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THE WHITE HOUSE

WASHINGTON

September 3, 1987

Dear Editor:

I have enclosed an article supporting the Bork nomination. I realize that it is a bit longer than the usual op-ed column, but I hope that you will carry it its entirety. I would, of course, be more than happy to reply to critical comments for a subsequent issue. Thank you very much for your cooperation.

Sincerely,

Max Green
Associate Director
Office of Public Liaison

The Case for Judge Robert Bork

Max Green

What is the real reason for the opposition to the nomination of Judge Robert Bork to the Supreme Court? I ask this question because to this date, the reasons that have been offered have been so patently unreal. Consider the charges:

-- "Judge Bork is an 'extremist'." This charge is belied by the fact that not one of the more than one hundred majority decisions Bork has written as a Court of Appeals judge has been overturned by the Supreme Court. Indeed, the Court reversed none of the four hundred plus decisions in which he was in the majority, and he has been in the majority in ninety four percent of the cases he has heard. In five years Bork has written a total of only ten full and seven partial dissents. This is hardly the record of an out of the mainstream judge.

-- Judge Bork opposes "freedom of choice". The truth is that none of the groups making this charge know what Bork's views are on the rights and wrongs of abortion, or on whether it should be freely available or not. Bork does not believe it is the business of appointed judges to make moral and political pronouncements; rather, it is to interpret the

constitution and laws of the land in accordance with the intention of those responsible for their adoption. Here too he is decidely in the mainstream, being in the tradition of the great Supreme Court justice Felix Frankfurter and of Alexander Bickel, probably the preeminent legal scholar of our time.

Accordingly, Bork opposed the decision in Roe v. Wade because it usurped the power of the state legislatures in the name of a "right to privacy" which is nowhere mentioned or fairly implied in the Constitution or the Bill of Rights. Bork is joined in his criticism of the decision by a growing number of legal scholars and judges including such liberal heroes as Archibald Cox.

It is worth noting as well that Bork opposed the human life bill, a legislative effort to overrule Roe by defining life as beginning at the moment of conception. In Senate testimony, Bork showed himself to be a vigilant guardian of the Court's prerogatives, arguing that the bill would strip the Court of its responsibility to interpret the provisions of the Constitution. Moreover, it is by no means clear that Bork would vote to reverse if a similar case would reach the Court in the future. Certainly his often expressed and demonstrated respect for and deference to judicial precedent would mitigate against the Court's overturning a policy which has become so ingrained and widespread in our society.

Nonetheless, we should understand what would happen and what would not happen if Roe v. Wade were indeed reversed. Abortions would not ipso facto become illegal. Rather the right to regulate access to abortion would revert to the states, the vast majority of which would almost certainly adopt liberal abortion legislation. As Michael Barone, the co-author of the encyclopedia Almanac of American Politics wrote in the Washington Post; "In the five years before the decision, legislatures in eighteen states with 41% of the nation's population liberalized their abortion laws, often to the point of allowing abortion on demand. On the day the decision came down about 75% of Americans lived within one hundred miles of a place where abortions were legal. Other legislatures would surely have liberalized their abortion laws in the legislatures sessions just beginning as the Supreme Court spoke.... the legislatures were acting more rapidly on this issue than they have on almost any issue in two hundred years of American history."

-- Bork would "roll back the clock on civil rights." Just how the judge would do this is left to the imagination, because once again, the facts belie the allegation. Here we know exactly where Bork stands, and that, to his critics dismay, is with the overwhelming majority of the American people. In 1963, fresh out of law school, Judge Bork argued in the pages of the liberal New Republic magazine that no matter how morally abhorrent, private citizens but not government had the right to discriminate. But by the early 1970's,

Bork had outgrown these libertarian views. In confirmation hearings for the position of Solicitor General in 1973, Bork testified that "it seems to me that I was on the wrong track altogether. It seems to me that the law (1984 Civil Rights Act) has worked very well, and I do not see any problem with the statute."

However, over the subsequent fifteen years, problems have arisen with regard to civil rights legislation, much of which has been interpreted to require race consciousness and race preferences rather than the color blind application of the laws that was intended by their authors. Bork has taken exception to this trend, most notably in his critique of the Bakke decision. In the Bakke case, a fractured Supreme Court permitted the University of California to discriminate against a Jewish applicant in favor of a far less qualified minority. If he is to be labeled an extremist for this, then so should the Anti-Defamation League which filed an amicus curiae in the case which made the same argument Bork had in his article.

-- Judge Bork would weaken the establishment clause. For example, he is said to favor public funding of religious schools, the proof being his criticism of the Court's decision in Aguilar v. Felton, a decision that prohibited the New York City Board of Education teachers from providing remedial education to educationally disadvantaged children in the private school they attended, including private

religious schools. The Court did not prohibit the public school teachers from teaching the parochial school students, only from teaching them in parochial school buildings. To comply, the Board went to the heavy expense of purchasing vans, leasing additional space in nearby buildings, et cetera. Therefore, the Board of Education will have to spend millions more each year on the education of parochial school students than before the decision was rendered. It is this absurd result that led Bork to conclude that "not much would be endangered if a case like Aguilar went the other way." This is the sum and substance of Judge Robert Bork on public funding of religious schools.

On the general issue of church-state, Bork has forcefully argued that it must be "approached with flexibility and caution... Fidelity to the historical clauses is particularly important in this most sensitive and emotional area of constitutional law." These are hardly the thoughts of a man about to go off the deep end. Indeed, they parallel the views of Morris Abram, the eminent lawyer who now serves as Chairman of the Conference of Presidents of Major Jewish Organizations. In a recent Public Interest article, "Is 'Strict Separation' too Strict," Abram says of the tripartite test that Bork too has criticized: "Neat efforts, like the tripartite test tend to founder in an area as complicated as the church-state relationship." Instead Abram endorses a "pragmatic" approach to this area of the law that I for one cannot distinguish from Bork's.

All the above notwithstanding, Judge Bork's opponents still speak in semi-hysterical tones. To listen to them one would think that the Republic will fall when he is confirmed. I think the reason that Bork gives his opponents fits is that his nomination reveals their own hypocrisy. For years now they have been charging the President with nominating second raters who pass the conservative litmus test. Bork is nothing if not first rate; even his foes admit that he is one of the most brilliant legal minds in the country. He is also inordinately qualified by virtue of exemplary service as a practicing lawyer, professor at Yale Law School, Solicitor General and Court of Appeals judge. And, he has obviously not passed any right wing litmus test, having argued against the Human Rights Bill and also President Reagan's own Balanced Budget amendment to the Constitution. Bork, thus, forces his opponents to show their true colors. The fact is that they are interested in results e.g., racial quotas, and they do not care much about how they get there. What irks them about Bork is precisely his devotion to "neutral principles," to the process of judicial decision making. However, for those of us committed to democratic principles, that is the very best reason for his confirmation.

** Among his responsibilities at the White House, Max Green acts as a liaison with the Jewish Comminity.

THE WHITE HOUSE

WASHINGTON

September 2, 1987

Dear Friend:

Enclosed is a copy of a speech, with two short addenda, by Arnold Burns, Deputy Attorney General. The speech covers all the issues that have been raised in connection with the Bork nomination. I think it is "must" reading.

Sincerely,

Max Green

Max Green
Associate Director
Office of Public Liaison

Department of Justice

ADDRESS

OF

THE HONORABLE ARNOLD I. BURNS
DEPUTY ATTORNEY GENERAL OF THE UNITED STATES

BEFORE

THE NATIONAL JEWISH COALITION

WEDNESDAY, AUGUST 26, 1987

THE GRAND HYATT HOTEL
WASHINGTON, D.C.

Thank you for the invitation to speak before this group on a very important question -- the confirmation of Robert Bork to be the next Associate Justice of the Supreme Court of the United States.

I stand here before you to tell you I am dead opposed to the confirmation of Robert Bork -- that is --the grotesque caricature of Robert Bork that is being served up to the American public.

At the same time, I am unabashed in my support of the confirmation of the Robert Bork I know and admire --the brilliant student; partner in one of America's great law firms; holder of, not one, but two distinguished chairs at the Yale Law School; one of the nation's foremost authorities on antitrust and constitutional law; Solicitor General responsible for handling hundreds of cases before the United States Supreme Court; and, finally, a respected judge for five years on the Court of Appeals for the District of Columbia, a court often described as "the second highest in the land." My job here today -- and your job if you decide to join me -- is to destroy the fictional Robert Bork and let the nation know about the real Robert Bork.

I

Let us begin our efforts at clarification by considering the words Senator Kennedy has used to portray Judge Bork:

> Robert Bork's America is a land in which women would be forced into back-alley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens' doors in midnight raids, schoolchildren could not be taught about evolution, writers and

> artists could be censored at the whim of the government and the doors of the federal courts would be shut on the fingers of millions of citizens.

I am dead opposed to the Robert Bork described by Senator Kennedy. Such a judge would be way out of the mainstream of American judicial opinion and should not be confirmed. But I ask you to compare this purely fictional Judge Bork with the Judge Bork that was unanimously confirmed by the Senate for the D.C. Circuit after receiving the ABA's highest rating -- "exceptionally well qualified" -- which is given to only a handful of judicial nominees each year. His five-year record reveals him to be a judicial craftsman of the first order, a jurist whose opinions command widespread admiration. It is a measure of Judge Bork's success that not one of his more than 100 majority opinions has been reversed by the Supreme Court -- think of it, not one. No appellate judge in the United States has a finer record. Indeed, not one of the over 400 majority opinions in which Judge Bork has joined has been reversed by the Supreme Court -- think of it, not one.

Judge Bork's occasional dissenting opinions have also shown distinction. I must emphasize, however, that in five years on the bench, during which Judge Bork heard hundreds of cases, he has written only 10 dissents and 7 partial dissents. He was in the majority 94 percent of the time, and only rarely parted company with other so-called "liberal" judges on the D.C. Circuit, such as Ruth Bader Ginsburg and Abner Mikva. For

example, Judge Bork and Judge Ginsburg have agreed on 90% of the cases before them. But even his occasional dissenting opinion was enough to mark him as a highly capable and respected judge. In Sims versus CIA, for instance, Judge Bork criticized a panel opinion which had, in his view, impermissibly 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.

So much for the notion of Judge Bork being outside the mainstream. No wonder retired Chief Justice Warren Burger recently opined that Judge Bork is the most qualified nominee for the court in the last fifty years.

II

Consider next Senator Biden's claim, that:

> We can be certain that . . . had he been Justice Bork during the past 30 years and had his view prevailed, America would be a fundamentally different place than it is today. We would live in a very different America than we do now.

I am dead opposed to the phantom, the specter of a Judge Bork that Senator Biden describes. The Biden version of Judge Bork is belied by what I have just told you about Judge Bork's never having been reversed by the "balanced" Supreme Court Senator Biden admires.

Moreover, the notion that one justice, or even the Supreme Court itself, can change America is more than wrong. It reveals a dangerous bias in favor of the omnipotent judge, at the expense of the democratic branches of government. The problem is that many of the opponents of Judge Bork regard the Supreme Court as a policy-making entity, a super legislature if you will, where they have gone to see their pet policies recognized or protected when they have found congress or the state legislatures unavailing. This is a dangerous view of the Supreme Court, fundamentally elitist and undemocratic. It makes the Supreme Court yet another political branch, a body expected to decide questions of law based on value preferences untethered to the written law.

Enthusiasts for an activist judiciary (usually carrying the liberal label) have become so accustomed to urging the courts, indeed relying on the courts, to render political judgments that it may be only natural for them to assume that President Reagan wants to use the courts for the same purposes. And there are in fact a goodly number wearing the conservative label who want this; they, too, paint a distorted picture of Robert Bork. But the President simply wants to get the Supreme Court to cease being political and to perform its constitutional role of interpreting and construing the laws made by others.

III

But allow me to continue to dispel confusion: This is the AFL-CIO leadership's Robert Bork:

> He is a man moved not by deference to the democratic process, nor by allegiance to any recognized theory of jurisprudence, but by an overriding commitment to the interests of the wealthy and powerful in society. . . . He has never shown the least concern for working people, minorities, the poor or for individuals seeking the protection of the law to vindicate their political and civil rights.

I am dead opposed to that Robert Bork. But the AFL-CIO's Bork is an imposter, and a not-too-effective one at that. It is gross mischaracterization of Judge Bork's record to say that he does not follow a "recognized theory" of jurisprudence. To the contrary, Judge Bork is universally recognized as one of the nation's leading exponents of judicial restraint, a doctrine which has as its foundation "deference to the democratic process", to quote the AFL-CIO again. He has consistently and fairly applied this philosophy in his role as a judge, emphasizing that a judge's view of what is desirable as a matter of policy has no place in the judge's decision of what the law means.

In interpreting a law, a judge must start somewhere, and the real Robert Bork begins with the text of the law, and proceeds to consider its history and structure, if necessary. This of course, is what all judges should do. Not every excellent judge will necessarily arrive at the same answer, but every judge

should apply the same set of rules -- the same methodology of judging.

A judge that interprets the law in this fashion will render some decisions in favor of, to quote the AFL-CIO again, "working people, minorities, and the poor," and will render some against them. It is enough to disprove the AFL-CIO's improbable thesis -- that Judge Bork simply computes the net worth of litigants to determine who should win the case -- to point to a couple of decisions.

Judge Bork authored an opinion holding that the Mine Safety and Health Administration had improperly excused a mine operator from complying with mine safety standards that were promulgated to protect miners. Judge Bork has also joined or authored numerous decisions that resulted in important victories for labor unions. In the private sector, these decisions include cases involving arbitration disputes, secondary boycott claims, and private settlements of unfair labor practice charges. In the public sector, they include cases involving employer attempts to withhold information from a union, employer misconduct in collective bargaining negotiations, employer obligations to grant official time to employees who negotiate labor agreements, procedures to ensure adequate labor protective arrangements in mass transit systems, judicial review in arbitration decisions, and government personnel regulations covering reductions in the labor force.

The false Robert Bork being portrayed by the AFL-CIO is a judge who bends the rules, or does not follow them, in order to reach a particular result. This portrait is the antithesis of everything for which Robert Bork has consistently stood over the last thirty years. Throughout his entire professional career, Robert Bork has inveighed against result-oriented judges.

IV

Consider next the national women's center's effigy of Robert Bork:

> [Judge Bork] would leave women defenseless against governmental sex discrimination. . . . Judge Bork's views reflect america of the 18th and 19th century, where under the law women stood behind men -- not by their side.

I am dead opposed to that Robert Bork -- because I am against the confirmation of any judge who intends to ignore the Constitution and the many laws we have on the books that prohibit discrimination on the basis of sex. But Judge Bork's record in the area of sex discrimination is hard to fault, even if we consider only the results of these cases rather than the facts and the law, which apparently is the mode of analysis of some of these groups.

But at the heart of this particular caricature is the notion that Judge Bork is a rigid, wooden judge, who clings desperately to "eighteenth century" notions in the face of twentieth century problems. Judge Bork's opinions paint quite a different picture.

The most notable example is his opinion in Ollman v. Evans. The case centered on allegedly defamatory statements by columnists criticizing a marxist history professor. Judge Bork wrote a concurring opinion, refusing to apply a "rigid doctrinal framework ... Inadequate to resolve the sometimes contradictory claims of the libel laws and the freedom of the press." Instead, wrote Judge Bork, we must be concerned that "in the past few years, a remarkable upsurge in libel actions, accompanied by a startling inflation of damage awards, has threatened to impose a self-censorship on the press which can as effectively inhibit debate and criticism as would overt governmental regulation that the first amendment would most certainly prohibit." Thus, Judge Bork refused to take a narrow view of the first amendment, observing that "it is the task of a 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 ...."

Libel lawyer Bruce Sanford has observed that "there hasn't been an opinion more favorable to the press in a decade." But what I want to emphasize is not the result in this particular case, for a number of highly respected lawyers disagree with Judge Bork's expansive press protection. The important point for purposes of determining Judge Bork's fitness for the Supreme Court is that the real Judge Bork's Constitutional theory is not at all like the horse and buggy, eighteenth century parody that his opponents have created.

V

Representative Conyers, spokesman for the Congressional Black Caucus, said last week that Judge Bork would "set back race relations more than 25 years." I am dead opposed to that Robert Bork. I am against the confirmation of any judge out to achieve such mischief because the ending of racial and religious intolerance has got to continue to be among our highest priorities. But the Robert Bork I know has given full sway to the Constitutional and statutory guarantees against discrimination. While Solicitor General, Robert Bork several times advocated a construction of the civil rights laws broader than that which the Supreme Court adopted! And as a judge he has authored some very important opinions in the civil rights area.

But rather than talk about words written by Judge Bork in opinions and legal briefs, I want to give you a true picture of the man by sharing with you an incident from early in his professional career. According to the Washington Post, when Robert Bork was a young associate at a major Chicago law firm, the application of an outstanding University of Chicago law student -- Howard Krane -- was briefly considered and then rejected. One associate overheard a partner saying that Krane was passed over because he was Jewish, and mentioned this to Bork. Even though only an associate, Bork went to see several senior partners and said, according to one of his colleagues, "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, and today Krane is managing partner of the firm.

VI

In sum, then, Judge Bork is the embodiment of an almost perfect judge -- he is brilliant, he is dispassionate, he decides cases on their facts and the law, not on his personal predilections. Why then do I say that he is "almost perfect." The answer is simple -- because we have lost cases in front of Judge Bork, including some big ones. And, as an occasionally disgruntled litigant, I would have a hard time describing the author of those opinions as "perfect." But we know that Judge Bork has always given us -- and all other litigants in his courtroom -- a "fair shake", or, to recite the words inscribed above the steps to the Supreme Court, "equal justice under law." With your help, I am sure that Judge Bork will soon climb those steps and become one of history's greatest justices.

SOME CRITICS OF JUDGE BORK HAVE RAISED THE ISSUE OF ABORTION, CONFIDENTLY PRONOUNCING THAT JUDGE BORK WILL VOTE THIS WAY OR THAT ON ABORTION ISSUES. THESE CRITICS MUST HAVE A FULLY-OPERATIVE CRYSTAL BALL IN THEIR POSSESSION, BECAUSE WE DO NOT HAVE SUCH A GIFT OF PROPHECY. NEITHER THE PRESIDENT NOR ANY OTHER MEMBER OF THE ADMINISTRATION HAS EVER ASKED JUDGE BORK FOR HIS PERSONAL OR LEGAL VIEWS ON ABORTION. AND IN 1981, JUDGE BORK TESTIFIED BEFORE CONGRESS IN OPPOSITION TO THE PROPOSED HUMAN LIFE BILL, WHICH SOUGHT TO REVERSE ROE VERSUS WADE BY DECLARING THAT HUMAN LIFE BEGINS AT CONCEPTION. JUDBE BORK CALLED SUCH A STRATEGEM AN "UNCONSTITUTIONAL" DEFIANCE OF A SUPREME COURT DECISION.

IN THE PAST, JUDGE BORK HAS ONLY QUESTIONED WHETHER THERE IS A RIGHT TO ABORTION IN THE CONSTITUTION. QUESTIONS ALONG THIS LINE HAVE BEEN RAISED BY MANY, IF NOT MOST, CONSTITUTIONAL SCHOLARS IN THIS COUNTRY, INCLUDING HARVARD LAW PROFESSOR ARCHIBALD COX AND STANFORD LAW SCHOOL DEAN JOHN HART ELY. BUT HE HAS NEVER SAID THAT THE ROE DECISION OUGHT TO BE OVERRULED. INDEED, GIVEN HIS OFTEN EXPRESSED VIEW OF THE GREAT IMPORTANCE OF PRIOR DECISIONS -- STARE DECIS AS IT IS REFERRED TO BY LAWYERS -- IT IS NOT AT ALL CLEAR WHAT HIS VOTE WOULD BE IF A CASE CHALLENGING THE DECISION CAME BEFORE THE SUPREME COURT. WE DO KNOW ONE THING, HOWEVER: JUDGE BORK WOULD DECIDE SUCH A CASE

CAREFULLY, DISPASSIONATELY, ON THE LAW AND THE CONSTITUTION. THAT IS WHY THE PRESIDENT NOMINATED HIM FOR THE POSITION.

CONCERNS HAVE BEEN RAISED IN SOME QUARTERS ABOUT JUDGE BORK'S VIEWS ON THE RELIGION CLAUSES OF THE FIRST AMENDMENT. THESE CONCERNS ARE MANUFACTURERED OUT OF WHOLE CLOTH AS WELL. JUDGE BORK HAS NOT HAD OCCASION TO PASS ON MANY RELIGION ISSUES IN THE D.C. CIRCUIT. JUDGE BORK WAS NOT INVOLVED, FOR INSTANCE, IN THE RECENT CASE CONCERNING THE APPLICATION OF AIR FORCE HEADGEAR REGULATIONS TO THE YARMULKE. INDEED, JUDGE BORK HAS DECIDED ONLY ONE RELIGION CLAUSE CASE WHILE ON THE BENCH -- A CASE WHICH INVOLVED A CHALLENGE TO THE PAYMENT OF GOVERNMENT FUNDS FOR THE SERVICES OF A LEGISLATIVE CHAPLIN. IN DISMISSING THE CHALLENGE, THE D.C. CIRCUIT SIMPLY NOTED THAT THE SUPREME COURT HAD SPOKEN ON THE ISSUE AND HAD HELD THAT PAYMENT OF SUCH FUNDS DID NOT VIOLATE THE ESTABLISHMENT CLAUSE.

SO WE ARE LEFT TO RELY ON JUDGE BORK'S DECISIONS IN OTHER CASES -- CASES WHICH DEMONSTRATE THAT HE FAIRLY AND DISPASSIONATELY REVIEWS THE LAW AND THE CONSTITUTION TO REACH HIS CONCLUSIONS, FAITHFULLY APPLYING PRIOR SUPREME COURT PRECEDENTS IN THE AREA. NO ONE NEED BE CONCERNED ABOUT A RADICAL SHIFT IN THE COURT'S RELIGION CLAUSE JURISPRUDENCE FROM THE APPOINTMENT OF A JUSTICE WHO DECIDES CASES IN THIS FASHION. TO SUGGEST OTHERWISE IS NOTHING OTHER THAN PURE DEMAGOGUERY.

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.

- No appellate judge in America has had a finer record on the bench: not one of his more than 100 majority opinions has been reversed by the Supreme Court.

- 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 Sims v. CIA, 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.

- He is not a political judge: 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 The New York Times 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.

NY Times, 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, mainstream 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

Saving Bork From Both Friends and Enemies

By Lloyd N. Cutler

WASHINGTON — The nomination of Judge Robert H. Bork to the United States Supreme Court has drawn predictable reactions from both extremes of the political spectrum. One can fairly say that the confirmation is as much endangered by one extreme as the other.

The liberal left's characterization of Judge Bork as a right-wing ideologue is being reinforced by the enthusiastic embrace of his neo-conservative supporters. His confirmation may well depend on whether he can persuade the Senate that this characterization is a false one.

In my view, Judge Bork is neither an ideologue nor an extreme right-winger, either in his judicial philosophy or in his personal position on current social issues. I base this assessment on a post-nomination review of Judge Bork's published articles and opinions, and on 20 years of personal association as a professional colleague or adversary. I make it as a liberal Democrat and as an advocate of civil rights before the Supreme Court. Let's look at several categories of concern.

Judicial philosophy. The essence of Judge Bork's judicial philosophy is self-restraint. He believes that judges should interpret the Constitution and the laws according to neutral principles, without reference to their personal views as to desirable social or legislative policy, insofar as this is humanly practicable.

All Justices subscribe at least nominally to this philosophy, but few rigorously observe it. Justices Oliver Wendell Holmes, Louis D. Brandeis, Felix Frankfurter, Potter Stewart and Lewis F. Powell Jr were among those few, and Judge Bork's articles and opinions confirm that he would be another. He has criticized the right-wing activism of the pre-1937 court majorities that struck down social legislation on due process and equal protection grounds. He is likely to be a strong vote against any similar tendencies that might arise during his own tenure.

Freedom of speech. As a judge, Judge Bork has supported broad constitutional protection for political speech but has questioned whether the First Amendment also protects literary and scientific speech. However, he has since agreed that these forms of speech are also covered by the amendment. And as a judge, he has voted to extend the constitutional protection of the press against libel judgments well beyond the previous state of the law. In his view, "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." Over Justice (then Judge) Antonin Scalia's objections, he was willing to apply "the First Amendment's guarantee .. to frame new doctrine to cope with changes in libel law [huge damage awards] that threaten the functions of a free press."

Civil rights. While Judge Bork adheres to the "original intent" school of constitutional interpretation, he plainly includes the intent of the Framers of the post-Civil War amendments outlawing slavery and racial discrimination. In this spirit, he welcomed the 1955 decision in Brown v. Board of Education proclaiming public school segregation unconstitutional as "surely correct," and as one of "the Court's most splendid vindications of human freedom."

> He is neither an ideologue nor an extreme rightist.

In 1963, he did in fact oppose the public accommodations title of the Civil Rights Act as an undesirable legislative interference with private business behavior. But in his 1973 confirmation hearing as Solicitor General he acknowledged he had been wrong and agreed that the statute "has worked very well." At least when compared to the Reagan Justice Department, Judge Bork as Solicitor General was almost a paragon of civil rights advocacy.

Judge Bork was later a severe critic of Justice Powell's decisive concurring opinion in the University of California v. Bakke case, leaving state universities free to take racial diversity into account in their admissions policies, so long as they did not employ numerical quotas. But this criticism was limited to the constitutional theory of the opinion. Judge Bork expressly conceded that the limited degree of affirmative action it permitted might well be a desirable social policy.

Abortion. Judge Bork has been a leading critic of Roe v. Wade, particularly its holding that the Bill of Rights implies a constitutional right of privacy that some state abortion laws invade. But this does not mean that he is a sure vote to overrule Roe v. Wade; his writings reflect a respect for precedent that would require him to weigh the cost as well as the benefits of reversing a decision deeply imbedded in our legal and social systems. (Justice Stewart, who had dissented from the 1965 decision in Griswold v. Connecticut, on which Roe v. Wade is based, accepted Griswold as binding in 1973 and joined the Roe v. Wade majority.).

Judge Bork has also testified against legislative efforts to reverse the court by defining life to begin at conception or by removing abortion cases from Federal court jurisdiction. If the extreme right is embracing him as a convinced right-to-lifer who would strike down the many state laws now permitting abortions, it is probably mistaken.

Presidential powers. I thought in October 1973 that Judge Bork should have resigned along with Elliot L. Richardson and William S. Ruckelshaus rather than carry out President Richard M. Nixon's instruction to fire Archibald Cox as Watergate special prosecutor.

But, as Mr. Richardson has recently observed, it 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 irrreparably crippled.

Mr. Bork allowed the Cox staff to carry on and continue pressing for the President's tapes — the very issue over which Mr. Cox had been fired. He appointed Leon Jaworski as the new special prosecutor, and the investigations continued to their successful conclusion. Indeed, it is my understanding that Mr. Nixon later asked, "Why did I go to the trouble of firing Cox?"

Lloyd N. Cutler, a lawyer who was counsel to President Jimmy Carter, was a founder of the Lawyers Committee for Civil Rights Under Law.

I do not share Judge Bork's constitutional and policy doubts about the statute institutionalizing the special prosecutor function. But if the constitutional issue reaches the Supreme Court, he will most likely recuse himself, as he has apparently already done in withdrawing from a motions panel about to consider this issue in the Court of Appeals. Moreover, as he testified in 1973, he accepts the need for independent special prosecutors in cases involving the President and his close associates.

Balance-the-budget amendment. While this proposed amendment is not a near-term Supreme Court issue, Judge Bork's position on it is significant because support for that amendment is a litmus test of right-wing ideology. He has publicly opposed the amendment on several grounds, including its unenforceability except by judges who are singularly ill-equipped to weigh the economic policy considerations that judicial enforcement would entail. This reasoning is far from the ritual cant of a right-wing ideologue.

Experience shows that it is risky to pinpoint Supreme Court Justices along the ideological spectrum, and in the great majority of cases that reach the Court ideology has little effect on the outcome.

The conventional wisdom today places two Justices on the liberal side, three in the middle and three on the conservative side. I predict that if Judge Bork is confirmed, the conventional wisdom of 1993 will place him closer to the middle than to the right, and not far from the Justice whose chair he has been nominated to fill.

Every new appointment creates some change in the "balance" of the Court, but of those on the list the President reportedly considered, Judge Bork is one of the least to create a decisive one.

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The Battle Over Bork

Senate Liberals Will Try to Block Nominee On Ideological Grounds

By STUART TAYLOR Jr.

WASHINGTON

With the direction of the Supreme Court, the Reagan legacy and the Democratic Presidential nomination all in play, the nomination of Judge Robert H. Bork portends the biggest ideological battle of President Reagan's second term. It will also be the major test of modern times on an issue as old as the Republic: Is the Senate's "advice and consent" role a mandate to reject a Presidential nominee to the Court because it dislikes his ideology?

The recent tradition, which the Administration says is rooted in the Constitution, has been Senate acquiescence on judicial nominees who share the President's philosophy. But liberals say the framers of the Constitution intended the Senate to play a coequal role; otherwise, they maintain, it would be rubber-stamping a President's effort to remake the law of the land — and to roll back constitutional protection of abortion rights — through appointments to the Court.

The liberals are citing experience going back to the debates at the Constitutional Convention and the Senate's rejection in 1795 of John Rutledge, President Washington's nominee to be Chief Justice, largely because of the nominee's opposition to the Jay Treaty with England. In the two centuries following, the Senate has rejected or forced the withdrawal of nearly 20 percent of presidential nominees to the Court.

Recent confirmation battles, even the liberals' attack on Jusuce William H. Rehnquist's elevation to Chief Justice, have focused on allegations of personal misconduct and veracity. But ideology was one key issue when President Johnson was forced to withdraw his nomination of Justice Abe Fortas to be Chief Justice in 1968. The senators opposing him included Strom Thurmond of South Carolina, now senior Republican on the Judiciary Committee, who took the occasion to filibuster against the liberal jurisprudence of the Warren Court and Howard H. Baker Jr., now White House Chief of Staff.

Ideology has assumed such prominence in the battle over Judge Bork because his vote and intellectually muscular conservatism seem so likely to tilt the Court sharply to the right on such politically and emotionally charged issues as free speech, affirmative action, religion and, most conspicuously, abortion. In many 5-to-4 decisions on these issues, the man he would replace, the moderate-to-conservative Justice Lewis F. Powell Jr., had voted with the liberals.

Judge Bork's eventual confirmation, even by a Democratic-controlled Senate, seems probable, though not assured. But with Senate hearings unlikely before

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Labor Day and a final vote unlikely before the Court's new term begins, the process promises to be one of long duration and unparalleled ferocity.

Liberal groups say their crusade to stop Judge Bork will be their major priority of the Reagan era. They will be pressing senators who are seeking the Presidency, especially Joseph R. Biden Jr., who as Judiciary Committee chairman will run the hearings.

President Reagan and his supporters on the right will push back with equal passion. The Bork nomination represents a last, best chance to advance Mr. Reagan's social agenda.

Genial and Tough

At the center of the storm stands a big, bearded, genial man, long a prominent critic of the "judicial imperialism" he ascribes to the "modern, activist, liberal Supreme Court." Most conspicuously, Judge Bork has denounced the 1973 decision identifying a constitutional right to abortion, and it seems clear he would provide the fifth vote to narrow, and perhaps overrule, that decision.

Liberal as well as conservative friends and associates praise Judge Bork as a deep thinker whose hard-edged theories are devoid of bigotry and tempered by a ready wit, who can enjoy a martini or a friendly debate with strong ideological adversaries. He won the American Bar Association's highest rating when nominated for the United States Court of Appeals for the District of Columbia, and the hunt for clouds on his integrity has been unavailing.

To his chagrin, the 60-year-old former Yale law professor has been known to the public chiefly as the Acting Attorney General who followed President Nixon's order to dismiss Archibald Cox as the first Watergate special prosecutor in the 1973 "Saturday Night Massacre." While opponents have deplored his role in that episode, some key participants say he acted honorably. Bork supporters question why the Senate should be any more troubled now than it was when it confirmed him unanimously in 1982.

His writings both as a scholar and as a judge clearly put him very far to the right on the spectrum of respectable legal thought. The law of the land would be very different today if Judge Bork had been in charge over the last few decades. He has denounced, for example, the "one person, one vote" rulings of the 1960's and decisions striking down poll taxes and protecting the advocacy of overthrowing the government.

While public controversy has centered on Judge Bork's denunciation of the abortion decision, his position on that issue is far closer to the mainstream of legal scholarship than some of his other views. He is assailed for what he terms "deference to democratic choice": his view that the judiciary should not override the social policy choices of elected officials by "creating" rights with no specific basis in the Constitution's language.

It is a measure of how deeply the institution of judicial review has taken root in America that elected senators are feeling so much pressure to reject a nominee whose philosophy rests on the premise that legislators should make the laws.

The Washington Post

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PAGE: A21

Michael Barone

Bork: The Liberals Have It Wrong

Liberals who have jumped so enthusiastically into the battle to deny confirmation to Judge Robert Bork don't seem to realize it, but they are fighting yesterday's battles. And if they are so unfortunate as to win, they risk losing tomorrow's legal-political wars.

Bork, I think it is fair to say, is the closest thing we have to a principled believer in judicial restraint—the idea that courts should overturn laws passed by legislatures only when the law violates an absolutely clear constitutional provision. His attackers do not really contest this proposition. Liberals don't like him because they fear he would refuse to overturn laws they don't like, notably anti-abortion laws; they don't claim he would overturn laws they favor.

If that's so, then Bork is exactly the kind of justice liberals should want. Right now, and probably for as long as the 60-year-old Justice Bork can be expected to serve, judicial restraint works for the liberals on most issues. American courts are mostly conservative. American legislatures are mostly liberal. Once it was the other way around, and it was in liberals' interest to make courts more powerful and legislatures less powerful. But today liberals have no reason to look for justices or doctrines to overturn what legislatures do. They should be looking for justices and doctrines that will let legislatures' acts stand.

It may not be obvious that legislatures are liberal today, especially to those in the warrens of backrooms of Washington liberal lobbies who imagine American legislatures are peopled mostly with Ku Klux Klansmen and Jerry Falwells. But 61 percent of legislators are Democrats, and they usually choose liberal leaders. Here in Congress, Jim Wright—a committed liberal on economics, the only national politician gutsy enough to speak out for a tax increase, and alert to civil liberties as well—succeeded Tip O'Neill as House speaker. In California, Willie Brown, a brilliantly skillful black from San Francisco, is speaker; New York's speaker is a liberal Jew from Brooklyn, Melvyn Miller; Pennsylvania's is Leroy Irvis, a black from Pittsburgh. Speakers George Keverian of Massachusetts, Vern Riffe of Ohio, Gary Owen of Michigan, Michael Madigan of Illinois, Tom Loftus of Wisconsin, and Jon Mills of Florida are all Democrats, liberals on most issues, and sharp political operators to boot. Bill Hobby, who runs the Texas senate, is the main force there for spending more on education and welfare. And so on in smaller states; but we've already covered the states where most Americans live.

Compare these legislatures with the courts. Most federal judges now are Reagan appointees, and while the balance would be changed if a Democrat won in 1988, that's not a sure thing. The recall by a 2-1 vote of Chief Justice Rose Bird has left the California courts in the control of political conservatives for the first time in 50 years. Mario Cuomo in New York has followed a policy of not appointing judges to further any liberal ideology. In the law schools the backers of liberal judicial theories are on the defensive, and much of the new debate is on the right. The argument there is whether judges should overturn laws passed by the legislatures as violations of economic liberty. On that argument Judge Bork is clearly identified as one who wouldn't overturn such laws.

But the liberals who are arguing against Bork aren't thinking about the cases seeking to overthrow the liberal laws of tomorrow. They're talking about decisions overthrowing the conservative laws of yesterday. (Most ludicrous is the argument, advanced even by The New York Times, that Bork might reverse the 1965 decision overturning the Connecticut law that banned contraceptives. That's a danger only if you think that some legislature is about to pass a law banning condoms—not terribly likely at a time when many think condoms are our front-line protection against AIDS.)

Foremost among liberals' concerns is abortion. It was the pro-choice groups which first loudly attacked Bork and whipped the Democrats into line; the National Abortion Rights Action League snapped its fingers and Joe Biden, doing what he said he'd never do, jumped. The pro-choice crowd fears, realistically, that Bork would vote to overrule *Roe v. Wade*, the 1973 decision that overturned all state anti-abortion laws. We would be back, Edward Kennedy says, to the days of back-alley abortions.

This is nonsense. The voters don't want abortion outlawed, and the mostly liberal legislatures are not going to vote to outlaw it. About a dozen states today pay for Medicaid abortions for the poor; they're not likely to turn around and ban abortion for everyone. Even in the supposedly dark ages before *Roe v. Wade*, legislatures were moving rapidly toward legalization. In the five years before the decision, legislatures in 18 states with 41 percent of the nation's population liberalized their abortion laws, often to the point of allowing abortion on demand. On the day the decision came down, about 75 percent of Americans lived within 100 miles of a place where abortions were legal. Other legislatures would surely have liberalized their abortion laws in the legislative sessions just beginning as the Supreme Court spoke. (Bob Woodward and Scott Armstrong in their book, "The Brethren," report that Justice Potter Stewart, influenced by his daughter, felt that few legislatures seemed likely to amend their abortion laws. On this political judgment he couldn't have been wronger; the legislatures were acting more rapidly on this issue than they have on almost any issue in 200 years of American history.)

Today the liberals who suppose that legislatures will put abortionists in leg irons are just as wrong—as the right-to-lifers are beginning to realize, with a sinking heart. A decision overruling *Roe v. Wade* would make pro-choice lobbyists work harder in state legislatures, which is where Justice Brandeis used to say liberal reformers should be busy working, and would force a lot of state politicians to take a stand on an issue they'd prefer to straddle. But that's what lobbyists and politicians are paid for.

Bork is not going to vote to overturn the Civil Rights Act (though he may say it means what it says and what Hubert Humphrey said it meant: that it forbids racial quotas), he is not going to overturn laws that can't be justified by free-market economics (as Judge Richard Posner would), and he is not going to overturn the graduated income tax or welfare programs (as University of Chicago professor Richard Epstein might). He is not going to write opinions that give thousands of conservative and sometimes just plain stupid state and local judges a warrant to overturn laws they don't like. The liberals are not likely to be granted another Reagan appointee who would be better for them than Bork. They should hope they're lucky enough to lose their fight to block his confirmation.

The writer is a member of the editorial page staff.

The New York Times

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PAGE: A-1

Bork's Evolving Views: Far From the New Deal

By STUART TAYLOR Jr.
Special to The New York Times

WASHINGTON, July 7 — Judge Robert H. Bork, whose nomination to the Supreme Court has spawned a bitter ideological battle between President Reagan and Senate liberals, said today that he was not asked his views or asked to make commitments on specific issues before Mr. Reagan chose him last week.

"Nobody has ever on this job or any other jobs asked for any commitments," Judge Bork said in an hour-long interview today. "I was never interviewed as to where I stood on anything."

Judge Bork, whose positions on many legal issues are widely known from his years as a judge and scholar, otherwise limited himself to questions about his personal background and the evolution of his views. He brushed away with a laugh a question about whether, if confirmed, he might have some surprises in store for the President who appointed him, or might even surprise himself. Such has been the case for some previous Supreme Court nominees, including Earl Warren.

Chewing Nicotine Gum

"Now, now," he said, in his first detailed newspaper interview since his nomination. "I really don't know and I'm not going to speculate about it."

The 60-year-old jurist answered questions today at his desk, in rolled-up shirtsleeves, occasionally popping a piece of nicotine gum in his mouth, an ashtray littered with cigarette butts in front of him. His once-red Brillo-pad hair and beard were flecked with gray.

Two secretaries bustled in and out of his office bearing telephone messages and judicial business.

Judge Bork declined repeatedly, but with a smile, to answer questions that flirted with the boundaries of the condition he had placed upon the interview: that he would not discuss his current views, current issues or his nomination, and that that his discussion of his past views should be understood only as personal history, not as an index to his current positions.

He did recount some significant changes in his views over the past 35 years:

¶While in law school he converted from a mix of New Deal liberalism and Eugene V. Debs socialism to a more conservative point of view.

¶As a Yale law professor he abandoned an effort to develop a comprehensive "theory of when governmental regulation of humans is permissible."

¶He initially opposed but later supported a key civil rights law.

¶He reversed his position on some issues in cases pending before the United States Court of Appeals for the District of Columbia, on which he has sat since 1982.

Lengthy Evolution

"I may have given the impression in the past that I was pretty confident of my views and still changed them," said Judge Bork, known more for the philosophical consistency and rigor of his conservative views than for flexibility. "Your intellectual evolution, one hopes, will last as long as you do."

"In 1952, I was out on a street corner with my wife, passing out leaflets for Adlai Stevenson," he recalled. "It was the years '52 to '54 when I had this experience that changed my mind."

The experience, he said, was an exposure to "serious economics," largely at the hands of Aaron Director, an economist on the University of Chicago Law School faculty. It was "a little bit like a conversion experience," he said, one that made him see the world "altogether differently." The central lesson: "A free economy, within obvious limits, produces greater wealth for people in general than a planned economy does."

His Nickname: Red

Judge Bork recounted personal details ranging from his childhood nickname (Red) to how he nearly became a journalist instead of a lawyer and how he had to argue his first case before the Supreme Court as Solicitor General with less than a day to prepare.

Judge Bork chafed a bit at the label "conservative" that has been freely applied to him. "I think things are a little more complex than that," he said. "Just in general, you will find among liberals, you will find among conservatives, people in each camp who disagree with each other about a lot of things, some of them quite important things."

He said at one point, "My present politics are really not important to anybody."

He has often expressed the view that judges should rigorously avoid allowing personal political views to influence their decisions, and should, rather, confine themselves to interpreting the intentions of the framers of the Constitution and of the legislators and executive branch officials responsible for setting social policy.

Visit to Senators

The Judge paid courtesy calls on top Senate Republicans today. The nominee visited Senator Bob Dole, the Republican leader; Strom Thurmond of South Carolina, ranking Republican on the Judiciary Committee, and Alan K. Simpson of Wyoming, the Republican whip.

Both Senators Dole and Thurmond spoke later on the Senate floor, urging Democrats to complete the confirmation proceedings in time for the opening of the next Supreme Court term Oct. 5. "The country will suffer if the Court is not at full strength," Mr. Thurmond said. But there is a chance that the process will not even begin until September. Senator Joseph R. Biden Jr., the Delaware Democrat who heads the Judiciary Committee, is to meet with Democratic members of the committee Wednesday to discuss the schedule.

Judge Bork was born March 1, 1927, in Pittsburgh, the only child of what he described as a middle-class family. He grew up there and in the nearby suburb of Ben Avon. His father was a purchasing agent for a large steel company, and his mother, before her marriage, a schoolteacher.

He attended public schools, ranking at the top of his class, joined the debating team and gave up football as a 140-pound sophomore because, he said, he knew what he was best at. He was "editor-in-chief of the school paper and class president, that sort of thing."

He spent his senior year at Hotchkiss, a New England preparatory school, as the quality of his public school declined because many of the best teachers were drafted for service in World War II.

He joined the Marine Corps out of "youthful vainglory," he said. He was training for overseas duty when the atomic bombing of Japan ended the war, and he ended up in China for a few months guarding the Nationalist Chinese supply lines.

> 'Your intellectual evolution, one hopes, will last as long as you do.'

After the war, he graduated from the University of Chicago in less than two years and sent for an application to attend Columbia Journalism School.

"They said that if I'd go someplace else to college for a while, they'd send me an application blank," he recalled. "That didn't cheer me up, so I went to law school."

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He entered the University of Chicago Law School still "somewhere between a follower of Eugene V. Debs and Franklin Roosevelt. I don't know, New Deal." But in his third year, under the influence of economists including Mr. Director, his viewpoint began to change.

A Different View

"I think a lot of people in the law and economics movement have had that kind of an experience," Judge Bork said. "They hit a social science which suddenly begins to give them an organizing way of looking at the world, that they'd never had before, and it does make a deep impression, and it does have the effect of making you see the world just differently, altogether differently."

Judge Bork stressed, however, that he was not among those theorists who saw economic analysis as the solution to every legal problem.

After law school, Mr. Bork went to work for Kirkland & Ellis, a prominent Chicago law firm, working on complex

In a decision written by Judge Robert H. Bork, a Federal court backed the right of banks to offer investment advice to the wealthy. Page D1.

litigation especially antitrust cases. He stayed from 1955 to 1962, becoming a partner.

"I realized I was going to be doing the same kind of thing over and over again, in different contexts, but roughly the same kind of thing," he said, "and I really hadn't gone into law with that sort of thing in mind. I had gone into it with a rather more intellectual interest in it."

After seriously considering an offer to be a writer for Fortune magazine, he took a teaching job at Yale Law School. He stayed there until 1981 except for a stint as Solicitor General of the United States and Acting Attorney General from 1973 to 1977.

It was at Yale, Judge Bork said, that he "had time to try to get my ideas in order," stimulated by "endless disagreements" with his best friend, Prof. Alexander Bickel, one of the nation's foremost constitutional scholars.

He Was Right

"I thought it was possible to work out a theory of when governmental regulation of humans is permissible, and on the other hand when individual freedom is required," Judge Bork said. "Alex thought that was wrong, that such a theory could never be worked out, and after a period of years of teaching it with him, I became convinced he was right."

Instead, he said, "I came to agree with his article on Edmund Burke's as the proper approach to politics." Judge Bork described this as "a non-abstract approach to government and politics, a prudential, balanced approach, the value of community, the value of tradition, a dislike for sweeping abstractions as characterized the French Revolution, a desire for a more humane society than that kind of abstraction produces."

Judge Bork noted a 1963 magazine article he wrote assailing a proposed Federal civil rights law that would have barred owners of restaurants, hotels and other public accomodations from excluding blacks. In his article he called it an unjustifiable limitation on the freedom of whites to choose with whom they would do business. Today, he called that view a manifestation of his then-exaggerated commitment to individual autonomy against the state.

Judge Bork declined to discuss the act that made him famous, his dismissal in 1973 of Archibald Cox as Watergate special prosecutor, on orders from President Nixon. He was Acting Attorney General at the time because two superiors had resigned.

"I've testified about it and I guess I'll testify about it again," he said. "I'd rather not run through it now."

Judge Bork denied a report in Time Magazine that he was "agnostic" on religion. "That's wrong," he said. "It's a very complex subject about which I think sometimes. I am not really an agnostic. On the other hand, I haven't got a simple position I can lay out for you. Nor do I want to. It's a fairly intimate thing."

Chicago Tribune

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Right and wrong ways to combat the Reagan court

Upon hearing the news of Robert Bork's nomination to the Supreme Court, Sen. Edward Kennedy was not shy about his reaction. "Robert Bork's America is a land in which women would be forced into back-alley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens' doors in midnight raids, schoolchildren could not be taught about evolution," Kennedy reported. He might have added that a resemblance between this fictional character and any person, living or dead, is purely coincidental.

Bork is a legal thinker of intellectual distinction and scholarly renown. The disadvantage of being

Stephen Chapman

selected for a position equal to his talents is having to be judged by people who are not.

Democratic Sen. Paul Simon of Illinois, an unapologetic ideologue of settled convictions, had his own doubts about Bork: "Is he too rigidly ideological? Is he open-minded?" Simon should be consoled by the knowledge that Bork won't prove any more ideological or closed-minded than Thurgood Marshall or William Brennan, though his views will be less congenial to the Left.

Three arguments have been made by those who oppose Bork's elevation to the Supreme Court. The first is that he is an extremist. The second is that he disgraced himself by firing special prosecutor Archibald Cox during the Watergate scandal. The third is that, as a member of the court, he will vote in a way that most Democrats won't like. This last, unlike the first two, has the virtue of honesty, but it rests on a novel idea about the Senate's role.

Bork is undoubtedly conservative in his views about the Constitution. This inclination shows itself in his overall philosophy, which holds that the courts should overrule legislative and executive decisions only when they have clear textual authority to do so.

It is also reflected in his conclusions about specific issues. He disagrees with the 1973 Supreme Court decision legalizing abortion, thinks evidence illegally obtained by police shouldn't always be barred as trial evidence, proposes to narrow the 1st Amendment's free speech protections and sees no constitutional protection for homosexual acts.

But Bork separates his political preferences from his constitutional judgments. The Bork who says sexually explicit material isn't protected by the 1st Amendment is the same one who as solicitor general dropped several obscenity prosecutions. Although he has endured much press abuse, he is distrustful of libel actions. Despite his fervent defense of the free market, he thinks the Constitution allows extensive regulation of commerce.

But Bork is no more an extremist than Ronald Reagan, who has been twice elected President by large margins—unless Kennedy wants to argue that the American people are right-wing nuts. Even by the more liberal standards of law school faculties, Bork is well within the boundaries of respectable thinking. His views on the 1973 abortion ruling, for example, are shared by many liberal scholars who don't want abortion banned.

The Saturday Night Massacre is an equally empty issue. Only a lunatic could believe that Bork fired Cox to help himself or to frustrate the investigation of President Nixon. Bork had to be talked out of resigning himself by Elliot Richardson, who had resigned rather than fire Cox, and he successfully pressed Nixon to appoint another special prosecutor. Richardson now praises Bork for his handling of the matter.

That leaves the argument that Bork should be rejected because he will render verdicts that Ted Kennedy and Paul Simon won't like. Granted, the Senate has the right to use any grounds it wants in evaluating judicial nominees, but it has a clear tradition of letting the president have his way on their judicial philosophy.

Kennedy's fondness for ideological criteria is newly acquired. Back in 1981, he and other liberal senators scolded conservatives who regarded Sandra Day O'Connor's past support of abortion as grounds for voting against her.

Besides, unless the Democrats despair of ever regaining the White House, they should think twice about overturning tradition. When President Dukakis names his replacement for Justice Marshall, Democrats will prefer a deferential Senate. If they reject a qualified nominee to the court because he holds unwelcome beliefs, they may find the decision coming back to haunt them.

By all established criteria, Bork ought to be approved. If the Democrats don't like the court's makeup, they should work to change it just as Reagan changed it. The right tool for that job is not the confirmation power but the ballot box.

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PAGE: PT2 p.5

?:k Believes in the Words

Reliance on the Constitution Doesn't Make Him an Ideologue

By BERNARD DOBRANSKI and LEON LYSAGHT

There is an unfortunate trend these days to further erode the distinction between law and politics. The formation and enforcement of laws is, of course, connected with the political process. On the other hand, the interpretation of the law should be divorced from the political process as much as possible. The problem is that the Constitution has, more and more, become an arena for carrying on political contests. Where proponents see little hope of legislative success, they have sought to cast their claims in constitutional molds. As a result, there are those who are more concerned with a judge's politics than with his or her view of the law and the role of the judiciary in our form of government. What is even more alarming is the growing tendency to interpret judicial decisions in political terms that only take account of results.

The [illegible]zzard of commentary surrounding nomination of Judge Robert H. [illegible] for the vacancy on the Supreme Court has obscured the legitimate issues and served to focus attention on the irrelevant and unknowable. We do not and cannot know whether Bork's heart was pure on the day he fired Archibald Cox. What we can determine is whether his conduct was within, and indeed required by, the law. We cannot know precisely how Bork, now on the U.S. Court of Appeals, will vote on a variety of issues that will eventually appear before the Supreme Court. What we can reasonably expect to understand is Bork's opinion as to the nature of the U.S. Constitution and his approach to interpreting it.

In a 1986 article in the San Diego Law Review, Bork sets forth his views on the proper role of the judiciary and the approach that it ought to take to constitutional interpretation. He discusses the problems created by the use of a concept like the "right of privacy" as the criterion for determining the result in Griswold vs. Connecticut. "My point," Bork says, "is simply that the level of abstraction chosen makes the application of a generalized right of privacy unpredictable." What concerned P[illegible]s the trend toward generalization [illegible]l decisions even when the Constitu[illegible]is silent on an issue, and what this [illegible]ght lead to as a source of unstructured judicial power.

The whole tenor of Bork's article is strongly reminiscent of the late Supreme Court Justice Hugo Black's dissent in the Griswold case. "Privacy," Black said, "is a broad, abstract and ambiguous concept which can easily be shrunken in meaning but which can also, on the other hand, easily be interpreted as a constitutional ban against many things . . . ." Black's view of the manner in which the Supreme Court ought to interpret the Constitution has much in common with Bork's as expressed in the San Diego Law Review article.

Both jurists take the position that the function of the Supreme Court is to interpret the Constitution by reference to the words that appear in it. Both believe that the words can and ought to be limiting factors on the discretion that judges have in making their decisions. Yet there is a growing group of law professors who think otherwise. And there appear to be a number of senators who believe that political ideology is the determining factor in judicial decision-making.

But political beliefs held before appointment to the Supreme Court have not been reliable predictors of judicial behavior. Hugo Black's political background (which included membership in the Ku Klux Klan) would hardly have predicted a judicial record of preserving individual rights. Earl Warren's performance surprised more than a few people.

More is known about candidates who have had judicial experience than those who have been selected from the political arena. But what is it that we know about current or former judges?

What we know is whether they view the law as a rational enterprise and whether, as judges, they are of the opinion that they must give good reasons for the decisions that they make. We can discover whether they believe that a judge is morally superior and, therefore, morally justified in substituting his or her opinion for the opinions of legislators or the general population. In short, what we can find out, and what we should want to know, is the degree to which the candidate for judicial office is committed to the rule of law.

It is appropriate to ask a political candidate what his or her opinions are in respect to abortion, prayer in schools, gay rights or any other matter within the political domain. What we should ask the candidate for judicial office is his or her opinion with regard to the law on these matters, and whether the candidate is prepared to faithfully apply the law. It is important to determine whether the judicial candidate differentiates between his preferences on matters of social policy and his view of the law on these same issues.

Bork has articulated his views on these matters in numerous law-review articles and judicial opinions. What he has said is neither unique nor radical. As previously noted, his position on constitutional interpretation bears striking resemblance to Hugo Black's. The view that a judge must justify his decisions by reference to the established meaning of the words does not justify calling him a right-wing ideologue. The nomination, and confirmation, of Judge Bork will not mean substantial change in life as we know it, no matter who "we" are.

Bernard Dobranski is the dean and Leon Lysaght is an associate professor of law at the University of Detroit School of Law.

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NEW YORK TIMES
December 10, 1981
p. A30

Echoes of Watergate

Historical news quiz: What do Robert Bork and Maurice Stans have in common? One answer is Watergate, and now there is another one. In the last few days President Reagan has nominated both men for Federal office, Mr. Bork as an appellate judge in Washington, Mr. Stans as a director of a Federal investment corporation. At this point the parallels abruptly stop.

Mr. Bork is the man who carried out President Nixon's command that the Watergate special prosecutor be fired, in the famous Saturday Night Massacre of October 1973. He was bitterly assailed at the time ("Nixon's Bork is worse than his bite," read one poster), but he had a principled rationale. He might not agree with a particular Presidential order, he said, according to one account, but nonetheless felt a duty to carry it out.

Mr. Bork, moreover, is a legal scholar of distinction and principle. For instance, he opposes the various court-stripping bills that have been introduced in Congress, a braver position than any so far taken by his Justice Department sponsors. One may differ heatedly with 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.

The same cannot be said about the appointment of Maurice Stans to the Overseas Private Investment Corporation. It is a much less important job, a part-time, two-year term on a 15-member board concerned with foreign economic policy. Still, the nomination probably makes him the first person with a criminal record from Watergate to be nominated to Federal office.

It is true that he was acquitted of obstructing justice and other charges related to Robert Vesco, the fugitive financier. But he also pleaded guilty to five misdemeanor charges of campaign contribution violations in the 1972 Nixon campaign. As finance chairman, the former Commerce Secretary squeezed a record $60 million out of contributors.

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Circumstances suggest that the White House wanted to hide the nomination. It was announced at the most sluggish time, on a Friday afternoon, embedded among a dozen other appointments, and without explanation.

Camouflage notwithstanding, the nomination conveys dismaying signals. One is that the President, wary of formal Watergate clemency, is willing to give a back-door pardon. More troubling, it implies White House indifference to the campaign finance law. Why, inviting these inferences, did Mr. Reagan make this nomination? It requires confirmation hearings; perhaps the Senate can find out.

Chicago Tribune

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PAGE: 9

The inevitability of Robert Bork

Ever since he went onto the federal appeals court during Ronald Reagan's first term, Judge Robert Bork has been thought of as a Supreme Court justice-in-waiting. That is simply because he is so clearly right for the job.

Though he has taken public positions and written judicial opinions that have upset political conservatives from time to time, his legal philosophy fits with what President Reagan has always said he wanted: Judge Bork has been consistently skeptical about using judicial power to set social policy.

He does not shy away from enforcing the provisions of the Constitution against political incursions; he has been vigorous in protecting political debate against government regulation, for example. But he has no taste for extending the reach of the Constitution beyond the values it announces in the text. This is why he has been critical of extending the judge-made right of privacy.

A former professor at Yale Law School, he has the intellectual strength to be a formidable spokesman for this point of view on the court. His scholarship both on and off the bench commands great respect even among those in the legal profession who do not share his views. And he has a witty, direct and often eloquent writing style that give his opinions special force.

Judge Bork also has had practical experience in government. As solicitor general in the Nixon and Ford administrations, he ran the office that argues the government's positions in the Supreme Court. He also served as acting attorney general during the Watergate tempest, and during Edward Levi's term as attorney general he was a close adviser on a wide range of issues.

His record during Watergate surely will be examined during his confirmation hearings because he gained notoriety as the man who fired the first special prosecutor, Archibald Cox. Opponents already are lining up to try to discredit him in this way because they are afraid he would swing the court to the right. And partisans will do anything to make the confirmation of a strong conservative difficult. But a fair appraisal of Judge Bork's service during Watergate will conclude that he acted with integrity and honor throughout.

When President Nixon ordered Atty. Gen. Elliot Richardson to fire Mr. Cox, Mr. Richardson resigned because of a commitment he had made to Congress not to impede the special prosecutor's work. William Ruckelshaus, deputy attorney general, also refused and left office. Judge Bork had made no commitment and recognized that the president had the authority to remove Mr. Cox if he chose. He planned to do the firing and then resign. But Mr. Richardson talked him out of resigning for fear that President Nixon would appoint an acting attorney general from the White House staff.

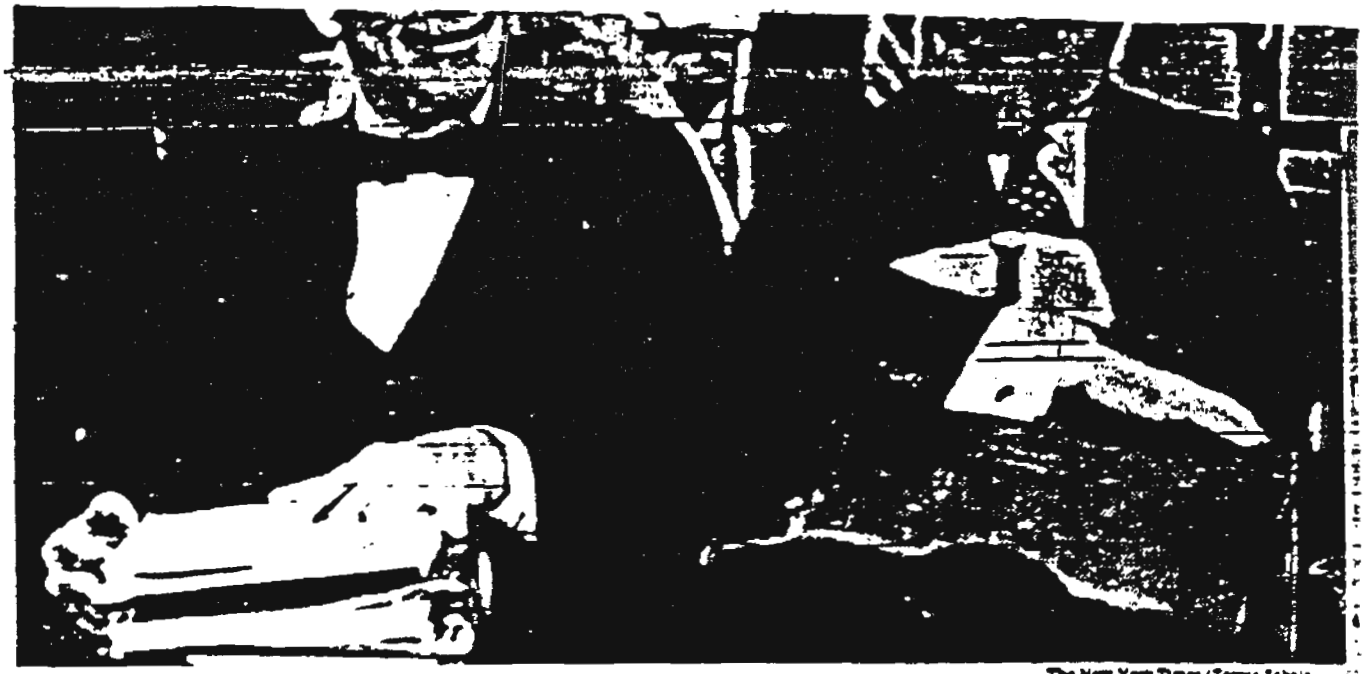
Judge Bork took quite a beating at the time, but his actions left a strong individual at the Justice Department to hold it and the special prosecutor's staff together and to push President Nixon to replace Mr. Cox with someone of equivalent integrity and skill. Judge Bork has nothing to apologize for.

Though liberals are gearing up for a fight and a number of Democratic presidential candidates, including Illinois Sen. Paul Simon, will have key roles in the process, it will be difficult for anyone to find a reason for the Senate not to confirm Judge Bork. The principal objection to him is that he is a judicial conservative, which is not an appropriate reason. His views are well within the mainstream of American jurisprudence; in fact, as a scholar and judge he has helped shape legal thinking in many fields, including constitutional law.

Senate Majority Leader Robert Byrd has threatened to stall the confirmation because he does not believe he has been getting cooperation from the White House on other matters. That is irresponsible. The Senate Judiciary Committee hearings should be thorough, but they should not be used for grandstanding or delay. There is no reason today why the court should have to begin its fall term short-handed.

If the members of the United States Senate are as intellectually honest as Judge Bork, they will have no choice but to consent to placing him on the court that he has seemed destined to join.

The New York Times, June 2, 1981



The New York Times/Teresa Zabala

Former Solicitors General Archibald Cox, left, and Robert H. Bork yesterday at a Senate subcommittee hearing

2 Ex-Solicitors General Oppose Bill to Curb Abortions

By BERNARD WEINRAUB

WASHINGTON, June 1 — Two former Solicitors General, Archibald Cox and Robert H. Bork, told a Senate panel today that proposed legislation seeking to make abortion illegal was unconstitutional, a view met by strong disagreement from other legal experts.

Appearing before the Judiciary Subcommittee on the Separation of Powers, whose chairman, Senator John P. East, personally opposes abortions, Mr. Cox and Mr. Bork said in essence that it was improper for Congress to tamper with the ultimate authority of the Supreme Court, which upheld a right to abortions in 1973.

Mr. Bork, the Alexander M. Bickel Professor of Public Law at Yale University and a conservative law scholar, said: "Only if we are prepared to say that the Court has become intolerable in a fundamentally democratic society and that there is no prospect whatever for getting it to behave properly, should we adopt a principle which contains within it the seeds of the destruction of the Court's entire constitutional role."

Mr. Cox, a Harvard Law School professor, said that the current anti-abortion measure before Congress "should be rejected as a radical and dangerously unprincipled attack upon the foundations of our constitutionalism."

At issue is a bill sponsored by Senator Jesse Helms, Republican of North Carolina, and Representative Henry J. Hyde, Republican of Illinois, declaring that human life "shall be deemed to exist from conception," thereby allowing states, if they choose, to prosecute abortion as murder. The bill, which is supported by Senator East, a North Carolina Republican, is based on a clause of the 14th Amendment that empowers Congress to enforce guarantees of due process and equal protection.

Enactment of the Helms-Hyde bill, said Mr. Cox, "would undermine the basic balance of our institutions."

The appearance of Mr. Bork and Mr. Cox at the crowded hearing stirred considerable interest. It was Mr. Bork, as Solicitor General in 1973, who carried out President Nixon's order and dismissed Mr. Cox as special Watergate prosecutor in the "Saturday night massacre." The two men chatted and smiled for photographers before the start of today's hearing.

Six other witnesses appeared at the hearings, which are scheduled to resume in the middle of June. These were Profs. Robert Nagel of the Cornell University Law School, and Basile Uddo of the Loyola University Law School, and four historians, Profs. Carl Degler of Stanford, James Mohr of the University of Maryland in Baltimore, William Marshner of Christendom College in Front Royal, Va., and Victor Rosenblum of Northwestern University.

Criticism for Bill's Opponents

Professor Uddo said it was within Congress's power, "as a co-equal branch" of the American Government, to "decide a question not answered by an applicable Supreme Court decision." Professor Uddo was especially caustic about legal experts opposing the bill.

He singled out Prof. Laurence H. Tribe, a Harvard University constitutional law specialist, who recently told the panel that there was a "unison of voices" among "virtually all careful students of the Constitution" opposing the bill.

Professor Uddo said: "The only way that one can accept that such a unison of careful scholars exists is if one believes that the entire universe of careful constitutional scholars is coterminus with those who teach at certain institutions and hold certain political-and-legal-views. He termed those views "self-serving."

The New York Times

3/16/81

The Congress Vs. the Courts

New Challenge Focuses Upon Jurisdiction Issue

By STUART TAYLOR Jr
Special to The New York Times

WASHINGTON, March 15 — An effort by conservatives in Congress to strip the Supreme Court and lower Federal Courts of jurisdiction in cases involving school prayer, busing and abortion could lead to a fundamental shift in Government checks and balances, in the view of concerned legal experts.

News Analysis

If the bills pass and are upheld by the Supreme Court against constitutional challenges, they would also apparently lead to enforcement by state courts of conflicting interpretations of the same provisions of the Federal Constitution. For the first time since it was established, the Supreme Court would be powerless to review and resolve conflicting state court rulings.

A proposal by Senator Jesse Helms, Republican of North Carolina, to take away Federal court jurisdiction over state plans for school prayer passed the Senate in 1979 but died in a House subcommittee last year. Opponents fear that it may be difficult in this year's more conservative Congress to stop this proposal and others that would take away Federal court jurisdiction over busing of school children for desegregation and abortion.

Subcommittee hearings in the House and Senate Judiciary Committees may begin next month on more than a dozen bills to impose restrictions on Federal court jurisdiction.

The constitutionality of these and similar proposals has been debated by scholars as well as members of Congress for decades. There is no definitive precedent. Although Congress has broad powers to regulate the kinds of cases that may be decided by the Federal courts, it has refrained for more than a century from enacting legislation designed to prevent them from enforcing constitutional rights declared by the Supreme Court.

As the checks and balances system evolved, Chief Justice John Marshall, in the early 1800's, asserted the supremacy of the Federal judiciary over Congress and the states in matters of constitutional interpretation.

This year, according to Carl Anderson, an aide to Senator Helms, "there will be a serious effort" by conservatives to enact legislation restricting Federal court jurisdiction over school prayer and busing, areas in which he said the Supreme Court had "usurped powers not granted to it by the Constitution."

"We're a lot stronger this year" on these issues, Mr. Anderson said. He said that Senator Helms and other conservative leaders would probably not push so hard for jurisdictional restrictions with respect to abortion because they are concentrating on a bill that would ban abortion.

The impetus for the bills restricting Federal court jurisdiction comes from many conservatives' outrage over Supreme Court decisions over 20 years. The Justices have prohibited prayer in public schools as an unconstitutional "establishment of religion," have required busing to desegregate public schools, and have struck down state laws restricting the right to abortions.

Unlike pending proposals for constitutional amendments, legislation restricting Federal court jurisdiction would not directly overrule these precedents. But it would remove the authority of the Federal Courts to enforce them.

Would Leave It to State Courts

This would leave it to state courts to enforce their own interpretations of the Constitution in these areas, applying previous Supreme Court precedents or ignoring them.

The primary attraction of these bills to conservatives is that they would be easier to enact than constitutional amendments, which must be approved by a two-thirds vote in each House of Congress and ratified by 38 states.

The court jurisdiction bills would become law if passed by a simple majority of each House and signed by the President, subject to judicial review of their constitutionality.

Although Congress has no power to overrule by legislation Supreme Court interpretations, the Constitution states that the Supreme Court's jurisdiction over most cases is subject to "such exceptions, and under such regulations, as the Congress shall make." The lower Federal courts were established by Congress, not by the Constitution itself, and Congress has traditionally determined what kinds of cases may be brought before them.

Conservative legislators and scholars such as Prof. Charles E. Rice of Notre Dame Law School read these provisions as giving Congress power to strip the Federal courts of jurisdiction over just about any constitutional issue.

View of Yale Professor

Opponents of the bills consider them unwise and probably unconstitutional," as Prof. Robert H. Bork of Yale Law School put it.

Professor Bork, a conservative who served as Solicitor General under Presidents Nixon and Ford, criticized the Supreme Court for "exceeding its mandate" in its decisions on abortion and busing. But he opposed congressional attacks on jurisdiction as a "cure that may set a precedent more damaging than the wrong Supreme Court decisions."

Liberals who applaud the Supreme Court's decisions on school prayer, busing and abortion are all the more alarmed at what John Shattuck, a Washington lobbyist for the American Civil Liberties Union calls the "attacks on the independence of the Federal courts" by conservatives in Congress.

If Congress does pass laws attempting to strip the Federal courts of their power to enforce specific constitutional rights, Mr. Shattuck said, the Supreme Court should strike them down as violating both the constitutional provisions on which those rights are based and the provision making the Constitution the "supreme law of the land."

1ST STORY of Level 1 printed in FULL format.

July 6, 1981

SECTION: Washington Whispers; Pg. 9

LENGTH: 60 words

BODY:

Republican Senate conservatives are signaling Reagan not to send up the name of Robert Bork for the impending vacancy on the Supreme Court. The right-wingers vow to fight nomination of Nixon's former solicitor general because he testified against an anti-abortion bill decreeing that life begins at conception.

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.

ABROAD AT HOME | Anthony Lewis

Freedom, Not Comfort

The Founders and the First Amendment

BOSTON

The Mobil Corporation has for some time been running message advertisements critical of the press. The latest, pegged to the trial of Gen. William Westmoreland's libel suit against CBS, was headed "A lie is a lie is a lie." It showed something that I doubt Mobil intended: how hard it is to accept the nature of American freedom.

The Mobil ad and other angry comments on the press evoked by the Westmoreland case have in common a number of premises: High public officials have a right to be protected by the law from press abuse. No one should be able to print lies about officials without punishment. An irresponsible press — critics often call it the liberal press — is trying to change American tradition in these matters.

As a matter of history, these propositions are false. As a matter of freedom, they are dangerous. And it is not the press that says they are. Jefferson said so. Madison said so.

Congress once passed a law punishing "false, scandalous and malicious writing" against the President and other high officials. That was the Sedition Act of 1798, signed by our last Federalist President, John Adams. It covered only damaging lies, yet Jefferson and Madison thought it was a fundamental affront to the whole new constitutional system. Why?

In the United States, citizens were to make the ultimate political decisions. To perform that role, Madison said, they must have "the right of freely discussing public characters and measures" — and freedom included the right to make mistakes, even offensive and deliberate ones. If Sedition Acts had stopped the press from attacking the Crown, Madison said, America might still be "groaning under a foreign yoke."

The Madison-Jefferson view carried the day. The Sedition Act expired after two years without a definitive court test, but since then most commentators have regarded it as unconstitutional — and so has the Supreme Court.

All this was not just a legal abstraction. American society operated on the premise that anything goes in political debate. British and other foreign commentators were often shocked at the verbal abuse in our public life, but that was the system.

George Washington and Abraham Lincoln suffered attacks far worse than anything encountered by General Westmoreland or his contemporaries. And they did not sue. Through most of American history high officials dealt with abuse by answering back, not by going to court.

That is why it is so odd to hear charges that the press is trying to change the rules of the game now. To the contrary, it is offended officials who are trying to make a radical change. They are suing in large numbers — generals, governments, senators, judges — and for enormous sums. When a Westmoreland claims $120 million, no one can doubt that the intended effect is to intimidate.

In short, the libel suit has become something quite different in 1984. It is being used as a political weapon, to stifle criticism and debate. It is in that context, that reality, that some in the press and the law have begun thinking about new ways of protecting the Madisonian premises of our democracy. One idea — the one that so outrages Mobil — is that high officials should not be able to sue for libel at all.

Last week an extraordinarily thoughtful judicial opinion threw light on the changing nature of libel suits. It was by Judge Robert H. Bork of the U.S. Court of Appeals for the District of Columbia.

The case before the court was an attack by columnists Rowland Evans and Robert Novak on a Marxist professor, Bertell Ollman, who sought $6 million in libel damages. Such "disproportionate" damages, Judge Bork said, could readily "silence political commentators forever." He said the recent surge of large libel actions loomed as "a threat to the central meaning of the First Amendment."

The close issue for a divided court was whether an attack on Professor Ollman was opinion, which is not subject to libel actions, or fact. But Judge Bork put that fine distinction aside. Someone who goes into "the public political arena" as the professor had, he said, must expect that "the debate will sometimes be rough and personal." It was a rich opinion, impossible to summarize adequately, but at the heart was the idea of uninhibited debate in the political arena.

"Perhaps it would be better if disputation were conducted in measured phrases and calibrated assessments ...," Judge Bork said. "But that is not the world in which we live, ever have lived or are ever likely to know, and the law of the First Amendment must not try to make public dispute safe and comfortable." □

The Washington Post

July 12, 1987

Judge Bork on the Bench

AMONG THE MANY documents that will be considered by the Senate during the debate on Judge Robert Bork's nomination to the Supreme Court are the opinions he has written during the past five years on the U.S. Court of Appeals for the District of Columbia Circuit. There are 138 of them. In themselves they do not give a complete picture, since a judge's work product is determined by the kind of cases he is assigned. In addition, an appellate court judge is bound to follow precedents set by the Supreme Court even when he disagrees with them, so his own personal views may not come through. Still, amid the many dozens of cases that are of very little general interest—and occasionally stunningly boring—some consistent patterns are discernible, and a couple of cases are especially interesting. There is much more to be explored on the subject of Judge Bork, but today we take up some aspects of his Court of Appeals record.

It has been said that despite some sharp philosophical divisions on the Court of Appeals, Judge Bork is personally popular among his colleagues. He has also agreed with the more liberal members of the court on many occasions, usually in cases on appeal from federal agency rulings. He has generally been supportive of agency decisions, and in criminal cases he most often ruled in favor of the government. His opinions reflect his view that not every problem in the world should be resolved in court, and he has ruled often to dismiss suits for lack of standing. These views are most strongly reflected in quasi-political cases involving such questions as committee assignments in the House of Representatives and the U.S. role in El Salvador. He ruled that the federal courts were not the place to resolve these problems.

Two areas of judicial philosophy on which Judge Bork has written major opinions are of particular interest. The right of privacy is the principal underpinning of the Supreme Court ruling in *Roe v. Wade*, legalizing abortion. If there is no constitutionally guaranteed right of privacy, state legislatures would be free to prohibit abortion. In *Dronenburg v. Zech*, a 1984 case in which Judge Bork wrote the opinion, a discharged Navy petty officer challenged his dismissal for homosexual conduct on grounds that such activity was protected by a constitutional right to privacy. In ruling that this activity was not protected by the Constitution, Judge Bork wrote extensively on the right to privacy and added in a footnote the comment that in academic life he had "expressed the view that no court should create new constitutional rights" (like privacy) but conceded that these views are "completely irrelevant to the function of a circuit judge." The Senate will want to ask him how these views will be reflected if he becomes a Supreme Court justice with the power to overturn earlier rulings of the high court. His attitude toward overturning settled cases is one of the main subjects that needs exploring.

In another 1984 case, *Ollman v. Evans*, Judge Bork wrote a concurring opinion setting out his views on the First Amendment. In dismissing a libel action brought against the columnists Evans and Novak, he wrote a vigorous defense of a free press threatened by "a freshening stream of libel actions," which may "threaten the public and constitutional interest in free, and frequently rough, discussion." He also made these observations on the role of the courts in protecting rights that *are* clearly guaranteed in the Constitution: "There would be little need for judges . . . if the boundaries of every constitutional provision were self-evident. They are not. In a case like this, it is the task of the judge in this generation to discern how the Framers' values, defined in the context of the world they knew, apply to the world we know. . . . To say that such matters must be left to the legislature is to say that changes in circumstance must be permitted to render constitutional guarantees meaningless. . . . A judge who refuses to see new threats to an established constitutional value, and hence provides a crabbed interpretation that robs a provision of its full, fair and reasonable meaning, fails in his judicial duty."

This defense of flexibility is quite contrary to what has been widely described as Judge Bork's rigidity on questions of "original intent." What does it mean? That's another key question that should be put to Judge Bork by those senators—surely there are some?—who are not going into the inquiry with minds made up. How does Judge Bork see the role of judges who seek to apply the original intent of the Framers of the Constitution? Where does the *Ollman* decision fit into that?

The Washington Post

July 10, 1987

Judge Bork and the Democrats

SHOULD JUDGE Robert Bork be elevated to the Supreme Court? To answer the question intelligently you need to know a lot of things. Aside from the basic questions of what standards the Senate ought to apply in judging nominees and how Judge Bork's constitutional philosophy will play out on the court, there is a mountain of published work and court opinions to be read. It also usually helps to pose questions to the nominee in a public hearing and take account of his responses. Apparently this is too much to ask of the chairman of the committee that will consider the nomination. While claiming that Judge Bork will have a full and fair hearing, Sen. Joseph Biden this week has pledged to civil rights groups that he will lead the opposition to confirmation. As the Queen of Hearts said to Alice, "Sentence first—verdict afterward."

Sen. Biden's vehement opposition may surprise those who recall his statement of last November in a Philadelphia Inquirer interview: "Say the administration sends up Bork and, after our investigation, he looks a lot like Scalia. I'd have to vote for him, and if the [special-interest] groups tear me apart, that's the medicine I'll have to take." That may have been a rash statement, but to swing reflexively to the other side of the question at the first hint of pressure, claiming the leadership of the opposition, doesn't do a whole lot for the senator's claim to be fit for higher office. Sen. Biden's snap position doesn't do much either to justify the committee's excessive delay of the start of hearings until Sept. 15. If minds are already made up, why wait?

A whole string of contenders for the Democratic presidential nomination have reacted in the same extravagant way. Maybe Judge Bork should not be confirmed. But nothing in their overstated positions would persuade you of that. These Democrats have managed to convey the impression in their initial reaction *not* that Judge Bork is unqualified to be on the Supreme Court, but rather that they are out to get him whether he is or not. Judge Bork deserves a fair and thorough hearing. How can he possibly get one from Sen. Biden, who has already cast himself in the role of a prosecutor instead of a juror in the Judiciary Committee? If there is a strong, serious case to be argued against Judge Bork, why do so many Democrats seem unwilling to make it and afraid to listen to the other side?

The Washington Post

July 11, 1987

Mark Shields

Will Democrats Self-Destruct on Bork?

Because she is Democratic National committeewoman from New York, Hazel Dukes undoubtedly knows that in four of the last five presidential elections her party has been badly beaten. She also undoubtedly knows the recurring doubts American voters have expressed during those years about the Democrats' national leadership: inability to define an overriding national interest distinct from the narrow interests of special constituencies; lack of tough, independent leadership; the perception that Democrats were no longer pioneers of change but protectors of the status quo.

Because she is also a board member of the NAACP, Hazel Dukes this week introduced New York Democratic Sen. Daniel Patrick Moynihan to that group's convention as someone who would certainly vote against the nomination of Judge Robert H. Bork to the Supreme Court. When she later learned that Moynihan would not say how he intended to vote on Bork, Hazel Dukes responded: "I have the votes in New York to defeat him. When I get together with his staff in New York, I'll get what I want. It's strictly politics."

Now, think just for a minute of what this means for the current plight of the Republicans. Here they are with an administration everywhere under investigation or suspicion and a president who looks to be the only living American with White House mess privileges who did not know how the contras were meeting their payrolls and loading their muskets. In November of last year the GOP lost the Senate and in November of next year they look to be a good bet to lose the White House. But wait: see if the Senate Democrats genuflect before the organized pressure groups on the nomination of Bork. A return to voter confidence and national leadership for the Democrats does not lie in a Senate filibuster of an able Supreme Court nominee.

In those last five presidential elections, the Democrats have won only 21 percent of the nation's electoral votes. One of the consequences of any party's being that noncompetitive for such an extended period is that the other party gets to nominate the members of the federal judiciary. And, except for when they are audible and palpable turkeys, those nominees are usually confirmed.

During the past 10 years, a lot of Democrats have revealed themselves as both unquestioning defenders of the status quo and anti-majoritarian snobs. There was a time, not too long ago, when Democrats genuinely welcomed huge Election-Day turnouts, confident that the more people who voted the better the party of the people would do. Now the preference seems to be for law clerks, not voters, to decide questions of public policy. That attitude is fundamentally anti-democratic.

The Bork nomination can surprise no one. In two national elections, Ronald Reagan carried 93 of 100 states while repeatedly amplifying his views on narrow construction and traditional values. Bork's credentials and his record entitle him to a prompt hearing and serious consideration. The arguments against his confirmation do not want for material or for eloquent advocates. But those Democrats who would prefer one day soon to propose nominees and ideas rather than simply to oppose them as they now do have to realize that the political power to initiate lies not in the approving press releases of pressure groups but in the White House.

And what about Sen. Moynihan, with a 100 percent pro-NAACP voting record? Now if he conscientiously studies the record and sincerely opposes the Bork nomination, Moynihan is guaranteed that his 1988 opponent, thanks to Hazel Dukes, will be able to accuse the Democrat of buckling under to interest-group extortion.

To win the White House, the Democrats must nominate a leader with vision who is independent, tough and can effectively define the national interest. To many thoughtful Democrats, Joe Biden of Delaware, the chairman of the Senate Judiciary Committee, looked like he could be that leader. But by seeming in the Bork nomination fight to be the prisoner or the patsy of liberal pressure groups, neither Biden nor anyone else will fill that bill of leadership for change.

Newsweek

July 20, 1987

'The Hottest Fight in a Decade'

Can Biden afford to lose his battle against Bork?

Last November Sen. Joseph Biden told The Philadelphia Inquirer: "Say the administration sends up [Robert] Bork . . . I'd have to vote for him, and if the [special-interest] groups tear me apart, that's the medicine I'll have to take." But that was then. Now that the administration actually *has* nominated Bork to the Supreme Court—and now that Biden is a declared presidential candidate—the Delaware senator has appointed himself leader of the battle against Ronald Reagan's nominee. He says it's a "winnable" fight; having put himself on the front line, it's one he probably cannot afford to lose.

A Cast of Thousands—otherwise known as the Democratic presidential contenders—quickly joined Biden at the barricades. Only Sen. Albert Gore Jr. said he "would not pass final judgment" until the confirmation hearings were completed in the fall. More than 75 special-interest and civil-rights groups (including the NAACP, despite a direct appeal from White House chief of staff Howard Baker) are working with Biden, and two major lobbying groups have each pledged $1 million to the cause. "It could be the most hotly contested judicial nomination in a decade," says Sen. Patrick Leahy, a member of the Judiciary Committee. "Maybe it's just as well the hearings won't begin until mid-September. We need time to get this nomination in perspective so our decision is based on merit and not emotion."

Bork's backers see him as the guarantor of the Reagan Revolution's future; his opponents charge he will undo a century of social progress, including abortion rights and affirmative action. But neither side is comfortable using ideology as a test for judicial fitness. Biden hopes to shift the debate away from Bork and questions about his qualifications. He wants instead to focus on what he sees as the administration's attempt to use the Supreme Court to impose social legislation that Congress has been unwilling to enact. Southern Democrats and moderate Republicans may be relatively sympathetic to Bork's conservative views. (Says Alabama Sen. Richard Shelby: "With Senator Kennedy against him, that puts a lot of Southern Democrats in bed with Bork.") But Biden believes those swing voters will reject the White House effort. The conservatives' counterstrategy is to play down the administration's social-issues agenda; play up Bork and his formidable intellect.

One possible pitfall for Biden is his own temperament and style. His harangue of George Shultz in a Capitol Hill hearing about the administration's South Africa policy last July damaged Biden because of its stridency; a snarling picture of the senator has been reprinted many times. "If he fights the nomination in a harsh, demonic way, he loses," says one adviser. By stating his opposition to Bork so unequivocally now, Biden may be trying to establish that his liberal credentials are beyond question. Then, when he chairs the confirmation hearings in the fall, he can appear calm and evenhanded—and win points for statesmanship.

Biden has a lot of work to do before September. Both sides say that if the confirmation vote were held now, Bork would win. The senator must extend the opposition movement "beyond the usual suspects," says one Senate Democratic aide, "or he will look like he's a captive of the interest groups." That would lose him the Bork fight and would batter his presidential chances as well. Still, he seems determined to take the risk. The confirmation hearings will probably make good TV. But is Biden casting himself on the "$1,000,000 Chance of a Lifetime"—or "The Gong Show"?

[illegible] with Ann McDaniel

The Washington Post

DATE: 7-22-87
PAGE: A21

George F. Will

Biden v. Bork

The senator is overmatched.

If Sen. Joseph Biden (D-Del.) had a reputation for seriousness, he forfeited it in the 24 hours after Justice Lewis Powell announced his departure from the Supreme Court. Biden did much to achieve the opposite of his two goals: He strengthened the president's case for nominating Judge Robert Bork and strengthened the Democrats' case for not nominating Biden to be president.

Six months ago, Biden, whose mood swings carry him from Hamlet to hysteria, was given chairmanship of the Judiciary Committee, an example of history handing a man sufficient rope with which to hang himself. Now Biden, the incredible shrinking presidential candidate, has somersaulted over his flamboyantly advertised principles.

Hitherto, Biden has said Bork is the sort of qualified conservative he could support. Biden has said: "Say the administration sends up Bork and, after our investigations, he looks a lot like Scalia. I'd have to vote for him, and if the [special-interest] groups tear me apart, that's the medicine I'll have to take."

That was before Biden heard from liberal groups like the Federation of Women Lawyers, whose director decreed concerning Biden's endorsement of Bork: "He should retract his endorsement." Suddenly Biden was allergic to medicine, and began to position himself to do as ordered. Either Biden changed his tune because groups were jerking his leash or, worse, to prepare for an act of preemptive capitulation.

He said that "in light of Powell's special role" as a swing vote (that often swung toward Biden's policy preferences) he, Biden, wants someone with "an open mind." Proof of openness would be, of course, opinions that coincide with Biden's preferences. Biden says he does not want "someone who has a predisposition on every one of the major issues." Imagine a justice with no predisposition on major issues. And try to imagine Biden objecting to a nominee whose predispositions coincide with Biden's.

Senators who oppose Bork will be breaking fresh ground in the field of partisanship. Opposition to Bork (former professor at Yale Law School, former U.S. solicitor general, judge on the U.S. Court of Appeals) must be on naked political grounds. Opposition must assert the principle that senators owe presidents no deference in the selection of judicial nominees, that jurisprudential differences are always sufficient grounds for opposition, that result-oriented senators need have no compunctions about rejecting nominees whose reasoning might not lead to results the senators desire.

If Biden does oppose Bork, his behavior, and that of any senators who follow him, will mark a new stage in the descent of liberalism into cynicism, an attempt to fill a void of principle with a raw assertion of power. Prof. Laurence Tribe of Harvard offers a patina of principle for such an assertion, arguing that the proper focus of confirmation hearings on an individual "is not fitness as an individual, but balance of the court as a whole."

This new theory of "balance" holds not merely that once the court has achieved a series of liberal results, its disposition should be preserved. Rather, the real theory is that there should never again be a balance to the right of whatever balance exists. Perhaps that expresses Harvard's understanding of history: There is a leftward-working ratchet, so social movement is to the left and is irreversible.

Continuity is a value that has its claims. But many of the court rulings that liberals revere (e.g., school desegregation) were judicial discontinuities, reversing earlier decisions. Even if putting Bork on the bench produces a majority for flat reversal of the 14-year-old abortion ruling, restoring to the states their traditional rights to regulate abortion would reestablish the continuity of an American practice that has a history of many more than 14 years.

Besides, that restoration would result in only slight changes in the status of abortion. The consensus on that subject has moved. Some states might ban second-trimester abortions, or restore rights that the court in its extremism has trampled, such as the right of a parent of a minor to be notified when the child seeks an abortion. But the basic right to an abortion probably would be affirmed by state laws.

Powell's resignation and Biden's performance as president manque have given Reagan two timely benefits. He has an occasion for showing that he still has the will to act on convictions, and that he has an opponent he can beat.

Biden says there should not be "six or seven or eight or even five Borks." The good news for Biden is that there is only one Bork. The bad news for Biden is that the one will be more than a match for Biden in a confirmation process that is going to be easy.

The Democrats' Glass Chin

Bork is a blue whale being attacked by anchovies—loud ones, but even loud ones are little

Judge Robert Bork, with his reddish beard and ample girth, is Falstaffian in appearance. In argument, he has an intellectual's exuberance: he argues for the fun of it. Alas, his adversaries are too distraught to argue. Here, for example, is Ted Kennedy's voice raised in defense of moderation against Bork's "extremism": "Robert Bork's America is a land in which women would be forced into back-alley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens' doors in midnight raids, schoolchildren could not be taught about evolution, writers and artists could be censored at the whim of government . . ."

Gracious. It is amazing that the Senate confirmed Bork, without a single objection, for an appellate court. Kennedy says America is "better" than Bork thinks. No, America is better than liberals like Kennedy think. They think Yahoos make up a majority which, unless restrained by liberal judges, will tolerate or legislate the satanical America Kennedy describes.

Sen. Patrick Leahy, a Vermont Democrat, says that if *Roe v. Wade*, the 1973 abortion case, "came up today, [Bork's] vote would determine that we would not have abortions, legal abortions." Leahy assumes, probably wrongly, that the Senate already has confirmed four justices who are ready to reverse the 1973 ruling. Leahy assumes, certainly wrongly, that if it were reversed, restoring to states the traditional right to regulate abortions, legislatures would ban abortions. Opinion polls refute Leahy. There is a broad consensus supporting liberal abortion policies.

Sen. Joe Biden, who has used Bork to establish himself firmly as the flimsiest presidential candidate, is courting liberal interest groups by saying: "I will resist any efforts by this administration to do indirectly what it has failed to do directly in the Congress—and that is to impose an ideological agenda upon our jurisprudence." It is unclear what thought is struggling to get out of Biden's murky sentence. If nominating Bork is "indirect," what is "direct"? The adjective "ideological" is today's all-purpose epithet, a substitute for argument, by which intellectually lazy or insecure people stigmatize rather than refute people with whom they disagree. What Biden is trying to do is preserve liberalism's ability to do in the court what it has failed to do in elections. As liberalism has become politically anemic, it has resorted to end runs around democratic processes, pursuing change through litigation rather than legislation.

The Democratic Party advertises itself as the tribune of "the people," but the party expresses distrust of the people when it opposes Bork, who favors broader discretion for the popular (legislative) branch. Regarding Bork, Democratic presidential aspirants resemble "a herd of independent minds." The party resembles a boxer rising wobbly-kneed from the canvas, his back covered with resin. It has been battered by the public's belief that the party is servile toward imperious interest groups. Now, because of Bork, the party is about to land a left hook on its own glass chin. When Sen. Pat Moynihan, Democrat of New York, who is up in 1988, hesitated to commit against Bork, Hazel Dukes, Democratic national committeewoman from New York, spoke of Moynihan disdainfully: "I have the votes in New York to defeat him. When I get with his staff in New York, I'll get what I want."

Liberalism has embraced Thurmondism. Liberals who claim the Senate is the president's equal in forming the court, and who claim a right to reject a nominee purely on political grounds, cite as justifying precedent the behavior of Strom Thurmond in opposing LBJ's 1968 nomination of Abe Fortas to be chief justice. Were the Senate an equal participant, it would be empowered to nominate its own judicial candidates. (When advising and consenting to treaties, it cannot negotiate its own version of treaties.) With judicial nominees, the proper Senate role is to address threshold questions about moral character, legal skills and judicial temperament. The logic of the liberals' position—the idea that the confirmation process is a straight political power struggle turning on the nominee's anticipated consequences—is that we should cut out the middleman (the Senate) and elect justices after watching them campaign.

Biden, chairman of the Judiciary Committee, is stalling, so hearings will not even begin for two months. Nevertheless, Democratic senator and presidential candidate Paul Simon of Illinois says his mind is all but closed against Bork. Why? Because Bork, although "mentally qualified," is "close-minded." Sen. Bob Packwood, Republican of Oregon, who can be as sanctimonious as the next saint when deploring single-issue politics, is threatening to filibuster against Bork unless satisfied that Bork will affirm all the pro-abortion rulings that Packwood favors.

Politically risky: Forty-one senators can block cloture (a forced end to a filibuster). There are 55 Senate Democrats. A significant number of Democrats will not join Biden's grovel before the interest groups, but Biden may have a few Republican collaborators. Suppose liberals block Bork and then block any similar jurist whom Reagan would nominate next. That would leave the court short-handed through the 1988 election—and through two court terms. That would be politically risky. So, having blocked Bork, they might have to confirm Reagan's next choice, who might be a conservative judicial activist.

Bork, believing in judicial restraint, is conservative about the process. A conservative activist would use judicial power the way liberal activists have, in a result-oriented way. Such an activist might hold that abortion is incompatible with the 14th Amendment's protection of the lives of "persons." An activist might favor striking down zoning laws because they violate the Fifth Amendment by taking property without just compensation. An activist might think minimum-wage laws unconstitutionally impair the obligation of contracts (Article I, Section 10). An activist might decide that the progressive income tax violates the equal-protection component of the Fifth Amendment's due-process clause. He even might reject the "incorporation doctrine" that makes the states, as well as Congress, bound by the Bill of Rights. That is something for Bork's critics to think about when they start to think. Until they do, Bork resembles a blue whale being attacked by anchovies—loud ones, but even loud ones are little.

Edwin M. Yoder Jr.

The Real Robert Bork

Leading the charge of the lightweight brigade against the Bork nomination, Sen. Edward Kennedy conjures up nightmarish visions of an America "in which women would be forced into back-alley abortions," blacks "sit at segregated lunch counters" and "rogue police . . . break down citizens' doors in midnight raids." This twaddle is what Adlai Stevenson used to call white-collar McCarthyism.

Robert Bork is an upright and scholarly judge of uncommonly serious and coherent views about the appropriate constitutional role of the judiciary. He has laid out those views for all to read and consider in many elegant and witty essays and lectures. And those writings reveal that Bork is not a right-wing bogeyman but a temperate and intelligent Jeffersonian.

If Kennedy and others of his persuasion cared enough to look closely at the views of their party's patron saint, they would be logically constrained to vote for Bork or explain why Jeffersonian principles are no longer acceptable—or, more probably, fashionable among conventional liberals.

What does it mean, in 1987, to be a judicial Jeffersonian? It means that with certain qualifications, usually ignored by demagoguing critics, you believe that in a democracy people are best governed by the officials they elect, free of overweening judicial supervision. If, for instance, a majority in a state legislature wants to ban the use of contraceptives or abortion, and if no clear constitutional impediment to that policy is discoverable, then they are entitled to exercise a degree of coercion that we enlightened few, including Bork, might deplore.

Bork believes, and has forthrightly argued, that many constitutional "rights" discerned by judges—especially the right of privacy used to overturn recent laws restricting contraception and abortion—are without constitutional warrant, and therefore no more than judge-imposed "wish lists."

Bork's problem, in other words, is that like Jefferson he finds judiciarchy—recently the favored mode of enlightened change in our society—hard to square with any theory of democratic government, even one with a substratum of natural law.

Bork's view, though unusually austere, is neither novel nor exotic. Many great judges—Holmes, Frankfurter, Black and the second Harlan, to name four—have embraced it in various forms. What is not to be denied is that so restrictive a view of the judicial function can have real political consequences. Those consequences are a legitimate source of inquiry in any confirmation process.

You could say to Judge Bork, for instance: "This touching faith in legislative government is all very well, but legislators often do dumb and despotic things and I prefer to take my chances with judicial supremacy." Bork's large deference to a judicially underregulated democracy might, indeed, be a reputable basis for opposing his confirmation. Any court he influences is going to jerk constantly at the leashes of overambitious or adventurous judges.

In fairness, it must be added that Bork's ultra-majoritarianism is not unqualified. He would not, for instance, resegregate America, because he believes the 14th Amendment "secures against government action some large measure of racial equality." And Kennedy's charge that in "Bork's Americ rogue police would be unleashed come crashing through your door pure moonshine, and especially inappr priate coming from a senator who vot for a federal "preventive detentio provision.

If I were president, Judge Bork whom I like and admire—would pro ably not be on my short list. If he confirmed, I fully expect rulings of h that I will enjoy roasting.

The favoring difference is—to bo row a Churchillian phrase—that Bo has "the root of the matter in him." I understands that constitutional gover ment is mainly about principled limits the exercise of power. He has the w and intellect to seek and enforce tho limits—to referee the jostle of democr cy—no matter whose wish list must temporarily sidetracked.

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Justice Bork or Ukase?

Robert Bork's America is a land in which women would be forced into back-alley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens' doors in midnight raids, schoolchildren could not be taught about evolution, writers and artists could be censured at the whim of government.—Senator Ted Kennedy.

We've been looking forward to a great constitutional debate, now that the Democrats opposing Ronald Reagan's judicial nominees have dropped pretenses about spelling errors and deed restrictions and flatly proclaimed that judicial philosophy's the thing. Just what philosophy, we've wondered, do Robert Bork's critics have to offer?

Ted Kennedy is abundantly clear: The purpose of jurisprudence is to protect one sacred cow for each of the Democratic Party's constituent interest groups. The law is what judges say it is, and the test of nominees is whether they will use this power to advance purposes Senator Kennedy favors. In particular, judges must advance these purposes *irrespective of the democratic outcome in the legislative branch in which the senator sits.*

So far as we remember, in fact, Judge Bork has no position on public policy toward, say, abortion. What he does believe is that judges should read the Constitution, and second-guess legislatures only on the basis of what it says. If the Constitution says nothing about abortion, legislatures can allow it or ban it. Someone who doesn't agree with their choice has every right to campaign for new legislators. If the Constitution doesn't speak, redress lies in the political process.

Judge Bork would never discover in the Constitution a "right" to Star Wars or aid for the Contras. His philosophy of judicial restraint is grounded in the fundamental constitutional principle of separation of powers. Congress makes the laws, the president executes the laws and the courts' only role is to ensure that the laws are consistent with the Constitution. Where the Bill of Rights is clear, such as outlawing racial discrimination, judges must make sure these rights are protected. But the courts are not supposed to invalidate laws simply because judges don't like them, or find new rights that do not appear in the Constitution.

Judge Bork made an elegant statement of this view in a case his enemies are sure to raise as proof of his reactionary ideas. *Dronenburg v. Chief of Naval Personnel* asked whether the courts should overturn the Navy's policy of mandatory discharge for sailors who engage in homosexual acts. Though receiving an honorable discharge, the plaintiff claimed a right to "privacy" that would override the Navy rule. Writing for a unanimous D.C. Circuit panel in 1984, Judge Bork said it would be wrong for judges to replace the judgment of the military by finding a right not mentioned in the Constitution.

"If it is in any degree doubtful that the Supreme Court should freely create new constitutional rights, we think it certain that lower courts should not do so," Judge Bork wrote. "If the revolution in sexual mores that appellant proclaims is in fact ever to arrive, we think it must arrive through the moral choice of the people, and their elected representatives, not through the judicial ukase of this court."

Ukase was a well-chosen word. It is derived from the Russian, and defined by Webster's as "in Czarist Russia, an imperial order or decree, having the force of law." Under our system of government, laws made by judges have a similar illegitimacy. The executive branch can change its rule against homosexuality in the military or Congress could pass a law to do so. This might or might not be a good idea, but Judge Bork was on firm democratic ground when he said it was not for judges to decide. The Founders called the courts the "least dangerous branch" because judges were supposed to play a negative role, upsetting legislation only that violates the text of the Constitution.

The distinction is not especially subtle or complex, yet is frequently missed by people who consider themselves intelligent and sophisticated. Conditioned by decades of judicial activism on behalf of liberal causes, they think of court cases in stark terms of who wins, not in terms of what the Constitution says. At stake in this standoff of competing judicial theories is whether the Constitution in its bicentennial year means anything at all.

Senator Kennedy has heard these arguments before. Ronald Reagan campaigned to two landslides on the promise to appoint supremely qualified judges who accept the limited role they were granted under our constitutional system. The Democratic Senate can of course reject Mr. Bork precisely because he is the kind of nominee the president promised; redress for that would lie in the next national election.