coercion in a very close election that the union won, the National Labor Relations Board's decision to certify the union should not be overturned nor a new election ordered.

  - In Musey v. Federal Mine Safety and Health Review Commission, Judge Bork ruled that under the Federal Coal Mine and Health and Safety Act the union and its attorneys were entitled to costs and attorney fees for representing union members.

  - In Amalgamated Transit Union v. Brock, Judge Bork, writing for the majority, held in favor of the union that the Secretary of Labor had exceeded his statutory authority in certifying in federal assistance applications that "fair and equitable arrangements" had been made to protect the collective bargaining rights of employees before

labor and management had actually agreed to a dispute resolution mechanism.

- In United Scenic Artists v. National Labor Relations Board, Judge Bork joined an opinion which reversed the Board's determination that a secondary boycott by a union was an unfair labor practice, holding that such a boycott occurs only if the union acts purposefully to involve neutral parties in its dispute with the primary employer.

- Similar solicitude for the rights of employees is demonstrated by Northwest Airlines v. Airline Pilots International, where Bork joined a Judge Edwards' opinion upholding an arbitrator's decision that an airline pilot's alcoholism was a "disease" which did not constitute good cause for dismissal.

- Another opinion joined by Judge Bork, NAACP v. Donovan, struck down amended Labor Department regulations regarding the minimum "piece rates" employers were obliged to pay to foreign migrant workers as arbitrary and irrational.

- A similar decision against the government was rendered in National Treasury Employees Union v. Devine, which held that an appropriations measure barred the Office of Personnel Management and other agencies from implementing regulations that changed federal personnel practices to stress individual performance rather than seniority.

- In Oil Chemical Atomic Workers International v. National Labor Relations Board, Judge Bork joined another Edwards' opinion reversing NLRB's determination that a dispute over replacing "strikers" who stopped work to protest safety conditions could be settled through a private agreement between some of the "strikers" and the company because of the public interest in ensuring substantial remedies for unfair labor practices.

- In Donovan v. Carolina Stalite Co., Judge Bork reversed the Federal Mine Safety and Health Review Commission, holding that a state gravel processing facility was a "mine" within the meaning of the Act and thus subject to civil penalties.

- Black v. Interstate Commerce Commission, a per curiam opinion joined by Judge Bork, held that the ICC had acted arbitrarily and capriciously in allowing a railroad to abandon some of its tracks in a manner that caused the displacement of employees of another railroad.

- Where the statute, legitimate agency regulation, or collective bargaining agreement so dictated, however, he has not hesitated to rule in favor of the government or private employer.

  - In National Treasury Employees Union v. U.S. Merit Systems, Judge Bork held that seasonal government employees laid off in accordance with the conditions of their employment were not entitled to the procedural protections that must be provided to permanent employees against whom the government wishes to take "adverse action."

  - In Prill v. National Labor Relations Board, Judge Bork dissented from the panel to support the National Labor Relations Board decision that an employee's lone refusal to drive an allegedly unsafe vehicle was not protected by the "concerted activities" section of the National Labor Relations Act. Judge Bork concluded that the Board's definition of "concerted activities," which required that an employee's conduct must be engaged in with or on the authority of other employees and not solely by and on behalf of the employee himself, was compelled by the statute.

  - In International Brotherhood of Electrical Workers v. National Labor Relations Board, Judge Bork wrote an opinion for the court upholding a National Labor Relations Board decision against the union which held that an employer had not committed an unfair labor practice by declining to bargain over its failure to provide its employees with a Christmas bonus. The court found that the company's longstanding practice to provide bonuses had been superseded by a new collective bargaining agreement which represented by its terms that it formed the sole basis of the employer's obligations to its employees and did not specify a Christmas bonus.

  - In Dunning v. National Aeronautics and Space Administration, Judge Bork joined Judges Wald and Scalia in denying an employee's petition for review of a Merit Systems Protection Board decision to affirm a 15-day suspension imposed by NASA for insubordination.

CRIMINAL LAW

- As Solicitor General, Robert Bork argued and won several major death penalty cases before the United

States Supreme Court. He has expressed the view that the death penalty is constitutionally permissible, provided that proper procedures are followed. This is the position of all but two of the current members of the Supreme Court.

- Judge Bork is a tough but fairminded judge on criminal law issues.

- He has opposed expansive interpretations of procedural rights that would enable apparently culpable individuals to evade justice.

  - In United States v. Mount, for example, he concurred in a panel decision affirming a defendant's conviction for making a false statement in a passport application. He wrote a separate concurrence to emphasize that the court had no power to exclude evidence obtained from a search conducted in England by British police officers, and that even assuming that it did, it would be inappropriate for the court to apply a "shock the conscience" test.

  - In U.S. v. Singleton, he overruled a district court order that had suppressed evidence in a defendant's retrial for robbery which had been deemed reliable in a previous court of appeals review of the first trial.

- On the other hand, however, Judge Bork has not hesitated to overturn convictions when constitutional or evidentiary considerations require such a result.

  - In U.S. v. Brown, Judge Bork joined in a panel decision overturning the convictions of members of the "Black Hebrews" sect, on the ground that the trial court, by erroneously dismissing a certain juror who had questioned the sufficiency of the government's evidence, had violated the defendants' constitutional right to a unanimous jury. Judge Bork's decision to void nearly 400 separate verdicts in what is believed to be the longest and most expensive trial ever held in a D.C. district court highlights his devotion to vindicating the constitutional rights even of criminal defendants.

ABORTION

- Judge Bork's personal views on abortion are irrelevant to his responsibility as a judge to decide fairly the cases which come before him, as are his personal views

on any subject. This reflects the heart of his judicial philosophy.

- Neither the President nor any other member of the Administration has ever asked Judge Bork for his personal or legal views on abortion.

- In 1981, Judge Bork testified before Congress in opposition to the proposed Human Life Bill, which sought to reverse Roe v. Wade by declaring that human life begins at conception. Judge Bork called the Human Life Bill "unconstitutional".

- Judge Bork has in the past questioned only whether there is a right to abortion in the Constitution.

- This view is shared by some of the most notable, main-stream and respected scholars of constitutional law in America:

  - Harvard Law Professors Archibald Cox and Paul Freund.

  - Stanford Law School Dean John Hart Ely.

  - Columbia Law Professor Henry Monaghan.

- Stanford law professor Gerald Gunther, the editor of the leading law school casebook on constitutional law, offered the following comments on Griswold v. Connecticut, the precursor to Roe v. Wade: "It marked the return of the Court to the discredited notion of substantive due process. The theory was repudiated in 1937 in the economic sphere. I don't find a very persuasive difference in reviving it for the personal sphere. I'm a card-carrying liberal Democrat, but this strikes me as a double standard."

- Judge Ruth Bader Ginsburg, one of Judge Bork's most liberal colleagues on the D.C. Circuit, has written that Roe v. Wade "sparked public opposition and academic criticism...because the Court ventured too far in the change it ordered and presented an incomplete justification for its action."

- The legal issue for a judge is whether it should be the court, or the people through their elected representatives, that should decide our policy on abortion.

- If the Supreme Court were to decide that the Constitution does not contain a right to abortion, that would not render abortion illegal. It would simply mean that the issue would be decided in the same way as

virtually all other issues of public policy--by the people through their legislatures.

- We do not know whether Judge Bork would vote to overrule Roe v. Wade. Some have suggested, however, that Judge Bork ought not to be confirmed unless he commits in advance not to vote to overrule Roe v. Wade. No judicial nominee has ever pledged his vote in a case in order to secure confirmation, and it would be the height of irresponsibility to do so. Indeed, any judicial nominee who did so would properly be accused not only of lacking integrity, but of lacking an open mind.

WATERGATE

- During the course of the Cox firing, Judge Bork displayed great personal courage and statesmanship. He helped save the Watergate investigation and prevent massive disruption of the Justice Department. As Lloyd Cutler has recently written, "[I]t was inevitable that the President would eventually find someone in the Justice Department to fire Mr. Cox, and, if all three top officers resigned, the department's morale and the pursuit of the Watergate investigation might have been irreparably crippled." Elliott Richardson has confirmed this as well.

- At first, Bork informed Attorney General Elliott Richardson and Deputy Attorney General William Ruckelshaus that he intended to resign his position. Richardson and Ruckelshaus persuaded him to stay. As Richardson has recently said, "There was no good reason for him to resign, and some good reason for him not to." Unlike Bork they had made a personal commitment not to discharge Archibald Cox. Richardson and Ruckelshaus felt that it was important for someone of Bork's integrity and stature to stay on the job in order to avoid mass resignations that would have crippled the Justice Department.

- After carrying out the President's instruction to discharge Cox, Bork acted immediately to safeguard the Watergate investigation and its independence. He promptly established a new Special Prosecutor's office, giving it authority to pursue the investigation without interference. He expressly told the Special

Prosecutor's office that they had complete independence and that they should subpoena the tapes if they saw fit--the very assertion that led to Cox's discharge.

- Judge Bork framed the legal theory under which the indictment of Spiro Agnew was allowed to go forward. Agnew had taken the position that a sitting vice president was immune from criminal indictment, a position which President Nixon initially endorsed. Bork wrote and filed the legal brief arguing the opposite position, i.e. that Agnew was subject to indictment. Agnew resigned shortly thereafter.

- All this is why, in 1981, The New York Times described Judge Bork's decisions during Watergate as "principled."

BALANCE ON THE SUPREME COURT

- It is simply wrong to suggest that Judge Bork's appointment would change the balance of the Court. His opinions on the Court of Appeals--of which, as previously noted, not one has been reversed--are thoroughly in the mainstream. His case-by-case approach is the same as Justice Powell's. Sometimes the civil rights plaintiffs win, and sometimes they do not. Sometimes the labor union wins, and sometimes it does not. In every instance, Judge Bork's decisions are based on his reading of the statutes, constitutional provisions, and case law before him. A Justice who brings that approach to the Supreme Court will not alter the present balance in any way.

- Moreover, the unpredictability of Supreme Court appointees is characteristic. Justice Scalia, a more conservative judge than Bork, has been criticized by some conservatives for his unpredictability in his very first term on the Court. Justice O'Connor has also defied expectations, as Professor Lawrence Tribe noted: "Defying the desire of Court watchers to stuff Justices once and for all into pigeonholes of 'right' or 'left,' [her] story...is fairly typical: when one Justice is replaced with another, the impact on the Court is likely to be progressive on some issues, conservative on others."

- There is no historical or constitutional basis for making the Supreme Court as it existed in June 1987 the ideal standard to which all future Courts must be held.

- No such standard has ever been used by anyone, conservative or liberal, in evaluating nominees to the Court. The Senate has always tried to look to the nominee's individual merits--even when they have disagreed about them.

- No such standards were used to evaluate FDR's eight nominations to the Court in six years or LBJ's nominees to the Warren Court, even though, as Professor Tribe has written, Justice Black's appointment in 1937 "took a delicately-balanced Court...and turned it into a Court willing to give solid support to F.D.R.'s initiatives. So, too, Arthur Goldberg's appointment to the Court in 1962 shifted a tenuous balance on matters of personal liberty toward a consistent libertarianism...."

INDEPENDENCE OF THE JUDICIARY

The confirmation process is not, and constitutionally cannot be, a contest between the Executive and the Legislature in which all weapons, including case-specific or political litmus tests, are fair game. It is proper neither for the President nor for Congress to use such litmus tests, and as a result neither the President nor any member of the Administration has asked such questions of Judge Bork. The avoidance of such tests in the nomination process is essential to preserve the independence of the judiciary. It is the constitutional role and independence of the judiciary, not that of Congress or the President, that is at risk. There will be no winners as between the Executive and the Senate in such a contest, but there could be a loser--the Court.

- The constitutional reason for rejecting "balance" litmus tests is clear: If the Senate tried to preserve the narrow balances of the present Court on, e.g., the death penalty or abortion, it would destroy the constitutionally-guaranteed independence of the Supreme Court.

- The Senate would have to interrogate any prospective nominee on his position regarding abortion, the death penalty, and dozens of other cases. To preserve all these competing balances would subject the Senate to paralyzing competing demands.

- This politicization would plague the confirmation process far beyond this Presidency: It would legitimate blatant vote trading whenever cases arouse strong political interests.

- Moreover, it would be as improper for nominees to answer these questions as it would be for the Senate to ask them. To force nominees to trade their votes on future cases in exchange for Senators' votes on confirmation would diminish the prestige of the Court and politicize judicial decisionmaking, allowing legislators to reach into the Court to control the disposition of cases and controversies.

  - Nominees did not testify at all before the appointment of Justice Brandeis in 1916 and did not do so regularly until considerably later. When such testimony became more common, the necessity of insulating the Court from political manipulation gave rise to the universally-recognized privilege against comments on issues or cases likely to come before the Court.

- As Senator Kennedy has said, "Supreme Court nominees...have properly refused to answer questions put to them by the Senate which would require the nominee prematurely to state his opinion on a specific case likely to come before him on the bench." And Justice Harlan said during his hearings that for him, as a nominee, to comment on cases or issues that might come before him "would seem to me to constitute the gravest kind of question as to whether I was qualified to sit on that great Court."

July 22, 1987

NATIONAL
JEWISH
COMMUNITY
RELATIONS
ADVISORY
COUNCIL

CHARNEY V. BROMBERG
ASSOCIATE DIRECTOR

443 PARK AVENUE SOUTH
NEW YORK, N.Y. 10016

(212) 684-6950

NATIONAL JEWISH COMMUNITY RELATIONS ADVISORY COUNCIL
443 PARK AVENUE SOUTH, NEW YORK, NEW YORK 10016 • (212) 684-6950

Memo

~~July 17,~~ 1987
Bork

TO: NJCRAC Member Agencies

FROM: Albert D. Chernin, Executive Vice Chairman

RE: NJCRAC LETTER TO MEMBERS OF THE SENATE JUDICIARY COMMITTEE AND NJCRAC MEETING ON NOMINATION OF JUDGE ROBERT BORK TO THE U.S. SUPREME COURT

Enclosed is a copy of a letter from NJCRAC Chair Michael A. Pelavin that was sent today to members of the Senate Judiciary Committee. This letter resulted from a meeting held in New York on July 9 of the NJCRAC Committee on Judicial Nominations under the co-chairmanship of Daniel S. Shapiro of New York and Hon. Jack B. Jacobs of Wilmington, on the nomination of U.S. Appeals Court Judge Robert H. Bork to the U.S. Supreme Court to fill the vacancy created by the recent retirement of Associate Justice Lewis Powell.

Guiding the discussion of the committee was the consensus position of the NJCRAC as articulated in the 1986-87 and 1987-88 Joint Program Plans, copies of which are enclosed with this memo. The Plan to be published on September 1 states: " The relevance of a nominee's views on fundamental national issues, such as civil rights and the separation of church and state, has become an important central part of the debate over what factors to consider in screening judicial nominees". The 1986-87 Joint Program Plan calls upon the Jewish community relations field to assess concerns about nominations in terms of "threats to individual freedoms guaranteed by the Bill of Rights," and "encourages the Senate to exercise its Constitutional obligation and power to scrutinize more vigorously the backgrounds and qualifications of nominees to federal judiciary posts".

While there was significant expression of concern with regard to Bork's positions and judicial philosophy, it was felt by a majority of those agencies present that the NJCRAC should not leap to judgement on the nomination at this time. The feeling was that judgement should be reserved until the committee meets again in early September after carefully reviewing all the available research undertaken regarding the views and positions of Judge Bork.

In the meantime, the committee agreed that the NJCRAC should write to members of the Senate Judiciary Committee. Noting that we are engaged in a careful deliberative process to evaluate Judge Bork's nomination, the enclosed letter asserts our concern about "a judicial nominee's stance on certain fundamental constitutional issues, particularly as they relate to the Bill of Rights, and a nominee's beliefs regarding judicial decision-making". We specifically cite "the federal courts' role in the protection of civil rights and basic civil liberties and on the principle of the separation of church and state", and we assert our belief that "evaluation of those core concerns is intergral to the confirmation process".

...2/

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February 14-17, 1988 • Los Angeles Hilton Hotel

The committee was advised that several of our national member agencies are engaged in research on the opinions and other writings, such as articles and speeches, of Judge Bork. In addition, it was reported that a number of other organizations, including the American Civil Liberties Union, People for the American Way, and the Leadership Conference on Civil Rights, are also heavily engaged in in-depth research and fact-finding on Bork. Thus it was felt that the committee should withold judgement until it meets again the first week in September in order to evaluate the findings gleaned from the research as a basis for arriving at a judgement.

The committee agreed that in evaluating Judge Bork our point of departure should be the Jewish community relations field's conception of the kind of society that is essential to the security and status of the American Jewish community. More specifically, the committee felt that an appropriate evaluation as the Joint Program Plan asserts, should "go beyond questions of character, legal scholarship, and judicial experience", and address the potential impact of the nominee on the Bill of Rights.

Some members of the committee did urge the NJCRAC to take a position at this time. They concurred with the statement of the American Jewish Congress advocating opposition to Bork's confirmation, that "he has expressed disagreement with a long series of significant precedents which are now deeply embedded in American law and which have significantly expanded the rights of citizens with respect to such crucial areas as privacy, free speech, civil rights, and church-state separation. Whatever the merits of individual decision, the fact remains that it would be a radical step indeed to overturn fifty or more years of constitutional development". The committee was also advised that the National Council of Jewish Women has taken a position in opposition to Judge Bork's confirmation by the Senate. (Subsequent to this meeting, the American Jewish Committee took a position similar to that of the NJCRAC, namely that we not rush to judgement on the nomination, but that careful research and fact-finding be done.)

The committee recognized that there will be, before too long, significant pressure on the Jewish community relations field, nationally and locally, to join in coalition with a range of religious, civil rights, civil liberties , labor, education, and other groups in opposing Borks' confirmation. Among organizations that have, to date, taken positions in opposition to Judge Bork are: Leadership Conference on Civil Rights, National Association for the Advancement of Colored People, Planned Parenthood of America, National Education Association, American Society of University Women, National Council of Senior Citizens, Americans United for the Separation of Church and State, National Black Leadership Roundtable, National Abortion Rights League, Children Defence Fund, People for the American Way, National Gay and Lesbian Task Force, National Women's Political Caucus and National Association of Women.

We recommend that national and community member agencies engage in their own deliberative processes on Judge Bork's nomination, including local fact-finding and research efforts where appropriate, utilizing local law-school faculty members, local ACLU offices, and so on. As you know, it does happen that new information on occasion has emerged from sources not necessarily available in New York and Washington.

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We are appreciative to you for sharing with us editorial and op-ed comment from your local press on the Bork nomination, and we thank you in advance for continuing to do so.

Enclosed for your information are the following materials:

— excerpts from the 1986-87 and 1987-88 NJCRAC Joint Program Plan ;

— statements of the American Jewish Congress and National Council of Jewish Women;

— an editorial memorandum prepared by People for the American Way;

— noteworthy op-ed articles from the New York Times and Washington Post

The NJCRAC has available a significant amount of written material by and about Judge Bork. If you are interested in any of this material, please call Jerome Chanes who will be happy to discuss with you what we have and share it with you.

ADC:lp

O, EX,CHAIR, X, X-EC, IF

This letter was sent to each member of the Senate Judiciary Committee.

National Jewish Community Relations Advisory Council NJCRAC

443 Park Avenue South, New York, N.Y. 10016 (212) 684-6950

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July 22, 1987

Hon. Joseph R. Biden
United States Senate
489 Russell Bldg.
Washington, DC 20510

Dear Senator Biden:

The National Jewish Community Relations Advisory Council, the national planning, coordinating and advisory body for the field of Jewish community relations, comprised of 11 national and 113 community member agencies, is now engaged in a careful deliberative process to evaluate the nomination of Judge Robert Bork to the U.S. Supreme Court.

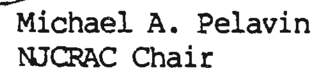
The organizations we represent (listed on the back of this letterhead) want to know about a judicial nominee's stance on certain fundamental constitutional issues, particularly as they relate to the Bill of Rights, and a nominee's beliefs regarding judicial decision-making.

Areas of concern include a nominee's personal philosophy and conduct on matters of racism, bigotry and prejudice. We would want to know about a nominee's position on the federal courts' role in the protection of civil rights and basic civil liberties and on the principle of the separation of church and state. We believe that evaluation of these core concerns is integral to the confirmation process.

Beyond the nominee's position on these fundamental constitutional questions, we are concerned about an appointee's approach to constitutional adjudication. The nominee ought not rigidly adhere to dogma nor doctrine; yet should respect established precedent. Fair resolution of present constitutional conflicts requires consideration of America's constitutional history together with the evolving nature of constitutional values.

We anticipate these concerns -- the nominee's stance on the substance of constitutional issues and on constitutional adjudication -- will be addressed in the confirmation process.

Cordially,



Michael A. Pelavin
NJCRAC Chair

MAP:ej
cc: Mark H. Gitenstein
Hon. Jack B. Jacobs

Excerpt from
Joint Progrm Plan - 1987-88

CHALLENGE TO THE BILL OF RIGHTS/NOMINATIONS TO THE FEDERAL JUDICIARY

Changing Conditions: As the President moves toward the end of his term there is every indication that he will continue his efforts to leave a federal bench that mirrors the Administration's views on the Constitution, particularly on the Bill of Rights. These views have been articulated by the Attorney General of the United States in his interpretations of the Bill of Rights. The reconstituted Senate Judiciary Committee of the 100th Congress is expected to scrutinize more closely the President's nominees for the federal judiciary.

Background: The Administration has made it clear that the President will seek to appoint judges to the federal bench who reflect his conception of the Constitution. As of July 1, 1987, there were 57 vacancies on the federal bench, 13 on circuit courts of appeals, 43 on district courts, and, with the resignation of Associate Justice Lewis Powell, one on the Supreme Court. Since taking office, President Reagan has appointed a total of 308 judges, including two associate justices to the Supreme Court and the Chief Justice. As of July 1, 235 of the judges hearing cases on district courts, or 40.8 percent of the total number of authorized positions, were appointed by President Reagan. Of 168 positions on the appeals court, 70 or 41.6 percent, were Reagan appointees.

In 1986, the Senate confirmed two members of the U.S. Supreme Court, Justice William H. Rehnquist to replace retiring Chief Justice Warren Burger and become the 16th Chief Justice of the United States, and Antonio Scalia as Associate Justice. Rehnquist was confirmed by a 65-33 vote, the largest "nay" vote ever cast against a nominee for Chief Justice. Scalia's confirmation vote was 98-0.

Earlier, the Administration was less successful in winning support for Jefferson B. Sessions III, nominated to the U.S. District Court for the Southern

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District of Alabama, who became the first of President Reagan's judicial nominations to be rejected. The Senate Judiciary Committee deadlocked with a 9-9 vote on a motion by Chairman Strom Thurmond (R-SC) to send Sessions's nomination to the Senate without recommendation. The tie killed the nomination. The NJCRAC, in communicating its opposition to the Sessions nomination, charged that he was insensitive on racial issues as reflected in a deeply disturbing record of remarks he made about the NAACP, the SCLC, the KKK, the ACLU, and the National Council of Churches.

The nomination of Daniel Manion to the U.S. Court of Appeals for the Seventh Circuit was approved when an effort to overturn an earlier vote confirming him failed by a 50-49 margin. The opposition of the NJCRAC to Manion's confirmation was founded on his lack of qualifications for the federal judiciary and on his questionable record in terms of the protection of individual liberty.

The relevance of a nominee's views on fundamental national issues, such as civil rights and the separation of church and state, has become an important central part of the debate over what factors to consider in screening judicial nominees. The question of the scope of the "Advise and Consent" function of the Senate has prompted lawmakers and legal scholars to assert that this function is not merely a courtesy or a formality, but a fundamental charge placed by the Constitution on the legislative branch co-equal with the executive branch. The Senate, in reviewing nominees, will have to consider such questions as to what extent is it legitimate to go beyond questions of character, legal scholarship, and judicial experience, and whether it is legitimate to deny confirmation to a nominee whose positions on issues may depart sharply from historically accepted values and constitutional precedents. As Senator Robert Byrd (D-WV) declared in remarks from the Senate floor in July 1986:

"Providing advice and consent is not merely a senatorial courtesy or a formality. It is a duty of fundamental importance to the maintenance of our tripartite system of government.

"Federal judges are not like the President's Cabinet who carry out the will and who serve at the will of the Chief Executive. Federal judges are appointed for life to an independent branch of our federal government. If such an appointment proves ultimately that a justice is unsuited for the role or unequal to the task, he cannot be dismissed as can a Cabinet officer.

"The only constitutionally authorized process to remove such an individual from the federal bench is that process by which the House impeaches and the Senate tries the individual, and if found guilty, he then is removed. But this is a difficult process, and it is usable only in situations of most outrageous conduct.

"So the only practical opportunity to observe, to judge, and to pass upon the merits of a judicial nominee is before that nomination is confirmed. It is not only appropriate, therefore, but also obligatory upon the Senate to exert closer scrutiny of nominees to the federal courts than of those presidential subordinates who can be removed at the Chief Executive's will and who serve at his will."

The role of the Senate, therefore, becomes more critical as the President appears to rely heavily on ideology as a basis for judicial appointments.

The most articulate spokesman of the Administration's ideological predisposition on constitutional questions has been Attorney General Edwin Meese. He has challenged U.S. Supreme Court rulings holding that the Fourteenth Amendment obligates application of the Bill of Rights to the states. He has described as "somewhat bizarre" recent decisions upholding church-state separation, and challenged the landmark Miranda ruling requiring law enforcement officials to inform individuals of their constitutional rights before conducting interrogations. The Attorney General also has asserted that the Supreme Court "does not establish a supreme law of the land that is binding on all persons and parts of the government," referring specifically to the Court's enforcement of the historic Brown decision. Meese has attacked the "astonishing" arrogation of power by the Court and by those who place its rulings "on a par with the Constitution itself."

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<u>Strategic Goals</u>: The Jewish community relations field should:

-- determine whether criteria should be formulated for assessing nominees for the federal judiciary;

-- continue its assessment of the Administration's nominations for the federal judiciary;

-- encourage the Senate to exercise its constitutional obligation by scrutinizing more vigorously the backgrounds and qualifications of nominees to federal judiciary posts;

-- undertake educational programs to interpret longstanding landmark Supreme Court decisions that buttress the defense of individual freedoms, and to warn of the dangers the Attorney General's views present to such protections guaranteed by the Bill of Rights;

-- encourage programmatic activities around the commemoration of the bi-centennial of the U.S. Constitution, aimed at further educating the Jewish and general public on the protections of the Bill of Rights, particularly the First Amendment.

Excerpt from

Joint Program Plan - 1986-87

— Attacks on Supreme Court Decisions Concerning the Bill of Rights and Nominations to the Federal Judiciary —

CHANGING CONDITIONS: **The Attorney General has opened a major debate about U.S. Supreme Court decisions interpreting the Bill of Rights' protections of individual freedoms. Congressional legislators and civil liberties and civil rights advocates have expressed concern that the Administration is seeking to reinterpret or reverse landmark Supreme Court decisions not only through advocacy but through its authority to nominate federal judges.**

COMMENT: In speeches to bar associations and other civic groups during 1985, Attorney General Edwin Meese took exception to landmark U.S. Supreme Court decisions protecting individual rights. He challenged as "intellectually shaky" Court rulings holding that the Fourteenth Amendment obligates states to apply the Bill of Rights in their legislation and administration of justice. He described as "somewhat bizarre" recent decisions upholding separation of church and state, and challenged the Court's *Miranda* ruling requiring law enforcement officials to inform individuals of their constitutional rights before conducting interrogations. Justices William Brennan and John Paul Stevens took the unusual step of publicly disagreeing with Mr. Meese's comments. Both observed that the Attorney General's opinions are at wide variance with accepted understandings about these matters.

The Court's decisions and the legal principles with which the Attorney General disagreed have long been supported by the Jewish community relations field as cornerstones for protecting and advancing pluralism, civil liberties and civil rights and good intergroup relations in the United States. Should the Attorney General's views become accepted policy regarding the way the nation's laws are enforced, radical shifts could take place in a variety of constitutional protections of individual freedom. In this regard, the Attorney General's views represent a radical departure from a consensus about these issues established during the past forty years.

An unusually high number of vacancies in the federal judiciary provides the Administration with opportunities to appoint judges who share the Attorney General's positions. In November 1985, half the nominees considered by the Senate Judiciary Committee had received the lowest positive rating given by the American Bar Association. Such professional peer judgments raise questions about whether the Administration, in making such nominations, is attempting to evade or subvert a well-established understanding about criteria for filling judicial posts in order to place on the federal bench appointees whose primary qualification to serve is ideological agreement with the Attorney General's criticisms of the Supreme Court's interpretation of the Bill of Rights' individual freedom protections.

The history of the nation's federal judicial system contains ample precedent to legitimate a president's decision to nominate to judicial posts persons who share his views on issues likely to come before the courts. Often overlooked, however, is the fact that the Senate is mandated by the Constitution to give its "advice and consent" in order for presidential nominees to assume judicial posts. This mandate makes the Senate as much a source of the courts' Constitutional legitimacy for such lifetime appointments as is the President. Thus, it is valid for the Senate to take into account the President's and his nominees' views on such issues when considering whether to provide consent to the proposed nominations. During the 19th century the Senate conceived of its role of "advice and consent" broadly, and rejected more than one out of every 13 nominees.

In the ordinary case, such a pattern of deference may well be appropriate. If the President's criteria have been intelligence, integrity and openmindedness — a willingness to be persuaded by cogent argument about changing needs and circumstances — the Senate, too, should use such criteria. But if the President takes philosophies, values and single issues into account in making his nominations, it is a mistake for the Senate to confine its inquiry to issues of ethics and technical competence. When the President tries to direct the Court towards a particular philosophy, or to particular lines of decision, over a period which will last much longer than his electoral mandate, the Senate has a historic role to play. Under the Constitution, the Senate has an obligation to chart the nominee's probable effect on the course of Constitutional law and to determine whether it is wise for the country to adopt that course. If the Senate concludes, in its best judgement, that it would not be, it should reject the nomination.

STRATEGIC GOALS: **The Jewish community relations field should:**

- **conduct educational programs drawing upon longstanding U.S. Supreme Court decisions which buttress the Jewish community's concerns about maintaining individual freedoms in a pluralistic society, and which interpret the dangers the Attorney General's views present to such protections guaranteed by the Bill of Rights;**
- **assess concerns about the Administration's nominations procedures regarding federal judiciary posts in order to determine whether such procedures constitute threats to the traditional independence of the judiciary and to individual freedoms guaranteed by the Bill of Rights;**
- **encourage the Senate to exercise its Constitutional obligation and power to scrutinize more vigorously the backgrounds and qualifications of nominees to federal judiciary posts.**

Appointments to the Federal Judiciary

Remarks of Senate Minority Leader Robert Byrd

Excerpted from the Congressional Record, July 23, 1986

The allocation of the appointment power was a subject of very keen debate at the Constitutional Convention in 1787. Initially the draft proposed that the appointment be left entirely to the Senate. But there was a compromise entered into. It is evident that the framers of that compromise intended that the Senate's role not be a purely perfunctory one. Let us read what the Constitution says, Article II, Section 2:

...he (the President) shall nominate, and by and with the Advice and Consent of the Senate, shall appoint...Judges of the Supreme Court, and all other Officers of the United States.

So it is clear that the Constitution entrusted the power to appoint members of the third branch of the national government—not just to the executive branch, not just to the legislative branch, but to both

political branches together.

Providing advice and consent is not merely a senatorial courtesy or a formality. It is a duty of fundamental importance to the maintenance of our tripartite system of government.

Federal judges are not like the President's Cabinet who carry out the will and who serve at the will of the Chief Executive. Federal judges are appointed for life to an independent branch of our federal government. If such an appointment proves ultimately that a justice is unsuited for the role or unequal to the task, he cannot be dismissed as can a Cabinet officer.

The only constitutionally authorized process to remove such an individual from the federal bench is that process by which the House impeaches and the Senate tries the individual, and if found guilty, he then is removed. But this is a difficult process, and it is usable only in situations of most outrageous conduct.

So the only practical opportunity to observe, to judge, and to pass upon the merits of a judicial nominee is before that nomination is confirmed. It is not only appropriate, therefore, but also obligatory upon the Senate to exert closer scrutiny of nominees to the federal courts than of those presidential subordinates who can be removed at the Chief Executive's will and who serve at his will.

U.S. Senators have a duty to the Constitution and to the nation's citizens, businesses and public and private institutions to ensure that judicial nominees have the experience, talent, the judicial temperament, the intellectual acumen, and the fairness of mind to perform their functions properly; and, particularly with reference to the appellate courts, to be able to contribute to a body of legal precedents that will englighten and guide the trial courts, the litigants, and all others who must attempt to anticipate what the courts will do.

So it is here in this body that the nominee's entire record has to be examined. One must view carefully the nominee's professional achievements, his public career, his academic credentials, his scholarly and other writings, his appellate briefs, and so on.

So the Senate has a duty to look at all these and at the whole man in order to screen out the simply mediocre. Appointment to a federal judgeship should meet a standard of excellence. Mediocrity is not good enough...Federal judges should be held to a higher standard of excellence, to a higher standard than in the case of other nominees who can be removed...at the will of the President...

The court of appeals is, in many instances, the last court to which an individual has resort, a court of last resort for thousands of citizens who, after being heard, will have no other recourse.

Oh, yes, a few of those cases may go on to the Supreme Court, but in the main the federal court of appeals will be the last recourse.

A Preliminary Examination of Judge Bork's Record

In preparing for the Bork confirmation hearings, the Senate has an obligation to examine thoroughly his entire public record. He has spoken and published extensively both during and before his appointment to the Court of Appeals. As a judge, he has written well over 100 opinions. The unifying theme of all of his work is his insistence on restricting the role of courts as protectors of the rights of individuals. This raises profound concern particularly because he has indicated his willingness to reverse established Supreme Court precedent with which he disagrees. For example, in a 1985 interview in the District Lawyer magazine, Bork stated, "Since the legislature can do nothing about the interpretation of the Constitution given by a court, the court ought to be always open to rethink constitutional problems."

A cursory examination of Bork's record reveals a number of issues to be explored thoroughly by the Senate.

Bork's narrow view of the First Amendment's guarantee of free speech would limit the rights of American citizens to free expression and to receive information. In a 1971 article in the Indiana Law Journal, Bork took the position that only speech that is "explicitly political" is protected by the First Amendment,

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and he reiterated it in his 1973 confirmation hearings for the post of Solicitor General, "I do think that the speech about politics, speech about government...and so forth are the core of the First Amendment." Under this view, works of artistic, literary or scientific character would not receive First Amendment protection. In a 1984 piece in the American Bar Association Journal, Bork wrote that his interpretation of First Amendment protections had expanded to include, "many other forms of discourse, such as moral and scientific debate." However, Bork did not specify whether he would include artistic expression, and he did not elaborate on his current First Amendment theory.

Even political speech is narrowly interpreted. In a 1984 lecture to the American Enterprise Institute, Bork criticized a Supreme Court decision which upheld a young man's right to wear a shirt with a political slogan on the basis that the Court improperly applied the First Amendment. He contended, "In a constitutional democracy the moral content of law must be given by the morality of the framer or the legislator, never by the morality of the judge."

Bork would move to limit access to information anytime the government contends it has a foreign policy interest in withholding information. He took this position in Abourezk v. Reagan, an important case currently pending before the Supreme

Court involving the State Department's authority to deny visas to foreign visitors who have controversial viewpoints or represent controversial governments.

Bork's views on a broad range of civil rights issues and legislation predicated on the equal protection clause of the Fourteenth Amendment must receive careful scrutiny by the Senate. In a 1963 article for New Republic, Bork opposed provisions of the Civil Rights Acts then under consideration, that would require the desegregation of public facilities. In a subsequent letter, quoted at his 1973 Solicitor General hearing, he wrote:

> The proposed legislation, which would coerce one man to associate with another on the ground that his personal preferences are not respectable, represents such an extraordinary incursion into individual freedom, and opens up so many possibilities of governmental coercion on similar principles, that it ought to fall within the area where law is regarded as improper.

At that hearing, Bork recanted this view, but the Senate should not overlook the fact that at a pivotal point in history when basic constitutional protections were about be given the force of law, Bork was outspoken in his opposition to such progress.

Moreover, throughout his career, Bork continued to oppose rights and remedies for racial discrimination. He remained unchanged in his views about several other important civil rights concerns raised in the 1973 hearings. He rejected the "one man, one vote" formula set forth in Reynolds v. Sims (1964) as "too much of a straight jacket" and without "theoretical basis." He

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challenged Harper v. Virginia Board of Elections, in which the Supreme Court struck down the poll tax as unconstitutional, as a decision unfounded on equal protection grounds. When questioned further by Senator Tunney about his current feeling whether Harper had been correctly decided in light of its impact upon the welfare of the nation, Bork cavalierly replied,

> I do not really know about that, Senator. As I recall, it was a very small poll tax, it was not discriminatory and I doubt that it had much impact on the welfare of the Nation one way or the other.

In 1972, Bork was the only law professor to testify in favor of the Nixon Administration's effort to curb remedies the Supreme Court had held were necessary to remedy unconstitutional school segregation. Five hundred law professors said the legislation was unconstitutional. Later, as Solicitor General, Bork continued to oppose remedies for discrimination in schools and housing, once being overruled by Attorney General Levi when he sought to file a brief opposing black parents and students in the Boston school desegregation case.

Bork's views apparently stem from his narrow interpretation of the equal protection clause, which he refers to in a 1971 Indiana Law Journal article as the "Equal Gratification" clause. Bork wrote that the clause requires "formal procedural equality" and that "government not distinguish along racial lines. But much more than that cannot properly be read into the clause."

Thus, Bork would not apply the equal protection clause to women or other minorities.

<u>Bork rejects the principle of a constitutional right to privacy and would permit government to intrude on the fundamentally private aspects of the lives of Americans</u>. Much has already been written about Bork's opposition to <u>Roe v. Wade</u>, the 1973 landmark case striking down state laws prohibiting abortion. In testimony before a Senate Judiciary subcommittee in 1981, Bork flatly called the decision "unconstitutional" and continued that <u>Roe</u> "is by no means the only example of such unconstitutional behavior by the Supreme Court." Bork's views go far beyond their implications for abortion rights, a politically polarizing issue.

<u>More important</u>, Bork's rejection of <u>any</u> constitutional right to privacy encompasses a 1965 decision of the Supreme Court that struck down a Connecticut law banning the <u>use</u> of contraceptives, even by married people, in the home. Regarding that case, <u>Griswold v. Connecticut</u>, Bork stated in a 1985 interview for <u>Conservative Digest</u>:

> I don't think there is a supportable method of constitutional reasoning underlying the <u>Griswold</u> decision. 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....Of course, that right of privacy strikes without warning. It has no intellectual structure to it so you don't know in advance to what it applies.

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As a judge, Bork has continued his campaign against the right to privacy. See Dronenberg v. Zech (1984).

Bork has used the doctrine of standing and other jurisdictional, or access, questions to limit individual rights. Construing statutes and precedent as narrowly as possible, he has slammed the courthouse door on people seeking to redress governmental abuses. In eleven civil cases involving constitutional court access issues, Bork denied access in ten cases, according to a 1986 Miami Law Review article. Included were decisions denying a claim by noncustodial parents to a constitutional right to visit their children and a claim by the homeless that they have a right to challenge shelter closings, a "wholly political decision."

In VanderJagt v. O'Neill 699 F.2d 1166(D.C. Cir. 1983) and Barnes v. Kline 759 F.2d 21 (D.C. Cir. 1985)(Bork J.,dissenting) he outlined his limited view of standing. He advocates extreme deference by the judiciary to legislative and administrative bodies, regardless of the impact on individual rights.

> Every time a court expands the definition of standing, the definition of interests it is willing to protect through adjudication, the area of judicial dominance grows and the area of democratic rule contracts. 759 F.2d at 58.

Taking this position, Bork abdicates his proper role as a federal judge in protecting the rights of the individual and minorities against the majority.

Bork's adherence to "original intent" is a vehicle for allowing executive power and majoritarian views to limit individual rights, without recourse to the courts. An original proponent of what Attorney General Edwin Meese has called the "doctrine of original intent," Bork considers himself an "interpretivist" or "intentionalist."

Adherence to this doctrine of original intent gives Bork the intellectual vehicle to justify overturning Supreme Court precedent he believes to be inconsistent with that intent. "Though we are obligated to comply with Supreme Court precedent, the ultimate source of constitutional legitimacy is compliance with the intentions of those who framed and ratified our constitution." Barnes v. Kline 759 F.2d 21, 56 (D.C. Cir. 1985) (Bork, J. dissenting) And, "Constitutional doctrine should continually be checked not just against words in prior opinions but against basic constitutional philosophy." Id. at 67.

Given this philosophy, it is likely that Bork would seek to restrict, if not overturn, decisions based on recognized individual rights, such as the right of privacy and equal protection guarantees, which he has criticized, but which are

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regarded as fundamental today. Bork's narrow view of the role of courts would upset the carefully crafted system of checks and balances created by the Constitution.

Bork's participation in the "Saturday Night Massacre" raises questions about his judgment and willingness to endorse government attempts to sidestep the rule of law. In 1973, as acting Attorney General, Bork participated in the infamous "Saturday Night Massacre," firing Watergate special prosecutor Archibald Cox. Attorney General Elliott Richardson resigned rather than fire Cox and Deputy Attorney General William Ruckleshaus was discharged for failing to fire Cox. Bork's action violated the Department of Justice charter establishing the special prosecutor, under which Mr. Cox could be removed only for "extraordinary impropriety." It was later found to have been illegal by a federal district court. Judge Gesell wrote:

> In the instant case, the defendant abolished the Office of Watergate Special Prosecutor on October 23, and reinstated it less than three weeks later under a virtually identical regulation. It is clear that this turnabout was simply a ruse to permit the discharge of Mr. Cox without otherwise affecting the Office of the Special Prosecutor -- a result which could not legally have been accomplished while the regulation was in effect under the circumstances presented in this case. Defendant's Order revoking the original regulation was therefore arbitrary and unreasonable, and must be held to have been without force or effect.

In his 1982 confirmation hearing, Bork justified his action by saying, "I had a moral choice to make, not encumbered by the charter." Bork said that firing Cox did not hamper the

investigation of the Special Prosecutor's office and that Cox was going to be fired whether he did it or not: "There was never any question that Mr. Cox, one way or another, was going to be discharged."

Mr. Bork chose to follow a President who sought to obstruct justice rather than follow the rule of law, and he rationalized his actions on the basis of a technicality. Particularly in these times of turmoil created by the actions of this Administration in the Iran Contra scandal, Mr. Bork's actions raise serious questions about the extent to which he, as a justice on the nation's highest court, would require the federal government to adhere to constitutional and other legal limitations.

Judge Bork's record on constitutional and civil liberties suggests that he would reverse many of the gains in rights and liberties won in this century. In rights of citizens to keep government out of their private lives, to exercise their rights to free speech, and even to look to the courts to uphold their rights, Judge Bork's views and rulings represent a radical departure from those of Justice Powell. He would undo much of the work of the Warren and Burger Courts in protecting the rights of citizens.

New York Times 3 July 1987

The Senate's Right To Reject Nominees

By Herman Schwartz

WASHINGTON

Every President tries to shape the United States Supreme Court to realize his special constitutional vision. The Constitution authorizes him, and his oath virtually obliges him, to do so. And this is what President Reagan is trying to do by nominating Judge Robert H. Bork for the Court's latest vacancy.

But the Constitution entitles the President only to try, not necessarily to succeed. The Framers divided the appointment power between the President and the Senate, just as they divided the treaty power. This sharing, which in the late Senator Sam Ervin's words, made "the Senate's role ... plainly equal to that of the President," was one of the many hard-fought compromises that made the Constitution possible.

Accordingly, if a Senator thinks a nominee will undermine his conception of the Constitution, the Senator has exactly the same right and duty as the President to protect his conception. It is not just a question of whether the candidate had high grades in law school or is a good and honorable lawyer. As Chief Justice William H. Rehnquist said almost 30 years ago, a candidate's views of the equal protection and due process clauses are equally important.

That this is precisely what the Framers intended was made clear right from the start and by those who probably knew best — those present at the creation.

On June 29, 1795, John Jay, Chief Justice of the United States, resigned to become Governor of New York. President George Washington offered the Chief Justiceship to South Carolina's John Rutledge, one of the most distinguished lawyers in America. With a popular President behind him, and a Federalist Senate, confirmation should have been easy.

And it would have been but for one thing. The controversial Jay Treaty with England had been ratified by the Senate just a few weeks earlier, and support for the treaty had become a litmus test of true Federalism. Mr. Rutledge, however, had attacked the treaty. Angry Federalist leaders urged the President to drop Mr. Rutledge. The President refused. Nevertheless, the Senate rejected the nominee, 14-10.

Three of the 14 no-votes were signers of the Constitution, including Oliver Ellsworth, a key figure at the Philadelphia convention, familiarly known as the father of the Federal judiciary, and a future Chief Justice himself. He surely knew a Senator's proper constitutional role.

The Rutledge episode is not unique. The Senate has rejected almost 20 percent of Presidential Supreme Court nominees, and an even higher proportion before 1900.

Ideology and politics often played a role in these rejections. In 1968, for example, 19 Republican Senators, including Howard H. Baker Jr. and Strom Thurmond of South Carolina, declared they would vote against President Lyndon B. Johnson's nomination of Abe Fortas as Chief Justice because Mr. Johnson was in his final year of office and they thought a new President — a Republican, they hoped — should be allowed to make that choice.

Equally important in the attack on Mr. Fortas was his liberalism. Conservatives like Sam Ervin of North Carolina, Mr. Thurmond, John L. McClellan of Arkansas and Everett M. Dirksen of Illinois lambasted Mr. Fortas for his views on law enforcement, obscenity, free speech, capital punishment, Federalism and many other issues.

They were constitutionally entitled to do so, whether they acted wisely or not. Constitutional experts of all persuasions agree with Prof. Charles L. Black Jr. of Columbia Law School that "in a world that knows that a man's social philosophy shapes his judicial behavior, that philosophy is a factor in a man's fitness" to be a judge.

A history of 'no' to Court appointees.

Of some 27 rejections or withdrawals under fire, more than one-third were for ideological reasons. James Madison's nomination of Alexander Wolcott in 1811 was rejected, 24-9, because Mr. Wolcott was considered too partisan. James Polk's nomination of George Woodward in 1845 failed, 29-20 (despite a 21-month vacancy on the Court), because of Mr. Woodward's anti-immigrant attitudes.

Similarly, several of Ulysses S. Grant's appointments were turned down for their views on such issues as civil service. A nominee's views on slavery were crucial in at least two instances. In 1930, the Senate rejected Chief Judge John Parker of North Carolina because of antiunion rulings and antiblack remarks.

None of these failed candidacies was challenged for lack of professional or ethical qualifications. In recent years, however, Senators have tended to overlook all but the most extreme ideological aberrations. The very conservative Antonin Scalia and Sandra Day O'Connor were virtually unopposed. No one ever seriously thought that either threatened to subvert the Constitution.

The nomination of Judge Bork poses just such a threat, however. In almost every context — remedies for racial discrimination such as busing and affirmative action, access to the courts, abortion, contraception, women's rights, state neutrality in religion, protection for free expression, constitutional protections for the accused — Judge Bork has condemned the Supreme Court's efforts. His conception of the judicial function as controlled by the original intent of the Framers would keep the Constitution in knee breeches and livery.

President Reagan, of course, shares Judge Bork's views, and that is one powerful reason why he nominated Judge Bork. Others, however, believe that this ideology threatens what Associate Justice Lewis F. Powell Jr. — whose retirement created the vacancy — called the "irreplaceable value" of judicial review in a democratic society: "Protection [for] the constitutional rights and liberties of individual citizens and minority groups."

Each Senator must decide independently whether confirming Judge Bork will preserve that "irreplaceable value." For two centuries, Senators have consistently made such judgments and for good reason — the Constitution demands it. □

Herman Schwartz is professor of constitutional law at the American University and editor of a recent book on the Supreme Court under Chief Justice Warren E. Burger.

COMMENTARY

Robert Bork Is Just What Reagan's Been Looking For

His 'judicial restraint' amounts to right-wing activism

By Lincoln Caplan

If Robert Bork fills Lewis Powell's seat on the Supreme Court, Ronald Reagan will finally put the ideological stamp on the court that conservatives have yearned for since Earl Warren became chief justice.

The Reagan view of "judicial restraint"—which is really right-wing activism—will replace the traditional restraint practiced by a line of justices from Felix Frankfurter and John Harlan down through Powell. To return the court to the limited role that the president and Bork say they believe the Constitution defines for it as a final check against the excesses of the majority, the prospective justice seems likely to forsake the restrained reasoning once associated with legal conservatives.

For 20 years, as a professor at Yale Law School, solicitor general, acting attorney general, a practicing lawyer and a federal appeals court judge, Bork has warned about the threat to the Republic posed by the "imperial judiciary," and by the transformation of the Supreme Court into a "naked power organ." Except in the limited instances where the Constitution explicitly empowers judges to protect the rights of citizens, Bork insists they should not. He takes a grudging approach to the safeguards of liberty in the Bill of Rights, and otherwise believes that Congress should make the laws, not unelected judges, and that any judicial action beyond the bounds clearly marked by the Constitution is a form of lawlessness.

A year and a half from the end of Ronald Reagan's presidency, this is no longer a startling view of constitutional law. What is notable about Bork's approach is the extreme manner in which he pursues it. Bork has cultivated the reputation of a moderate conservative, but he is not. Comparing him with the man he was picked to succeed makes this point. Where the conservative Powell honored precedent even if it meant upholding a liberal policy, Bork is not likely to be so respectful.

In close cases about major social issues where his vote was decisive, Powell fit the model of some of this century's great proponents of judicial restraint. They believed that the Constitution is filled with ambiguities, compromises and internal tensions, and that when the Constitution itself gives little guidance on how it should be interpreted, the techniques they used to reach decisions were as important to their judicial philosophy as the decisions themselves.

The most dramatic example of Powell's devotion to the judicial craft involved the right to abortion. In a 1983 case, the Reagan administration filed a widely publicized brief attacking the landmark holding of *Roe v. Wade*. Powell responded by departing from his usual gentility and writing a majority opinion that sternly lectured about the legal doctrine of *stare decisis*—abiding by precedent. According to Powell, following a principle laid down in a previous case that is like the one before the court "is a doctrine that demands respect in a society governed by the rule of law."

Bork's most publicized opinion as an appeals judge indicates that he does not feel constrained by precedent, as Powell did. In a circuit court case about homosexuality, Bork raised legal eyebrows with his assertion in his majority opinion that the constitutional right to privacy articulated by the Supreme Court in *Roe v. Wade* did not extend to a protection of homosexuals from discrimination. According to Ronald Dworkin, a respected legal philosopher who teaches at Oxford and New York University, Bork demonstrated a "blatant distaste for ordinary legal argument" and ignored the obligation of appellate judges "to respect Supreme Court decisions by trying in good faith to identify and enforce constitutional principles" in new cases.

BY BILL LaROCQUE FOR THE WASHINGTON POST

Robert H. Bork

To Dworkin, as to other observers of Bork's career as an appellate judge, the "message is clear enough: If the Supreme Court acts in a way Bork thinks wrong, he will not apply its decisions in a principled manner." Some of Bork's colleagues on the bench have repeated this assessment of his opinions in cases about topics as technical as rate-making and as profound as the separation of powers among the three branches of government. Some have also accused him of the act that he claims to abhor—judicial legislation, or what he calls "unlimbering the ultimate malediction of legal debate."

U.S. Circuit Court Judge Carl McGowan, who has earned a reputation as a Powell-type judge in his 24 years on the bench, criticizes another Bork opinion, a dissent that Bork considers his most significant judicial writing, as a "sweeping view" that flatly contradicted established Supreme Court precedent. The case dealt with whether members of Congress have standing to sue the president in federal court. Bork said no, and under his inflexible view no member or even Congress itself could challenge the constitutionality of the executive branch's actions in the Iran-contra affair.

Bork has long displayed a taste for controversy. He attended the University of Chicago Law School during the rise of the conservative, free-market movement in economics labeled the Chicago School, and left behind what he calls the "liberal-socialist" leanings of his youth. Chicago was the first university to hire an economist on a law school faculty, and Edward Levi, who was then law school dean and later became attorney general, taught an antitrust course with economist Aaron Director in which they used economic theory to rebut the law's traditional antitrust doctrine.

Bork recalled, "A lot of us who took the antitrust course or the economics course underwent what can only be called a religious conversion. It changed our view of the entire world." He made his early reputation by arguing that antitrust policies meant to spur economic efficiency often did just the opposite, and he was a charter member of the powerful legal movement known as "Law and Economics." The movement's focus on the impact of laws instead of on legal reasoning is revolutionizing the way judges and scholars do their work.

Bork became famous in 1973 when he followed Richard Nixon's orders and fired Archibald Cox as Watergate special prosecutor during the so-called Saturday Night Massacre. Bork knows that, for many people concerned about the integrity of the law, his compliance with Nixon's order marked him as an "apparatchik" (Bork's word), because he had dismissed a man who had been chosen to help reaffirm the rule of law and who, in so doing, had challenged Nixon's presidency.

But, as Bork told the Senate during a 1982 hearing on his nomination to the U.S. Court of Appeals for the District of Columbia Circuit, he was only doing his duty when he fired Cox. As solicitor general, he was the last official in line to succeed to the attorney generalship, once Elliot Richardson and William D. Ruckelshaus resigned rather than fire Cox. If Bork had resigned, he argued in his own defense, Nixon undoubtedly would have appointed someone from outside the Justice Department—probably from the White House staff—to take charge, and the department would have been crippled by a mass resignation of career attorneys.

In an interview in 1985, Bork referred to what he did in Watergate as resolving the "tension between legal principle and political expediency." Earning a reputation for brilliance, practical savvy and contrariness—and for a sense of humor that some call ironic and others cynical—he has made a career of shrewd resolutions such as this one where his explanation of why he did what he did makes it hard to discount his point of view and, at the same time, suggests that it would be risky to predict what he might do the next time around. He prides himself on finding an acceptable line between seemingly irreconcilable views.

Shortly after Attorney General Edwin Meese III introduced his notion of a "jurisprudence of original intention" in a series of speeches in 1985, Bork addressed the same subject himself. "I want to demonstrate that original intent is the only legitimate basis for constitutional decision," he stated in a speech at George Washington University. Unlike other Reagan conservatives who joined many mainstream scholars in giving the attorney general low marks, he expressed general agreement with Meese.

But Bork offered an example defining an important area of disagreement: In the instance of a part of the Constitution, such as the commerce clause, where the court has followed one interpretation long enough for citizens to rely on it extensively, and a change would disrupt American life, Bork felt bound to follow that interpretation, even if he believed it departed from the framers' original intent and was wrong.

When Bork resolves the tension between a legal principle and some political expediency, he often rejects the techniques of restrained reasoning to bring about a conservative political result. Since he has weighed in on the Reagan side in almost every social controversy whose outcome will be determined by his rise to the court, especially abortion (he regularly calls the *Roe* decision "unconstitutional"), it is easy to argue that Bork's conservative politics have dictated his expedient choices, and that the main role principle has played in his judgments is as an after-the-fact rationalization.

He has been campaigning for the Supreme Court for almost 20 years (he wrote "Why I Am for Nixon" in The New Republic in 1968), and his record is clear: against key provisions of the Civil Rights Act of 1964, in favor of a congressional limit on the use of busing as a tool of school desegregation in 1972, critical of Justice Powell's landmark endorsement of affirmative action in the 1978 *Bakke* case (the opinion Powell says he's proudest of in his court tenure).

Replacing Powell with Bork promises a sea change in American law. It is great enough to warrant an unusually careful inquiry that will leave no doubt about what Bork stands for and help the Senate decide whether he is the right person for the Supreme Court today. ■

Lincoln Caplan, who writes regularly for The New Yorker, is the author of the forthcoming "The Tenth Justice: The Solicitor General and the Rule of Law."

Federalist 17

FOUNDATIONS OF FEDERALISM

Federalism and Gentrification

Judge Robert Bork

I noticed that without discussion, a very broad title has been given to this: Foundations of Federalism. I have no intention of talking about that but we will think of some way in which it ties in. The brevity of the remarks that I have, which is merciful, is accounted for by the difficulty I have in finding anything new to say about federalism and my deep regret, which you may shortly share, that you did not chose another topic. But I will talk a little bit about the prospects for federalism in the federal courts and that is a quite mixed prospect.

As we know, under the onslaught of the New Deal the Supreme Court virtually gave up federalism as a limit upon the powers entrusted to Congress under Article 1, Section 8. That surrender seems permanent to me, at least for a long time, and I used to inveigh against it in class--the fact that the Court had stopped enforcing federalist limits. That does not mean, however, that I thought it entirely appropriate for the Court suddenly to reawaken and begin to enforce federalism at a time when I was Solicitor General, so that I became the first Solicitor General in forty years

to lose a Commerce Clause case, which is a little bit like being the first NFL team to lose to Tampa Bay. And that was New Orleans, so you see the depth of the disgrace.

Despite my professional chagrin, I agree at least with the impulse that produced the result in National League of Cities v. Usery, the case I lost, which was the invalidation of the amendment to the Fair Labor Standards Act that applied wages and hours provisions to the employees of state and local governments. But I doubt that the case has much generative potential. I doubt that it does more than express an impulse because there is no doctrinal foundation laid in the case for the protection of state rights or state powers to govern, and therefore, I doubt that it is a generalizeable instance.

The opinion, as you may know, by Justice Rehnquist, claims that it is one thing for the federal government to displace a state's laws on particular subjects but quite another to regulate the state's activities themselves. Now that distinction, if it is one, is unrelated to the concerns of federalism because it is entirely possible to strip a state of all of its sovereignty either way, either by regulating the state itself or by displacing its policy making function

with federal law. Besides that, the federal government, as Justice Stevens' dissent makes plain, regulates states in many ways already that the Court will not declare unconstitutional. So that if the distinction offered by Justice Rehnquist for the majority is relevant, it has already been collapsed. Now the Court remains hobbled.

As you do know, Justice Rehnquist and Chief Justice Burger have been attempting to preserve state autonomy wherever possible, but it is a kind of guerrilla warfare. They have not been able to articulate any generalized standard by which they delineate the outer boundaries of federal power and the proper scope of state power and I doubt that they ever will arrive at one. I do not think the subject matter allows of it, and if it does allow of it, it would have to be a formula that could control the spending power and the taxing power as well. It seems unlikely that the Court will do that. So I think that for the time being, with the Court made up as it is, it will continue on an ad hoc course. Its only alternative is once more to abandon the idea of protecting state sovereignty, and that seems to be unjustifiable too. So I think we are in for a period of murky control.

I actually wanted to talk more about an area in which the threat to state sovereignty comes from the Court and not

from congressional powers. This is what I referred to in the title of this talk as the "gentrification" of the Constitution.

We now have a Court--and I think it is not improper to say it--we have a Court which is creating individual rights which are not to be found in the Constitution by any standard method of interpretation. The Court itself, from time to time, admits that, and more significantly the defenders of the Court's performance admit it. That is, there is now an enormous industry in the law schools of faculty members who are writing articles explaining why it is proper for a court to create rights that are not to be found anywhere in the Constitution. As you know, John Ely has been writing books, Ronald Dworkin, Michael Perry is coming out with one. Harry Wellington has written on it. Charles Black. So that there is this enormous body of opinion supporting what they call "noninterpretivist review", encouraging the courts or trying to justify what the courts are in fact doing.

Now what this theoretical apparatus does, and what the courts are doing--what the theoretical apparatus is designed to justify--is in fact to create new constitutional values which are nothing more than the imposition of upper middle

class values on the society. It is not surprising, once you begin to create new values, that that happens, because judges are drawn by and large from the upper middle class, or if they do not come from there originally, they become acculturated in the process of their education.

In addition to that, the two most powerful institutions to which courts respond have particular class values. To talk about social class in the United States makes us all uncomfortable, but the fact is that social class is one of the most important facts of our national politics. The institutions to which the Court responds are the press and the law school faculties. Those are the people they talk to; those are the people who are responsible for the reputations of individual judges. If you are a judge, I think even though you do not know it, you are quite likely to begin to tilt somewhat because you get reinforcement, if you go one way, from the press and the law school faculties, and you get heavy criticism if you go the other way.

The composition of the press is quite well known. The magazine Public Opinion recently did a survey and as you might expect, the personnel of the media are heavily what one might call "left liberal". In every election since 1968

or even earlier, over eighty percent often well over eighty percent, of the press voted for the democratic candidate. That is, in every election, it is a landslide among media personnel. In addition to that, their values, as measured in this survey, are quite egalitarian and permissive. I do not think you have to be around law schools long to understand that law school faculties tend to have the same politics and values.

To the degree that courts respond to these two institutions, and they do, you have a reinforcement. If they are going to create new constitutional values, they will turn out to be the values of that class and they will not be the values of the blue collar class or the rural South or a variety of other groups you can think of. Indeed, if you look at the writings of the professoriate in this debate about what it is that justifies a court in creating new constitutional values, you will see what they want. They want sexual freedoms; they want freedom for abortion; they want the death penalty outlawed and so forth and so on. They want every kind of expressive behavior, or any kind of behavior that can remotely be called expressive, protected by the First Amendment.

That, in fact, is the way the Court is going. So we have seen, in the last twenty-five years, a radical expansion of the First Amendment. We have seen a radical expansion of the Equal Protection Clause, which Holmes was once able to characterize accurately as the last resort of constitutional argument, but now it is the first resort of constitutional argument. We have even seen the resurrection of substantive due process.

This dramatic expansion of constitutional rights results in the nationalization of moral, social and political values. From a constitutional prospective, that is quite odd because matters such as abortion, public school discipline, drinking ages, acceptable sexual behavior and the like have always been considered, throughout our history, as matters for the local police power reserved to the states. It is conventional and correct to question the legitimacy of judicial incursions into these fields because they were previously thought committed to democratic choice.

It is also possible to question not merely the shift from democratic to judicial governments, but the shift from local to national standards. There is no uniform national consensus concerning the moral standards that are now being imposed by

the judiciary. That would not matter if the Constitution, properly interpreted, required the imposition of such standards, but as I have said, it is now a trucid fact, and it is admitted in the academic debate on both sides, that the question of whether or not a particular value result is rooted in the Constitution is one that is no longer central to the inquiry of the courts.

To anyone who knows the academic world, it comes as no surprise to discover that most of the writers on this topic regard it as naive, passe and probably displaying bad motivation to suggest that today's majorities and legislatures ought not to be denied the power to govern unless the Constitution itself, fairly construed, makes the choice. That is, the liberty of free men, among other things, is the liberty to make laws, which is increasingly being denied. I suggest to you, therefore, that we are seeing not merely a shift from democratic to judicial rule, but a shift from local, diverse moral choices to a nationalization of morality through the creation of new constitutional rights. Because these new constitutional rights reflect the values of one class, I think it is proper to call it the gentrification of the Constitution.

Roe v. Wade is the classic instance. The court there nationalized an issue which is a classical case for local control. There is simply no national moral consensus about abortion, and there is not about to be. But the Court, by nationalizing that issue, has now taught both sides to seek a resolution at the national level. The strong opponents, on both sides, want to keep it at the national level because they want a flat rule and that promises to be an enormously divisive political issue for that reason. It is an issue that really ought to be back in the states. But it is only one case in which the Court has served as a nationalizing institution and I think here, even more than in the area of economic regulation, when the court nationalizes morality by making up these constitutional rights, it strikes at federalism in a much more central way.

There is no reason to think the trend has stopped. If you think where we were twenty-five years ago when these rights had not expanded and morality had not been nationalized and centralized nearly to the degree that it has been now, you can imagine where we may be twenty-five years from now, particularly if the propriety of what the Court is doing is not severely questioned, and particulary if the debate about noninterpretivist review is not won by those who think that

adjudication, because we are training faculty members and law students in noninterpretivist expansive modes of judicial review. It is an intellectual debate. Perhaps it can be won. If it is won and the Court returns to its rather more modest role with respect to morality, then we will have the possibility of continuing federalism in the area; otherwise not.

Questions and Answers

Judge Bork and Mr. Fried

Mr. Calabresi: Are there any questions for Judge Bork or Professor Fried?

Q. [Unintelligible on tape]

A. Mr. Fried: That is a very optimistic and hopeful suggestion and as I think about it, I hope you can infect me with your optimism and then I would be lead to agree with you. I hope that is so. I worry because I see many examples where it is not so because after all, majorities do have a tendency to tyrannize and to tyrannize not only in respect to issues such as sexual freedom, but also in respect to such issues as economic liberty. Majorities sometimes tend to tyrannize in imposing a measure of equality from which they think they will benefit but in fact as a result of which all suffer. The returns are not in. I am a little bit less sanguine than you are. Perhaps you are right.

Judge Bork: If I may comment upon that, I think our history demonstrates in fact that people do move or that federalism has been a way to keep them from escaping conditions they do

not like. The great racial migrations in this country were in large part people escaping from local laws that they found tyrannical. In other areas, the movement for federal law has come from the fact that Wisconsin would enact what they regarded as a progressive statute and found their businesses leaving. In order to prevent what they called the "free ride", they went for federal law, to enlarge the unit so that people could not escape it. This escaping through keeping the jurisdiction which governs small so that it is possible to escape without enormous cost, has always been an important aspect of American freedom.

Q. [For Judge Bork regarding the prospect for Board of Education, Island Trees Union Free School District No. 26 v. Pico, No. 80-2043, argued before the Supreme Court March 2, 1982 (50 U.S.L.W. 3751), involving authority of local public school board to remove books that it finds objectionable from school libraries.]

A. Judge Bork: I have no idea which way they will go. It seems to me they will be highly conflicting about that. I do not know what it means to say that you cannot ban books because I do not know how you know whether people are banning books. They have to use their resources in some way and

make choices. I do not know how one knows why they did not buy a particular book.

Q. [Question is removing books already there.]

A. Judge Bork: In ten years that will be a problem that will pass because the books will be gone and then the question is what do you replace. I do not know what they are going to do.

Q. It seems to me that the question that has been posed between [Judge] Bork and Professor Fried is whether it is enough to permit movement from state to state to assure that diversity or whether there is a role in the national government, and perhaps in the courts as well, to make sure that there is movement and change within the local jurisdiction. In a way, that is posed by questions like the one-man-one-vote. One-man-one-vote, if it is carried as far as the Supreme Court did...[Tape change] change which would allow current local values to win out. That would have been an appropriate national intervention to assure local change. The question is whether there are not other things of that sort which the federal courts could do. Since they now do not have doctrines to permit them to do that, they tend

instead to go beyond and establish the national point of view. For instance, one could have viewed an appropriate solution to the Bakke case as a statement that this was an undue delegation of power at the local level, that perhaps affirmative action could have been constitutional if the State of California had done it directly at the state level. But instead, they delegated the power to some boards of trustees who delegated it further. There was none of the kind of responsiveness that Professor Fried was asking for. What I am asking, really, is whether the thing can be polarized quite as simply as you do, Bob, or whether what we should not be trying to do is to get the federal courts to develop the kinds of doctrine, anti-monopoly laws, which would allow local government to be opened not only by having people move from one state to another, but by having them throw the rascals out.

A. Judge Bork: This constant use of the antitrust laws as an ideal to which we should repair worries me. I do not know why one must assure change for its own sake anyway, but the idea of allowing local majorities to govern, which is what Justice Stewart would have allowed in the Colorado case--"Show me that the majority can reapportion and I will allow almost any reapportionment that a majority chooses"--

is fine, but all you are talking about there is a court that keeps democratic processes open and that really could act under the Guarantee Clause, if you can use the word "guarantee". The Republican Form of Government Clause is really the clause they ought to have addressed in those cases. I did not follow the rest of your argument very clearly; that part I agree with.

Q. Delegation doctrine. Charles Black has suggested this. There might be a federal right in some areas to have a reconsideration at the local level of some significant issue but there might not be a federal right of what that reconsideration might be. For example, rather than saying "there is federal prohibition of the death penalty", there is a federal right, somehow, that issues as significant as the death penalty be reconsidered by local legislatures. That is pushing it quite far, but that would allow an opening up of the process in a way that....

A. **Judge Bork:** It is quasi-Jeffersonian. There is some virtue in inertia. People do not have to be agitated all the time about issues and told to reconsider everything. If a legislative majority has won and you have reached a period of stability and there is not enough agitation or strength

in an open political body which has the capacity to do it, to force a reconsideration, I do not see why the court should agitate the situation by forcing a reconsideration.

Q. If you put it in terms of straight politics, if your choice is between a situation in which the court is upset by seeing that a current majority does not seem to be able to have its own will at the local government level (with all the institutions of representative government open), what tends to happen is that that court uses the Constitution at the federal level, thus imposing the centralized value, while if it had available to it a way of pressuring the state, it might be more willing to....

A. Judge Bork: But that is a second best solution. What you are suggesting is that the courts are unable to keep their hands off when they should and therefore, they ought to go only half way instead of all the way. I think it would be better if they just kept their hands off.

Q. You are more optimistic than I.

A. Judge Bork: No, I am not optimistic.

Q. ...How do you distinguish majority tyranny and simply losing a vote in the Senate, which is something that our counterparts on the left do not seem to be able to do, and is not majority tyranny a much preferable solution, since it can be undone reasonably easily, than judicial tyranny?

A. Mr. Fried: I suppose a tyranny which can be readily undone is obviously preferable to one that cannot. How can one object? How can one disagree with that proposition? To minimize the possibilities of a majority tyranny, at this point, strikes me as simply Panglossian. I just cannot understand how one can do it. There is such a problem. Majorities can tyrannize. What the questioner raised is, "Well, yes, but perhaps the best guarantee against that is this freedom to pick up and move." It is very interesting that Constant was a remarkable man, and a colorful figure in many ways. He was also a novelist and was one of the earliest defenders of the virtues of what is today called the "multi-national corporation", because he pointed out that the liberty of the moderns, and this may be along the lines that you are raising, is greatly facilitated by the fact that wealth today, and that was at the beginning of the nineteenth century, had more and more begun to take the form of money, while in the days of the ancients, wealth was in the form of

land. That meant that people who were tyrannized could not pick up their resources and leave, but today, and that was true then, they could put their resources in their back pockets and cross the border, as he did several times himself, first during the revolution, and then with Napoleon, and so on and so forth. The idea that money could cross borders rather easily, he thought, was a way of disciplining tyrannical majorities. I suggest Constant to the lobbyists and other defenders of multinational corporations because that is, of course, a point that might be made in their favor as well.

Q. [Nationalization of morality--even the defenders of noninterpretivism are not happy with Roe, and the only other example I can think of is Pacifica Foundation v. FCC, which I take it you think was wrongly decided, since it represents the nationalization of morality.]

A. Judge Bork: My point was that any time you go outside a fair reading of the Constitution from its text, its history, its structure and so forth, to create new rights, not only do you get a nationalization of morality, but you get the imposition of upper middle class, college educated, east-west coast morality.

A. But I took it you were arguing from recent history, and not potential.

A. Judge Bork: Griswold v. Connecticut, all the sexual freedom cases. They have gotten to the point now where the Fifth Circuit--I forget which state it was passed a statute that if a wife was going to have an abortion, she had to tell her husband and listen to him. He did not have a veto but he got a right of a hearing on the thing. Naturally, some doctor sued to knock that out because it was an invasion of her privacy to have to tell her husband she was going to have an abortion. Of course, the court said "we have to consider the right of privacy against the right of procreation", which the husband has. That is another made-up constitutional right; that is nowhere to be found. This court winds up legislating in this area with two entirely made-up constitutional rights. This is a process that is going on. It happens with the extension of the Equal Protection Clause to groups that were never previously protected. When they begin to protect groups that were historically not intended to be protected by that clause, what they are doing is picking out groups which current morality of a particular social class regards as groups that should not have any disabilities laid upon them. They do it through the exten-

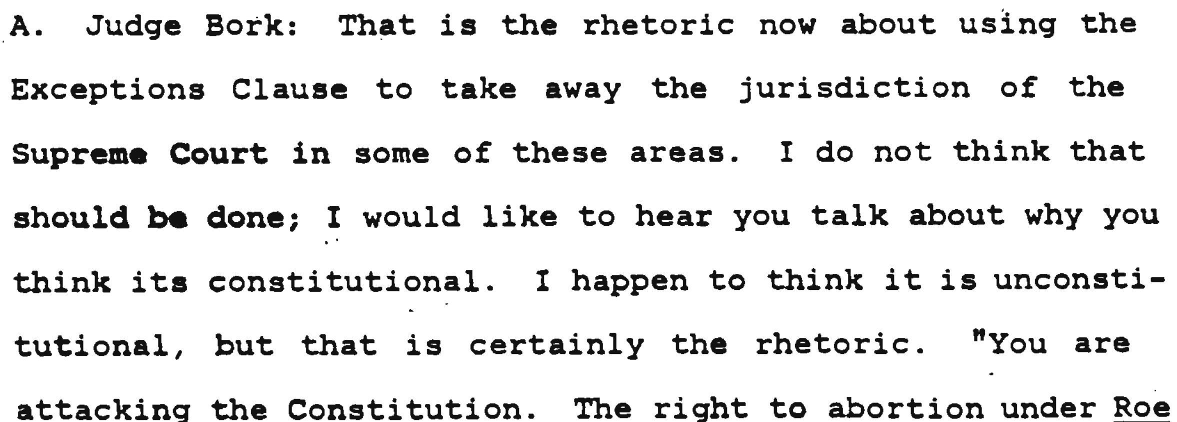
sion of the First Amendment to all kinds of behavior that one would not have thought implicated the values of free speech. All of these are nationalizations of morality, not justified by anything in the Constitution, justified only by the sentimentalities or the morals of the class to which these judges and their defenders belong.

Q. Everyone has pretty well agreed that people should not be allowed to starve. [That some level of government has an obligation to keep people literally from starving.] This is also an area that ideally everyone would like to let someone else take care of. How do you think this problem should be taken care of under federalism?

A. Mr. Fried: That is to my mind the truly difficult issue in the view that I was putting forward and I think the most potent objection to it, and I am very sensitive to that. I would suggest two things: first, I know of no evidence that local communities are any more willing to allow people to starve to death than the federal government. Particularly if they get the habit of having the ultimate responsibility so that they do not feel that if they pass by on the other side, there is, in fact, a good Samaritan coming who is the federal government. If that idea is not available, if they

are the good Samaritan of last resort, I think there is no powerful evidence that local communities would not pick up that responsibility. After all, historically, they did assume it. It may be that the competitive pressures, which I celebrate and want to maintain on the states and local communities, might make that more difficult to do. That is why I suggest that there might have to be some kind of federally mandated minimum standards to keep the competitive pressures from driving that kind of support down beyond a minimum level. That is the best I can do to answer your question, and it is, I admit, a bit lame.

Q. Mr. Bator: [Two move strategy. On Monday, noninterpretivist finds a new right; on Tuesday, in a highly formal interpretivist fashion, we use the rhetorical gambit of pushing to the limits the new right discovered on Monday.]



A. Judge Bork: That is the rhetoric now about using the Exceptions Clause to take away the jurisdiction of the Supreme Court in some of these areas. I do not think that should be done; I would like to hear you talk about why you think its constitutional. I happen to think it is unconstitutional, but that is certainly the rhetoric. "You are attacking the Constitution. The right to abortion under Roe

v. Wade is the Constitution and we must not let legislatures tamper with the Constitution." The fact that the Court has tampered with the Constitution is conveniently forgotten. That is now the framers' will. The trimester business was in their minds.

Q. Mr. Rees: It also is apparent that the only time that people are really willing to engage in excursions away from judicial positivism and to real criticism of the Court is when it refuses to extend these principles that it extended on Monday. The criticisms of Harris v. McRae tended to be extremely intemperate, tended to go along the lines of "We have already decided that black is white. Having decided that black is white, that is a given. That is not going to be reconsidered. How can the Court, with a straight face, look in the mirror in the morning, refusing to extend that principle to declare that pink is green?" There are quite a lot of moral outrages generated over Harris v. McRae.

I would like to ask Professor Fried, I noticed that in about the third or fourth sentence of your speech you jettisoned what you called "historical arguments" and what I think Professor Bork would have called "bare construction of the Constitution". That is to say, are not you, by trying to

persuade us that federalism, with these modifications, is good and will work and it is sort of a humane thing, are not you engaging in a matural version of what you accuse in your first sentence certain other people of engaging in. That is, our horses can ride well on this turf and therefore we are for it. Is not the interesting test of a commitment to a constitutional federalism whether we can be for it even when it achieves bad results. If we really think that we need minimum standards to make sure the states do not do anything we really disapprove of and that really does not work, are we really not very much for federalism at all, except as a policy for which we may argue in the forum of our choice, be it legislature or court?

A. Fried: That is very shrewd, very eloquent, very embarrassing. I will admit, because you force me to do so, that my concerns are to figure out how I would like the world to look, to try to persuade you that that is a good way for the world to look, to persuade you that my reasons for thinking that that is a better world are correct reasons, and then to think how we might help bring that world about. If it turns out that you have some other parallel arguments for that same conclusion, I am heartened. I must admit that I have a temptation, a tendency, to ask that kind of question.

It comes from being a professor of jurisprudence. Perhaps if one day I become a judge like Judge Bork, Professor Bork as he then was, I might lose that deformation and move in your direction. Guido Calabresi thinks not.

Q. I wonder if Judge Bork might respond to the comment Professor Fried made in his talk about alluding to the problem of a race to the bottom.

A. Judge Bork: That is the argument about federalism and always has been. In the cases, in the laws, the argument always was that states cannot do as much that would be good and they would like to do because they will lose industry, they will lose population, they will lose--I am sure that is true. I am sure that some states will not give as much welfare or so forth as they would if they faced no competition. If you tax heavily or have heavy welfare payments, some industry is going to leave. And in fact, if you give heavy welfare payments, some people are going to come in. I do not see why you call that "the race to the bottom". Standards get modified by the possibility of competition. I do not know what is bottom about it. You could, if you made each state an island so that nobody could leave, you would get more welfare payments.