THE WHITE HOUSE

WASHINGTON

July 29, 1987

MEMORANDUM FOR SENIOR WHITE HOUSE STAFF

FROM: TOM GIBSON TG.

SUBJECT: Issue Briefs and Talking Points in Support of Judge Bork

Attached, are two sets of materials that differ only in the header at the top of the page. Please use and circulate these materials through your own network as is customary and appropriate. The "Talking Points" header is for use by spokesmen inside the Administration. The "Issue Brief" header is intended for individuals and groups outside the Administration. Included here on plain bond are salient quotations, from prominent members of the Senate, that address the issue of ideological tests. They are for your appropriate use.

Also attached are selected editorials and columns which you may find useful.

Thanks very much.

JUDGE ROBERT H. BORK

THE PRESIDENT'S NOMINEE TO THE SUPREME COURT

Overview

- On July 1, the President nominated Judge Robert Bork to replace retiring Justice Lewis Powell on the Supreme Court. Judge Bork has served with great distinction on the U.S. Court of Appeals for the District of Columbia since 1982, when the Senate unanimously confirmed his appointment.

- Judge Bork is superbly well qualified to join the Supreme Court. The American Bar Association gave him their highest possible rating in 1981 -- "Exceptionally Well Qualified." Observers from across the political spectrum agree he is an outstanding intellectual, an impressive legal scholar and a premier Constitutional authority.

- Judge Bork is a mainstream jurist. He has been in the majority in 94 percent of the cases he has heard. Furthermore, none of his opinions has ever been reversed by the Supreme Court.

- The American people demand an effective, efficient government and they deserve prompt action on this nomination. Unwarranted delays in hearings and confirmation proceedings do a grave disservice to the Court and the Nation. The Supreme Court should have its full nine-member complement when it begins its October term.

- Ideology should have no role in the Senate's decision. The issue is whether the judges and the courts are called upon by the Constitution to interpret the laws passed by the Congress and the states -- the "judicial restraint view" -- or whether judges and the courts should write orders and opinions which are, in effect, new laws -- the "activist" view.

- Judge Bork believes that the Constitution requires law writing be left to legislative bodies. It is the role of the judiciary, in contrast, to interpret the laws which are enacted.

- Judge Bork deserves a fair hearing, and the Senate should ensure that he receives one.

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- In more than 100 opinions from the D.C. Circuit, no majority opinion written by Judge Bork has been overturned by the Supreme Court.

- Moreover, the Supreme Court adopted the reasoning of several of his dissents when it reversed opinions with which he had disagreed.

- Highlights of Judge Bork's legal career:

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  Mr. Bork...is a legal scholar of distinction and 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.

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Bork on the Role of "Precedent" -- No Radical Shifts in Policy

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  -- Between 1985 and 1986, the Judiciary Committee took an average of only 3 weeks to begin confirmation hearings after the President announced his nomination.

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- In the past quarter century, it has taken the Senate Judiciary Committee only 18 days, on average, to begin hearings on Supreme Court nominations. In the case of Judge Bork, hearings will not begin before September 15th, some 10 weeks from the time President Reagan sent the nomination to the Senate.

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- Judge Bork's record indicates he would be a powerful ally of First Amendment values on the Supreme Court.

- Because of his reputation and formidable powers of persuasion, his championing of First Amendment values carries special credibility with those who might not otherwise be sympathetic to vigorous defenses of the First Amendment.

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- Immediately after carrying out the President's instruction to discharge Cox, Bork acted to safeguard the Watergate investigation and its independence.

- He promptly established a new Special Prosecutor's office, giving it authority to pursue the investigation without interference. He expressly ensured the Special Prosecutor's office complete independence, as well as his right to subpoena the tapes if he saw fit.

- Robert Bork framed the legal theory under which the indictment of Spiro Agnew went 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, that Agnew was subject to indictment. Agnew resigned shortly thereafter.

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  -- Richardson and Ruckelshaus persuaded him to stay. They felt that it was important for someone of Bork's integrity and stature to stay on the job.

  -- Judge Bork's decision to stay on helped prevent mass resignations that would have crippled the Justice Department and the subsequent investigation.

- Immediately after carrying out the President's instruction to discharge Cox, Bork acted to safeguard the Watergate investigation and its independence.

- He promptly established a new Special Prosecutor's office, giving it authority to pursue the investigation without interference. He expressly ensured the Special Prosecutor's office complete independence, as well as his right to subpoena the tapes if he saw fit.

- Robert Bork framed the legal theory under which the indictment of Spiro Agnew went 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, that Agnew was subject to indictment. Agnew resigned shortly thereafter.

NO IDEOLOGICAL TESTS SHOULD APPLY

- Ideology should have no role in the Senate's decision on whether to confirm Judge Bork. The application of ideological tests would end the independence of the judiciary.

- The Senate would have to interrogate any prospective nominee on his position on dozens of issues. Attempts to preserve all these competing balances would subject the Senate to paralyzing competing demands. The judicial selection process would become completely politicized.

> "...[H]istory should be enough caution to those of us on the floor who are willing, for our own political needs and/or because we think we know, to stop predicting what she is going to be and to underscore the need for us to have more objective criteria to determine whether or not someone should or should not be on the Supreme Court of the United States -- that is, their intellectual capacity, their background and training, their normal character, and their judicial temperament. We cannot be asked to effectively do much beyond that; for, if it were our task to apply a philosophic litmus test beyond that -- which is not the constitutional responsibility of this body, in my opinion -- it would be a task at which we would consistently fail, because there is no good way in which we can know."
>
> --- Sen. Joseph Biden
> Congressional Record, 9/21/81
> (Sandra Day O'Connor nomination)

> "...[T]he Senate must not apply litmus tests of its own. No party to the process of naming federal judges has any business attempting to foreclose upon the future decisions of the nominee."
>
> --- Sen. Joseph Biden
> Congressional Record, 6/6/86

"...[T]his hearing is not to be a referendum on any single issue or the significant opposition that comes from a specific quarter.... [A]s long as I am chairing this hearing, that will not be the relevant issue. The real issue is your competence as a judge and not whether you voted right or wrongly on a particular issue.... If we take that attitude, we fundamentally change the basis on which we consider the appointment of persons to the bench."

--- Sen. Joseph Biden, Hearing on Nomination of Abner Mikva to D.C. Circuit at 394, 396

"Single-issue politics has no place in the solemn responsiblity to advise and consent to appointments to the Supreme Court or any other Federal Court."

--- Sen. Edward M. Kennedy
Congressional Record, 9/21/81

"I believe there is something basically un-American about saying that a person should or should not be confirmed for the Supreme Court...based on somebody's view that they are wrong on one issue."

--- Sen. Howard Metzenbaum
Congressional Record, 9/21/81

"I am familiar with your [Bork's] views with respect to antitrust legislation, antitrust enforcement, and you and I are totally in disagreement on that subject. However, as I said at the time Justice [Sandra Day] O'Connor was up for confirmation, the fact that my views might differ from hers on any one of a number of different issues would not in any way affect my judgment as it pertains to confirmation or failure to confirm a member of the judiciary."

--- Sen. Howard Metzenbaum
Congressional Record, 1/27/82

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Bork's nomination: An appalling delay

PRESIDENT REAGAN'S NOMINATION OF Robert H. Bork to the Supreme Court has become a dangerous power struggle. Opponents have raised more than $2 million for a campaign to block Senate confirmation. Supporters are raising a like sum. The implication is somewhere between vulgar and obscene. And that's not the worst.

What is? Two offenses rise high:

1. The nomination and confirmation process is being politicized by both sides into a contest of power that already has sorely damaged the confirmation process.

2. Fought with blind ideological bluster, the debate thus far has little if anything to do with Bork's personal or professional competence or credentials.

The most dramatic illustration of Point 1 was Sen. Edward Kennedy's swift diatribe: "Robert Bork's America is one 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, school children could not be taught about evolution," etc.

THAT LEFT CHICKEN LITTLE sounding Solomonic. Much of it is clearly rebutted by Bork's record. But that merely dramatizes the greater offense.

Joseph Biden (D-Del.) is chairman of the Senate Judiciary Committee. Throwing even the pretense of fairness or professionalism into the Potomac, he has declared himself as a forefront opponent of Bork. Then he postponed the confirmation hearing until Sept. 15, *10 weeks* after Reagan submitted the name.

Opposition to Bork is not all political opportunism. Many feminists, blacks, Hispanics and others are rallying against him. He is conservative—as should be expected of any Reagan appointee. He is firm in his opposition to social policies of importance to major segments of the American population. But it is his deep commitment to judicial restraint, his opposition to legislation by judicial interpretation, that underlies the most vehement opposition.

How his social or judicial philosophy may affect his performance is fit material for examination. That is what confirmation hearings are *for*. Then, if opposition to Bork carries the day, so be it. But not before.

IT IS NOT PROPER FOR LEGISLATORS or anyone else to demand that judicial candidates make ideological commitments on future rulings. It should be equally unacceptable to reject candidates on presumed ideological grounds without questions or answers.

However it may serve his presidential ambitions, Biden has thrown away any credibility he might have had as chair of the Judiciary Committee in the Bork matter. *And* the date he has set is irresponsibly delayed.

He should give up that chair for the purpose of the confirmation hearing. And his colleagues should reschedule the hearings and pledge to complete it before considering leaving on a summer recess.

The New York Daily News Sunday, July 26, 1987

N.Y.TIMES: 07-16-87

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.

> He is neither an ideologue nor an extreme rightist.

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."

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?"

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. ■

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

N.Y.TIMES: 07-5-87

WASHINGTON
James Reston

Kennedy And Bork

Senator Edward M. Kennedy of Massachusetts is urging the Democratic majority in the Senate to mount a major ideological attack on President Reagan's nomination of Robert H. Bork to the Supreme Court. But if they're wise they won't follow him down this stormy path.

If he replaces Lewis F. Powell on the Court, Judge Bork might well cast the decisive vote against abortion, affirmative action and church-state issues. No doubt Mr. Reagan nominated him precisely for his conservative philosophy on these controversial issues.

Accordingly, as the President had every right to choose a candidate of his own persuasion, Mr. Kennedy has the same ideological right to oppose him, but the Senator has stated his case in such vehement terms that he's scaring the Democrats more than the Republicans.

Mr. Kennedy asserted that "Bork's rigid ideology will tip the scales of justice against the kind of country America is and ought to be."

He said that Judge Bork's firing of Archibald Cox as special prosecutor during the Watergate hearings was enough in itself to disqualify him for the Supreme Court, and he added:

"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."

This sounds to at least some of the candidates for the Democratic Presidential nomination like an invitation not merely to reject Judge Bork but like an invitation to make the social issues a central part of the 1988 election campaign, and they don't like it.

After their landslide defeats in the Presidential elections of 1980 and 1984, the Democrats have been trying to avoid the impression that they are merely a party of special interest groups — feminists, blacks, labor unions and other aggrieved minorities. Accordingly, even the liberal Democratic candidates are not interested in another "charge of the light brigade."

In their recent debate with Bill Buckley in Houston, they made clear that they were going to make a campaign issue out of President Reagan's "Star Wars" program, his support for the Nicaraguan contras, his budget and trade policies, his scandals and also what they regard as his indifference to the mounting problems of Mexican political and social unrest. This is the formidable election agenda they have in mind.

Judge Bork's views are clearly controversial, but nobody questions his reputation as a legal scholar or forgets that he was confirmed unanimously to his present seat on the Federal Appeals Court in Washington just five years ago.

Mr. Kennedy, however, having abandoned his own Presidential ambitions, has increasingly emerged as the leading spokesman of the neglected people of the nation: the poor, the homeless, the sick and the aged.

He is clearly troubled by the tendency in his own party to shift to the right under the influence of Ronald Reagan's successful election tactics, and he's arguing that if the candidates try to emulate Mr. Reagan, the voters will prefer honest Republican conservatives to bogus conservatives among the Democrats.

> The Senator is scaring Democrats more than Republicans.

The chances are that his colleagues will follow him part way but not in the extreme language he has used so far. They may even postpone the confirmation process until the autumn in order to concentrate on the Iran-contra hearings with Colonel North, Admiral Poindexter and Secretaries Shultz and Weinberger on the stand.

This will give the anti-Bork factions time to organize their arguments and their demonstrations and perhaps even keep the Court paralyzed with a four-four lineup in the early days of the new term.

The Administration is trying to avoid this and is appealing for a decision on Judge Bork after the last days of Colonel North's testimony and before the Congress rises for the summer recess.

If the Democratic leadership of the Senate refuses to cooperate and follows the Kennedy line, the chances are that it will face public opposition, divert attention from its main campaign issues and lose the fight over Judge Bork in the end.

Senator Kennedy cannot beat Judge Bork on the ideological issue alone. Even his own brother insisted on an ideological appointment to the Court when he chose Arthur Goldberg, a distinguished lawyer and darling of the unions.

The Philadelphia Inquirer

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PAGE: 10A

Bork deserves a long look, not a knee-jerk rejection

There must be no rush to judgment on the nomination of Robert H. Bork to the U.S. Supreme Court. In fact, precisely because the Bork nomination is especially sensitive, it is especially important for the Senate to review his nomination with the most thorough, painstaking care it can muster before rendering a verdict upon him. Unfortunately, Sen. Joseph R. Biden Jr. (D., Del.), who will chair Judge Bork's confirmation hearings, seems to have other ideas.

After meeting with leaders of several liberal activist groups opposed to Judge Bork, who sits on the U.S. Court of Appeals for the District of Columbia, Mr. Biden said that he intends to lead Senate opposition to his confirmation. Aside from creating the perception that the senator is a latter-day Walter Mondale, too eager to roll over for liberal pressure groups, Mr. Biden's announcement was grossly premature.

It was also somewhat contradictory, for Sen. Biden postponed hearings on the Bork nomination until Sept. 15 to allow time for the in-depth research that is essential before the Senate can take the full, fair measure of the man. That decision happened to be a good one, in spite of Republican complaints that the Supreme Court might have to begin its session next October short one member.

Mr. Biden, who as a presidential candidate is under special political pressures, says he already has done so much research on Judge Bork that it would be hypocritical of him not to declare up front that he expects to oppose his confirmation. That makes a mockery of the hearing process. Why hold them at all if senatorial minds are already made up?

There are powerfully good reasons for reserving judgment on Robert Bork. First and foremost, it is not at all clear yet whether he is the kind of conservative who would honor legal precedent, or the kind who would uproot it in a crusade to roll back recent history.

Before deciding how to vote, even the most doctrinaire liberals should reflect upon the irony that senators are being pressed, as New York Times reporter Stuart Taylor observes, "to reject a nominee whose philosophy rests on the premise that legislators should make the laws." Being opposed to judges' inventing law is not necessarily inimical to precious values.

Finally, everyone should recognize that Ronald Reagan will remain President another 18 months. Whom might he nominate if Robert Bork is rejected? It might well be someone less able. If so, is the Senate prepared to keep the ninth Supreme Court seat vacant into 1989? Is that the American system at work?

In the end, wisdom and duty may indeed oblige the Senate to reject Robert Bork out of conviction that his presence on the Supreme Court would harm the nation. Before making their decisions, however, senators owe Judge Bork — and themselves, the people and this system of government — the elemental fairness of withholding judgment until after he has been examined thoroughly through a painstaking confirmation process.

THE ARIZONA REPUBLIC

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PAGE: A18

SUPREME COURT

Byrd's Bum Rap On Bork

WITH it becoming increasingly likely that U.S. Court of Appeals Judge Robert Bork will be President Reagan's choice to fill retiring Justice Lewis Powell's seat on the U.S. Supreme Court — and with Senate demagoguery already warming up — it is time to set the record straight.

Senate Majority Leader Robert Byrd, D-W.Va., already has sent up storm warnings over a possible Bork confirmation, saying his nomination could be "inviting problems" because of Bork's "Watergate experience."

This is arrant nonsense and Byrd knows it. Bork's "experience" with Watergate was limited to a single episode: the 1973 "Saturday night massacre." At the time he was the U.S. solicitor general. When President Nixon ordered Attorney General Elliot Richardson to fire Special Prosecutor Archibald Cox, he and Deputy Attorney General William Ruckelshaus both resigned rather than carry out the directive.

The dirty work fell to Bork as next in line at the Justice Department. Although Nixon's action was legal, Bork disagreed with it, as did Richardson and Ruckelshaus, and he, too, offered to resign rather than fire the pesky Cox.

Richardson and Ruckelshaus, however, persuaded Bork not to resign since somebody at the department sooner or later had to carry out the chief executive's legal order. Bork was prevailed upon, did not resign, and fired Cox.

End of Bork's "Watergate experience."

For Byrd to dredge up this episode and hint darkly that Bork's action, however personally distasteful, was anything other than legal and honorable is insulting to a distinguished jurist and respected constitutional scholar.

But if demagoguery were not enough, Byrd also is threatening to hold the confirmation process hostage to the Democrats' legislative agenda, in effect extorting the president into swallowing more tax-and-spend measures or face a stalling, foot-dragging campaign against Bork. This is a perversion of the Senate's solemn constitutional responsibilities.

Bork's nomination, despite his impeccable qualifications for the high court, is not only likely to get caught in the Capitol Hill partisan political battles, but also will come under ideological opposition from left-wing special-interest groups on the basis of his conservative approach to constitutional interpretation.

If Bork is nominated, his confirmation should not be captive to political partisanship or ideological rancor, but should be treated with the respect, dispatch and solemnity due the high court and the constitutional process.

Chicago Tribune

7/2/87

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.

Chicago Tribune DATE: 7/22/

What if President Simon nominated a liberal judge?

By Robert J. Steigmann

Consider this scenario: In November, 1988, Sen. Paul Simon is elected president, but the Republicans recapture the Senate and Strom Thurmond re-assumes the chairmanship of the Senate Judiciary Committee.

In June, 1989, Justice Byron "Whizzer" White resigns from the Supreme Court for health reasons. President Simon's White House staff then conducts what it describes as "an intensive evaluation" of potential appointees to find the best-qualified individual who shares President Simon's liberal philosophy and his abiding conviction that the Constitution "is a living document capable of evolving over time to ensure that the least of our citizens enjoy those rights and privileges deemed fundamental in a free society."

In July, 1989, President Simon announces his choice: Judge Abner Mikva of the United States Court of Appeals for the District of Columbia Circuit. In explaining Judge Mikva's selection, President Simon states that he has known Judge Mikva since the days they served together in the Illinois General Assembly, and he knows Judge Mikva to be a brilliant legal scholar and a man of the highest integrity. The President denies that he used any litmus test in the selection process, such as approval of the 1973 *Roe v. Wade* decision that legalized abortion.

Later in July, 1989, the President calls for quick Senate hearings on the nomination of Judge Mikva so that the court can be at full strength when it begins its October term. The President and the Senate Democratic leaders point out that Judge Mikva was confirmed by the Senate just 10 years earlier for his appellate judgeship, that he since has served with distinction on the court reputed to be the nation's second highest, and that he has received the American Bar Association's rating of "exceptionally well-qualified" for the Supreme Court.

Upon learning of Judge Mikva's nomination, Sen. Orrin Hatch, the second most senior Republican on the Judiciary Committee, says: "Abner Mikva's America is a land in which the police are shackled in their efforts to control dangerous criminals, yet the frightened citizenry may not own guns to protect themselves; where the death penalty may not be imposed no matter how vile the murder; where no restraints may be placed upon the purveyors and peddlers of filth, even when children are involved; and where 13-year-olds may get abortions on demand without their parents even being notified."

In August, 1989, Judiciary Committee Chairman Thurmond expresses "grave concern" over Judge Mikva's nomination, explaining that he fears the nominee is an "ideologue, not a man with an open mind." Sen. Thurmond predicts that scrutinizing the nominee's record and legal philosophy may take months.

"Justice White has occupied the conservative center of the court with regard to his legal philosophy," Sen. Thurmond explains. "The careful balance of the court might be jeopardized by this nominee's decidedly leftward tilt and his possible unwillingness to follow the court's recent precedents holding, for instance, that the death penalty is constitutional despite statistical studies showing a disparity in its utilization based upon the race of the victim, or the holding that states may constitutionally criminalize consensual homosexual acivities between adults."

Meanwhile, Jerry Falwell, Phyllis Schlafly and some far-right and anti-abortion groups announce a nationwide effort to block Judge Mikva's confirmation "to preserve recent gains in the Supreme Court and to protect the lives of millons of the innocent unborn."

Does any of this sound familiar?

The public and the senators who soon will be passing judgment on President Reagan's nomination to the Supreme Court of Judge Robert Bork should consider what their attitudes would be in this scenario.

Both judges are men of the highest repute who are held in the highest esteem by their peers. Both are distinguished legal scholars who have for years demonstrated their judicial skills on the same appeals court in the District of Columbia. Both have received or would receive the ABA's "exceptionally well-qualified" rating.

In fact, the only notable difference between the two is that one is a liberal and the other is a conservative. This is not, and cannot be, a legitimate basis for the Senate to confirm one and reject the other.

The President has the right to select a person of his liking to serve on the Supreme Court. The Senate's opportunity to advise and consent is not grounds for rejecting a nominee, otherwise qualified, because he or she is not a person of the Senate's liking. Instead, it gives the Senate the right to satisfy itself completely that the nominee is a person of the highest integrity, with demonstrated legal ability, who is held in the highest esteem by the legal community.

Raw political power might defeat Judge Bork's confirmation, just as it might the hypothetical nomination of Judge Mikva. But the opposition to Judge Bork is no more principled than would be the opposition to Judge Mikva.

Robert J. Steigmann is a judge in the 6th Judicial Circuit, Champaign County.

THE SUN

DATE: 7-2-87

PAGE: 18A

The Bork Nomination

President Reagan's nomination of Robert H. Bork to the Supreme Court quite properly and quite ironically puts the Democratic-controlled Senate on the spot. The question is whether the Senate will exercise "legislative restraint," if we might coin a phrase, in passing judgment on Judge Bork, an intellectual heavyweight among legal experts who believe in "judicial restraint."

Judge Bork, now a member of the U.S Circuit Court of Appeals in Washington, is a conservative who has inveighed many times against judicial activism that tends in his view to create rights not contemplated by the framers of the Constitution. In a typically trenchant speech, printed on the page opposite, he asks: "Why should constitutional law constantly be catching colds from the intellectual winds of the general society?"

It is precisely this kind of thinking that makes Judge Bork an anathema to the abortion rights movement, civil rights leaders, homosexuals and other population groups that in recent years have looked to the Supreme Court for protections Congress was often unwilling to legislate. Hence, his confirmation hearing (in the words of Joseph Biden, presidential hopeful and Senate Judiciary Committee chairman) promises to create "a very hot summer and a very hot fall."

Heat rather than light is definitely not what is needed in considering the Bork nomination. Senators have an obligation to examine his past opinions and writings, which are voluminous, as part of their inquiries. But if liberals seek to apply an ideological litmus test or weigh Mr. Bork's strictly as a conservative replacement for the centrist Justice Lewis F. Powell, who is taking his swing vote into retirement, they are midst boobytraps.

What would *President* Biden think, for example, if his liberal nominee to succeed Justice Thurgood Marshall were to be fought bitterly by conservatives strictly on the basis of ideology? He would be as outraged as Lyndon Johnson was when Southern Democrats, while denying racial bias, tried to block the Marshall appointment in 1967. Their specious argument: He was a "constitutional iconoclast" who would have the country ruled "by the arbitrary notions of the Supreme Court."

What the Senate should determine is whether Judge Bork is suited by temperament, legal scholarship and experience to sit on the nation's highest tribunal. To attempt to anticipate his future opinions is a fool's errand.

History offers many examples of justices who mocked pre-confirmation expectations. Felix Frankfurter, the liberal professor snatched out of Harvard Law School by FDR, became a conservative stickler on civil liberties and free speech. Salmon P. Chase, who as Abe Lincoln's secretary of the Treasury poured out paper money, went on the Supreme Court and declared it illegal tender. Sherman Minton's evolution as a conservative was as surprising as Earl Warren's liberalism.

It is fascinating that Mr. Bork's most famous opinion as an appeals judge came in a libel case in which he split with Antonin Scalia, now another Reagan conservative on the Supreme Court. In that case, Judge Bork took a benign view of some of the Warren Court's creative precedents that he has often criticized. So as Alban Barkley once said: "Every time we vote to confirm a member of the Supreme Court we take a chance . . . on how his mind will work when he dons the robes."

One potential roadblock to Judge Bork's nomination ought to be bulldozed flat right at the beginning. As solicitor general in the Nixon administration, he obeyed the president's order on Oct. 20, 1973, to fire the special Watergate prosecutor, Archibald Cox, after Attorney General Elliott Richardson and Deputy Attorney General William Ruckelshaus resigned rather than do so. He thus became the villain of the "Saturday Night Massacre." Despite his "personal fear of the consequences," Mr. Bork took on the task to preserve what was left of the Justice Department and prevent an unraveling of government. For this, he is under attack by the likes of Rep. Richard Gephardt, another Democrat running for president. But it is interesting that Mr. Richardson defends Mr. Bork's action, praises him for pushing Leon Jaworski as Mr. Cox's successor and says he would make a good Supreme Court justice.

The Sun opposes many positions with which Judge Bork is identified. We favor abortion rights, oppose the death penalty, support the exclusionary rule against the use of illegally obtained evidence in criminal cases and believe the high tribunal must indeed reflect "the intellectual winds of the general society." But while we dislike some of Judge Bork's opinions, we defend the president's right to nominate a highly qualified jurist who shares his conservative views.

The Senate ought to give Judge Bork a fair and judicious hearing, especially in light of the significance of his appointment. Its final decision will reflect as heavily on the Senate as on the nominee.

THE [redacted] SUN

DATE 13A
PAGE

Bedeviled by Bork

Wallowing in Wild Surmise

By James J. Kilpatrick

Washington.

EDWARD KENNEDY is having hysterics. Joe Biden is scuttling for cover. Along the left-field foul line the banshees are howling to high heaven. What's the commotion? President Reagan has nominated a superlatively qualified jurist, Robert Bork, to the U.S. Supreme Court, and Judge Bork is — ugh! gasp! aargh! — a conservative.

Listen to Senator Kennedy. Judge Bork, he says, wants an America "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 would not be taught about evolution, writers and artists could be censored at the whim of government, and the doors of the federal courts would be shut on the fingers of millions of citizens."

What bilge! What absolute rubbish! The senator's fountains of hyperbole erupt from puddles of wild surmise. True, Judge Bork has criticized the Supreme Court's decision in Roe v. Wade, the famed abortion case. So have scores of other scholars. It was a terrible piece of constitutional law. But to assume that Judge Bork is fairly slavering to overrule that piece of judicial activism is to rely on a doubtful assumption. And if Roe v. Wade were overturned, the effect would be to restore the abortion issue to state legislatures where it had reposed for a hundred years before six members of the high court rewrote the Constitution in 1973.

What else? The senator says that Judge Bork favors "rogue police" who could break down our doors at midnight. Mr. Kennedy cannot possibly believe any such thing. The genesis of this ridiculous charge is that Judge Bork takes a strict view of the "exclusionary rule." He has little use for some of the metaphysical divinations in which the court has engaged in recent years. He would admit probative evidence unless there were truly good reasons for excluding it.

Senator Biden, as chairman of the Judiciary Committee, was quite prepared last year to vote to confirm Judge Bork for a seat on the Supreme Court. Now the gentleman from Delaware is waffling, backing up, flip-flopping. He is bidding for the political support of the anti-Bork loonies, and he is losing his image of integrity in the process.

We ought to understand what these two influential senators are up to. They seem determined to destroy a system of constitutional checks and balances that has worked from the very beginning of the Republic. Under the Constitution, presidents have the power to nominate; senators have the power to confirm. The unwritten rule is that even the most controversial nominees, provided they are judicially qualified, will be confirmed.

Twice in this century the Senate has abandoned that rule. In both instances — with the nominations of John J. Parker in 1930 and Clement Haynsworth in 1969 — the Senate disgraced itself by capitulating to the demands of organized labor.

Is Judge Bork an "extremist"? If so, then surely the same pejorative tag could have been hung on Thurgood Marshall when he was nominated in 1967 to succeed Tom Clark. Justice Marshall had spent 20 years as head of the NAACP's Legal Defense Fund; he was far more ardent in support of the Civil Rights Act than Judge Bork ever has been eloquent in criticizing it. But Justice Marshall was confirmed 69-11.

Remember Felix Frankfurter? He was a founder of the American Civil Liberties Union, a flaming liberal who never drew a conservative breath. He was confirmed in 1939 by voice vote after only 12 days of protest from the right wing.

Critics called Louis Brandeis an anarchist; he was confirmed 47-22. Harlan Stone in 1925 was about as rock-ribbed a Republican as Calvin Coolidge could have found; only six votes were cast against his confirmation. Warren Harding named Pierce Butler to the court in 1922 for one reason: He wanted one more conservative to vote with Van Devanter, McReynolds and Sutherland. The nomination caused the same kind of uproar we are hearing now. Mr. Butler was denounced as a reactionary who had throttled dissent as regent of the University of Minnesota, but less than a month after his nomination the Senate confirmed him, 61-8.

Judge Bork's qualifications are impressive. In the almost unbroken tradition of this century, he deserves confirmation by a lopsided vote. If the junior senator from Delaware should win the White House next year, which a merciful heaven should forfend, he will have at least three predictable vacancies to fill. I hereby promise that if President Biden nominates judges as qualified as Bob Bork, I will not complain at his liberal choices. I would say, as I say of Ronald Reagan, he's entitled.

The Baltimore Sun

THE SUN

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Bork-Bashing Boomerang

Say the administration sent up Bork and, after our investigation, he looked a lot like another Scalia. . . I'd have to vote for him and if the [liberal] groups tear me apart, that's the medicine I would have to take.

That was Sen. Joseph Biden, candidate for the Democratic presidential nomination and chairman of the Senate Judiciary Committee, speaking a year ago to the *Philadelphia Inquirer* and adding nary a caveat or a proviso to his statement. But don't call the pharmacy. Senator Biden needs no medicine. Last Thursday he advised constituency groups with clout in the Democratic Party that he would "most certainly" oppose the elevation of Judge Robert H. Bork to the Supreme Court.

Senator Biden's explanation of his switch was intriguing: Before, he had been speaking "in the context of replacing a conservative with a conservative." Really? In the context of a year ago, most speculation focused on whether Mr. Bork would be named to replace Justice Thurgood Marshall or Justice William Brennan, the oldest and most liberal members of the Supreme Court. Actually, the vacancy now being filled was caused by the resignation of Justice Lewis F. Powell, a centrist.

So Senator Biden's gyrations can be dismissed as strictly political. And why not? A confirmation hearing "by its nature is political," he says.

Obviously, Mr. Bork will be facing a stacked jury. Listen to Sen. Edward M. Kennedy, another committee Democrat: "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." This statement is so intemperate and distorted that rightwing columnists are having a field day quoting it and commenting on the moral qualifications of its source.

Can Bork-bashing boomerang? Democrats had better give this question some thought. Frank J. Donatelli, a political adviser to President Reagan, told the *Washington Times* last week that the White House hopes it has "set a trap for the Democrats." As he figures it, the Bork nomination will put the political spotlight on social issues — affirmative action, law and order, crime, drugs (significantly, he didn't mention abortion) — which will "play to Republican advantage."

Some Democrats are wise enough to avoid the appearance of a rush to judgment. Sen. Albert Gore, a Tennesseean trying to prove his Southern bona fides as he bids for the presidency, advised the NAACP that he will render his verdict "only after hearing all the evidence." Smart fellow.

On the page opposite, former Sen. Charles Mathias of Maryland, a Republican who opposed three Supreme Court nominations by GOP presidents, offers a commentary on the Senate confirmation process written *before* the Bork nomination. It should be must reading for all senators.

THE WALL STREET JOURNAL.

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PAGE: 19

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.

The Washington Times

The Bork Inquisition

The liberal political community has reacted to the Supreme Court nomination of Judge Robert Bork with what might charitably be called hysteria. Dozens of civil rights, abortion, and liberal "public interest" lobbies warn that a court including Judge Bork would hurl America back into a dark age of segregation, discrimination, and back-alley abortions. Senate liberals meanwhile have created the novel concept of court "balance" — meaning, "a liberal majority" — in order to justify their assault on Judge Bork.

The hasty, hot response to the Bork nomination demonstrates that liberal groups consider the Supreme Court a legislature of last resort — one that will do their bidding when elected state and federal representatives will not. These groups worry that a "conservative" court would replace many of the legislative acts performed by the court in the 34 years since Earl Warren became chief justice with conservative commandments.

This fear misinterprets Robert Bork's academic and judicial record. He has argued strenuously against the court's behaving as a legislature for any purpose, liberal or conservative. An intellectual descendant of Alexander Bickel, he believes the judiciary should use its irreversible powers sparingly, letting elected officials handle policy matters. He thus has refused as a judge to write conservative legislation on such matters as contraceptive "consent laws."

Given his background, the charge that he would "turn back the clock" on civil rights and other reforms seems ludicrous. Do people seriously believe that he would reverse the Brown vs. Board of Education of Topeka decision and reinstitute Plessy vs. Ferguson? Of course not. Would he reverse the voting rights acts? No: Those are legislative decisions. What about laws regulating fair housing, equal employment opportunity, etc? Those undoubtedly would remain intact. There seems only one "social issue" on which he might make a difference, and that is affirmative action — a matter on which the court has been notoriously inconsistent over the years. Even then, the Bork history indicates that he would be extremely wary about reversing state laws and regulations.

The abortion issue offers another interesting test. Pro-abortionists know that Judge Bork would give the court a majority capable of reversing the Roe vs. Wade decision that struck down all state laws regulating abortion. But would such a court declare abortion unconstitutional? No: It merely would return the issue to the states, where legislatures could decide whether to permit abortion. If abortion proponents are right and most of the American public approves of the so-called "abortion right," then they have nothing to fear. State legislatures would make abortions legal. If, on the other hand, the American public opposes the institution of abortion, the pro-abortion groups want the court to impose upon the nation something that the people don't want.

In short, the only thing on which Robert Bork would "turn back the clock" would be the activism of the Warren and Burger courts. He quite rightly believes that when courts legislate, they change the law of the land without the consent of the governed. Since voter consent is the foundation of America's representative democracy, judicial legislation actually weakens the moral foundations of government.

But the "turn back the clock" argument is not the only one used against Robert Bork. Some commentators claim that the Senate, as part of its duty to advice and consent on court nominations, has a right, even a duty, to impose political or constitutional litmus tests upon court nominees. That's true, but Congress also has a duty to behave consistently and responsibly in such matters. And consistency would demand a Bork confirmation.

Not only did Congress approve of Judge Bork's elevation to the U.S. Court of Appeals five years ago, Senate Judiciary Committee Chairman Joseph Biden quite recently noted that he would have to vote for a man with Judge Bork's qualifications. If the Senate had principled qualms about "original intent" advocates like Robert Bork and Antonin Scalia, those qualms certainly would have surfaced in Judge Bork's earlier confirmation, or in last year's confirmation of Antonin Scalia. But they did not.

The final argument against Robert Bork involves old-fashioned character assassination. Sen. Edward Kennedy says Judge Bork is unqualified because Mr. Bork, when serving as Richard Nixon's solicitor general, fired Archibald Cox as Watergate special prosecutor. Elliot Richardson, who resigned from the administration rather than fire Mr. Cox, defends the action. He says he advised then-Solicitor General Bork to fire Mr. Cox — and then stay on to ensure a continuing investigation. And indeed, Mr. Bork made sure that the administration retained another special prosecutor, Leon Jaworski.

The inconsistent, hypocritical assaults on Robert Bork fit into a larger pattern of foot-dragging by the Senate, which has tried to sabotage judicial appointments involving such eminently qualified people as constitutional scholar Bernard Siegan by refusing to act on them. Incredible as it may sound, Senate Democrats actually seem prepared to stall on these nominations for the 18 months left before the next president takes office.

These actions, unparalleled in recent congressional history, aren't likely to restore flagging public confidence in the Congress. Senators thus should understand that the Bork hearings will offer them a choice: They can appease liberal pressure groups and skewer Robert Bork or they can resist such pressure and give deserved approval to a man whose intellectual, legal, and moral credentials are above reproach.

The Washington Times

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PAGE: A-9

The Bork file

Robert Bork has begun making media rounds, partly to counter vicious and uninformed attacks against him and his record. These assaults are best summarized by Sen. Edward Kennedy's claim that "Robert Bork's America is a land in which women would be forced into back-alley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens' doors in midnight raids, schoolchildren could not be taught about evolution, writers and artists would be censored at the whim of government, and the doors of the federal courts would be shut on the fingers of millions of citizens for whom the judiciary is often the only protector of the individual rights that are the heart of our democracy."

This characterization, as many thoughtful liberal commentators have noted, is inane at best. Robert Bork has no desire to play god from the bench, and his record proves it. He reveres a legislature's right to make laws, even stupid ones, and courts' duty not to interfere with that right unless legislatures clearly violate the Constitution.

Last week, for instance, he upheld the so-called "fairness doctrine" in a case involving a television news reporter who lost his job when he filed to run for political office. His station said it could not afford the costs of "equal time" for his opponents every time he appeared on the air. The last thing a gung-ho conservative interventionist would do is approve the fairness doctrine. But Judge Bork upheld one of liberal America's favorite laws.

As a judge, he has been deeply respectful of precedent, including the *Griswold* case that created the "right to privacy." If there is any argument against him, it is not that he would be an unconstrained lawmaker on the bench, but that he would be too reluctant to overthrow legislative acts that violate people's rights. He and fellow non-interventionists like Supreme Court Justice Antonin Scalia have come under fire from some conservative legal scholars who think the court should be more aggressive in protecting private property, an institution especially dear to the Constitution's founders.

University of Chicago-trained theorists like Richard Epstein, Bernard Siegan, and Judge Richard Posner say the court should engage in "economic substantive due process" — it should strike down any law that weakens the institution of private property, including intellectual private property. They criticize judges of the Bork-Scalia mold for giving too much respect to legislatures and allowing them to pass things like rent-control laws, "fairness doctrines," economic regulations, zoning restrictions, and other incursions into the realm of property.

Their arguments have a solid anchor in the literature of "original intent," since James Madison, Alexander Hamilton, Thomas Jefferson, Benjamin Franklin and other founders considered private property an essential foundation for a free society. Supreme Courts for 150 years accordingly protected property from legislative assault. Only after the Supreme Court abandoned economic due process in the 1930s did the American welfare state — and American tax rates — begin to grow like kudzu.

We share some of these reservations about Mr. Bork and the "non-interventionist" school of law. There is a significant difference between using the bench as a forum for writing law and using it to prevent legislatures from weakening the rights upon which this nation was founded. Nevertheless, Judge Bork's record indicates that he would help steer the court away from writing law and toward interpreting the Constitution. That is an important step toward restoring the court's role as a curb to legislative and special interest raids on individual rights in the name of "group rights."

Mr. Kennedy and Sen. Joseph Biden have made Robert Bork into an effigy for Edwin Meese, Ronald Reagan, and *betes noires* of the liberal world, rather than addressing the man and his record. Robert Bork's confirmation hearings should not be a show trial against people liberals love to hate. It should provide a fair assessment of Robert Bork.

Sen. Flip-Flop

Senate Judiciary Committee chairman Joseph Biden, dubbed "the incredible shrinking presidential candidate" by columnist George Will, has a credibility problem. His future in the Democratic Party, as a candidate for president or dog catcher, evidently requires him to submit to servitude he once bragged was beneath him: carrying water for liberal interest groups opposed to Robert Bork's Supreme Court nomination.

"Say the administration sends up Bork," he told the Philadelphia Inquirer last November, "and after our investigation, he looks a lot like another [Associate Justice Antonin] Scalia, I'd have to vote for him. And if the groups tear me apart, that's the medicine I'll have to take. I'm not Teddy Kennedy."

Now that a Bork nomination is more than a hypothesis, Joe Biden has changed his tune. He met last Wednesday with some of "the groups" — specifically, representatives from the Leadership Conference on Civil Rights, the Women's Legal Defense Fund, and the NAACP — and reportedly promised to lead the fight against Judge Bork. One of those emerging from the meeting told the New York Times, "He made it very clear to us that he knows what he's going to do, and that he considers the confirmation fight so important that he's willing to work on this, and not on the presidential campaign."

But the flip-flops were not over. Perhaps trying to avoid the perception that he had changed positions so dramatically, Sen. Biden pledged at a news conference to give

Judge Bork's nomination a "full and thorough and fair" review. He even admitted that he would do some research on Robert Bork, who has compiled an impressive record as a scholar and jurist. Even as he said this, however, Judiciary Committee spokesman Pete Smith confirmed the charge that Senator Biden "intends to oppose the nomination and to lead the effort against it in the Senate."

Sen. Flip-Flop, whose strongest complaint is that Robert Bork's mind isn't as "open" as his, reversed polarities again on Thursday, when he told yet another reporter about Judge Bork, "most certainly, I'm going to be against him."

Now put this in historical perspective. In 1982, when Senator Biden was also a member

of the Judiciary Committee, the Senate voted *unanimously* to confirm Judge Bork's appointment to the Federal Appeals Court for the District of Columbia. Now, though he admits that the judge is "a brilliant man", he says he does not believe "that there should be six or seven or eight, or even five Borks" on the Supreme Court.

All of which makes one wonder about Joe Biden's math skills. After all, anyone can see that there is only one Robert Bork. But there seem to be two Joe Bidens.

The Washington Times

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PAGE: A1

JOSEPH SOBRAN

With the ease of Wade Boggs extending a hitting streak, Teddy Kennedy keeps adding to his own world record for effrontery. The senior Massachusetts Democrat sits on the Senate Judiciary Committee, which will hold confirmation hearings concerning Judge Robert Bork's nomination to the Supreme Court. And already, Teddy is sinking to the occasion.

He is homing in on October 1973 — when Mr. Bork, as Richard Nixon's solicitor general, fired Archibald Cox, the special prosecutor in the Watergate case, after Elliot Richardson and William Ruckelshaus had refused to do it.

Mr. Kennedy calls this deed an "unconscionable assignment" and "one of the darkest chapters for the rule of law in American history." The president, says Teddy, "should not be able to reach out from the muck of Irangate, reach into the muck of Watergate, and impose his reactionary vision . . . on the Supreme Court."

Teddy, Teddy, Teddy. Have you already forgotten those bumper stickers that pointed out: "Nobody drowned at the Watergate"? Have you no memory of the muck of Chappaquiddickgate?

A friend of mine once cracked that Teddy Kennedy would do well to steer clear, as it were, of all aquatic imagery. It tends to conjure up a picture of a girl drowning in a car while Teddy swims straight for his attorney.

But apparently the moral statute of limitations has expired on acts committed in 1969, though not those of 1973. Or maybe it's that Judge Bork has never been punished, whereas Teddy has paid his debt to society (a hanging judge stripped him of his driver's license for a whole year). If you doubt that America is the land of opportunity, consider that a little boy with Mr. Kennedy's problematic relation to the law can grow up to serve on the Senate Judiciary Committee.

His own record and his present insufficiency do nothing to deter him from challenging the fitness of one of the finest legal minds in America, or from suggesting that Judge Bork's past is comparable to Klaus Barbie's.

Mr. Kennedy would probably assume an attitude of moral superiority if he were shouting his lines from the window of a jail cell, and it would be no surprise if he raised the question, during Judge Bork's confirmation hearings, whether the nominee really took his own tests in law school.

Joseph Sobran, a senior editor of National Review, is a nationally syndicated columnist.

The better part of valor is discretion, and the ratio is especially acute in Teddy's case. One thing we will not see is the senator offering reasoned criticism of Judge Bork's legal thought to Judge Bork's face.

In a debate format, Judge Bork would eat Mr. Kennedy alive. Teddy will make sure it doesn't come to that. He will be content with the perch of power from which he can safely throw epithets like "extremist" and "Neanderthal" at his target.

The Kennedy strategy is to keep the discussion at this level of invective: "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, and the doors of the federal courts would be shut on the fingers of millions of citizens," etc.

This is the language of a man who is confident that he can get away with just about anything. Irresponsibility being his criterion, his hallucinogenic dystopia begins, naturally, with the vision of a society where abortions are hard to get, then proceeds to cater demagogically to liberal and minority paranoia.

Mr. Kennedy and the Democrats calculate, correctly, that they had better not try to beat Judge Bork on his own ground: constitutional logic. The recklessly accusatory approach moves the controversy from Judge Bork's strength to theirs, which is sheer power. But Teddy oversteps the most generous limits of plausibility whenever he takes on the role of point man in attacking another man's integrity.

The Democrats will stop at nothing, including character assassination, rather than invite the public to compare dispassionately the merits of their way of thinking with Judge Bork's. He can outthink better minds than those of the party hacks who are now hacking at him. Their only hope is to out-Herod Herod, or even out-Biden Biden.

It tells you something important about the Democrats that in this year of the Constitution, they are bent on shouting down a thinker of Judge Bork's stature.

Their volume is evidence of their fear of what he has to say, their contempt of the court they say they want to protect.

The Washington Times

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PAGE: D1

MICHAEL NOVAK

Bork in the TV wings

Let me say right out that Robert Bork is my friend. And, pretty soon, the whole country is going to see him up close, on television, and come to know him as I know him. I think he's going to have the same effect Lt. Col. Oliver North had. As Supreme Court nominee, I think he's going to be a national hero.

On Col. North, the national press allowed the left to dominate the news for six months. Then, when the public met the real Col. North, face-to-face on television, there was a thunderclap. Col. North was not like his prior image.

Judge Bork is one of the two or three most brilliant people I know. Like Falstaff, he also is a lot of fun, friendly as portly men often are, easygoing and witty. Many liberal journalists know him well and like him a lot (which is why a good many have risen to his defense). If to have a liberal spirit means to be generous in judgment, attentive to facts and to nuance, careful about evidence, and open to new ideas and serious argument, Bob Bork has a classic liberal spirit.

The press has a reportorial function and relishes extreme dramatic statements. The wild left of the Democratic Party, therefore, makes a lot of news. And seeing themselves on television everyday, and in the papers, gives the wild left the illusion that it represents the public. Reality is not so kind.

There are four reasons why the wild left, in going ballistic about the Bork nomination, has already hurt the Democratic Party.

• *The public is going to get the chance to see Judge Bork face-to-face on televison.* Judge Bork's cool intellect and affable manner are going to bowl the people over, and make Joe Biden and company look like intellectual pygmies. When the public asks itself "who is a better guardian of the Constitution, Yale and Chicago constitutional law scholar Robert Bork, or the special interest groups that have ganged up on him?", the people will feel that, once again, the hysterical left has wildly exaggerated.

• *The Democratic Party of today will look limp, compared with its heroes of 30 years ago.* Did the Democratic Party of 30 years ago stand for "ideological balance"? It did not. It stood for presidential leadership, and a court that in the long sweep of history winnows the wisdom of the people. It wanted a court in tune with the legislature. It wanted first-class talent, the smarter the better. The Democratic Party, in those days, had a clear agenda for the court.

If a Democrat is elected in 1988, will a Democrat seek "ideological balance"? Obviously, he will not. The notion that the court must show "ideological balance" is a new invention, fashioned from hysteria, cut to false pretenses.

But, in 1988, a Republican is likely to be elected. (In the last five presidential elections, the Democratic candidate has won only 21 percent of the electoral votes.) If a Republican is elected in 1988, will the Democrats want a court given to "judicial restraint" — or a court given to "conservative activism"? If it wants the former, Judge Bork is the best justice it can possibly find.

• *The Democrats control 61 percent of all U.S. legislators, and are best served by a Supreme Court that respects the Constitution and the constitutional role of legislatures.* Judge Bork is not a conservative activist, who wants to "balance" liberal activists. He wants to follow the Constitution and legitimate law, independent of his personal preferences.

On television, Bill Moyers asked Judge Bork (May 28, 1987) where he stood on conservative activists and liberal activists on the court. Judge Bork replied that his own version of "judicial restraint runs right across those values. That is, it's neither liberal nor conservative."

Mr. Moyers replied: "Restraint requires that you do what?"

Judge Bork: "To stick to the law as it was intended to be applied . . . "

To my mind, the best traditions of the Democratic Party require just that: judges who defend and protect the Constitution, not personal preferences. For the near future, Democrats need judges who respect the legislatures Democrats control.

• *The legality of abortion is protected today by state laws.* The wild left is arguing that if the Supreme Court finds Roe vs. Wade lacking a constitutional base (as many constitutional experts, right and left, think that it does), abortion will be outlawed. But that is incorrect. Almost every state today has passed laws making abortion legal. Even if abortion is not a "constitutional right," legislatures have made it legal.

The irony is that many Democrats — such as Gov. Mario Cuomo of New York — say that abortion is "personally offensive" to them but that "the law" permitting abortions must be observed. Judge Bork has never been so inconsistent. He also holds that the law must be observed, but has not voiced personal reservations such as those of Gov. Cuomo.

I myself am more opposed to abortion than Judge Bork has ever claimed to be. But on the Supreme Court, I want justices of flinty constitutional integrity, not those who share my own political judgments.

This is a pluralistic society, after all. Justice Bork will expect political argument on abortion to go on — for and against. That is an issue for legislatures to decide, not judges.

In short, the opposition to Judge Bork rests on massive illusions.

These illusions will be shattered by the hearings on his nomination. Judge Bork is about to become a hero to those Americans who love and respect the wisdom of the Framers of the Constitution, who set the courts above partisan passion and the hysteria of political faction.

The public soon will see the real Judge Bork, beyond the flagrant character assassination of the extremists of the left. They will come to love and to respect him as his friends do.

Michael Novak is a nationally syndicated columnist and a resident scholar at the American Enterprise Institute.

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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?

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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 bidden. 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 Washington Post

Judging Judge Bork

WE PRINT today a letter from Joseph Rauh, the ageless counsel to the Leadership Conference on Civil Rights, taking unhappy issue with our posture thus far on the nomination of Robert Bork to be a justice of the Supreme Court. Mr. Rauh's basic view of the matter is pretty simple. Judge Bork comes out wrong on the issues; that's reason enough to oppose him; and it's wrong, not to say naive, to criticize those who do. You have here a rousing political fight pure and simple, involving particularly the rights of individuals and minorities against the mass. The only serious question is whether you're for such rights or against.

But of course it's a little more complicated than that. Mr. Rauh is dead right that conservative groups are overjoyed at the nomination and mobilizing to support it; that they see it as a way of recapturing a court and a direction that for years have eluded them; that conservative senators declared without a moment's thought that they would support the nominee—and that liberals are free if they choose to respond in kind. The issue is whether they *should* respond in this knee-jerk fashion; we think not.

If ultimately the Senate does come to reject Judge Bork, the deed should be done in a different way, and for better reasons. The confirmation process otherwise becomes a power play; the test is not the quality of the nominee but whether he or she will vote right on whatever are the leading issues of the day. Yes, we know that court fights have often been conducted on this basis before, and, yes, it's true the president started it, in that he nominated Judge Bork in large part for the very reasons that the liberals are now opposing him. That doesn't make it right.

If indeed Judge Bork is, as Mr. Rauh says, "against minority rights, women's rights, criminal defendants' rights, church-state separation . . . privacy generally and abortion choice in particular," who can imagine such an ogre in public life? But surely that is a terrible distortion of both the judge's views and the issue that his nomination forces on the Senate. Judge Bork has reached any number of conclusions over the years that his critics do not like; we dislike a good many ourselves. But the record to this point does not support the charge that he is somehow "against" either the groups whose side he has sometimes refused to take or the practices that he has declined—or, as with abortion, indicated he might decline—to protect.

Rather, Judge Bork's position has been that on a range of issues in recent years the courts have exceeded their writ, have intervened without authority to make what were political or legislative decisions. His disposition, as we so far understand it, would be to narrow both access to the courts and the relief that the courts can provide. The courts, were he to have his way, would be more passive, less of a corrective on the political process than they have been. This powerful albeit restrictive view of the role of the courts takes the judge a long way. It, more than anything else, seems to explain the distance he has kept from the groups and causes that Mr. Rauh quite properly cares most about.

Does Judge Bork go too far in this? Would he be doctrinaire? Would he shut the door to such an extent that the courts could no longer play their traditional leavening role in the system? Questions at that level are the right kind for the Senate now, not whether he has voted or indicated that he would vote right or wrong on abortion or affirmative action.

Mr. Rauh says that Attorney General Edwin Meese is also an issue in this confirmation fight. Do you wonder how? The attorney general is 1) the point man in the administration for conservative causes, 2) as ever, in a certain amount of potential trouble for what has always been a pretty fuzzy sense of public ethics and 3) an ardent Bork supporter. And therefore . . . well, you understand. Mr. Meese was in similar trouble during his own confirmation proceedings several years ago. Our position finally was that we didn't like him but we didn't think the critics had made a strong enough case to justify rejecting him. There is no such issue in the Bork nomination. Mr. Rauh is playing the same game of smudge-by-association that in other contexts over the years he has heroically opposed. Now as then, it tarnishes the debate.

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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?

7-11-87

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.

The Washington Post

Michael Barone

Bork: The Liberals Have It Wrong

The 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 warren-like backrooms of Washington liberal lobbies who imagine American legislatures are peopled mostly with 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.

7-23-87

Senator Biden, Judge Bork, and presidential politics

By Peter Osterlund
Staff writer of The Christian Science Monitor

Washington

Sen. Joseph Biden has a problem. It's Robert Bork.

Judge Bork has been nominated to fill the open slot on the Supreme Court. Civil liberties groups have mobilized in opposition to Bork, whose conservative judicial philosophy, they fear, could lead him to cast the deciding vote to reverse some landmark Supreme Court decisions, including a 14-year-old judgment permitting abortions.

That puts Senator Biden in the hot seat. The Democrat from Delaware is the chairman of the Senate Judiciary Committee, which will hold hearings on the nomination in the fall and decide whether or not to recommend that the Senate confirm Bork. At the same time, Biden is a contender for the Democratic presidential nomination, and he seeks the political support of groups that oppose Bork's appointment.

At a luncheon meeting with reporters yesterday, Biden said he will oppose Bork's nomination. "I don't have an open mind," he said, "because I know this man – he was always used as the [conservative] counterpoint for every constitutional debate we had in law school."

In the past, however, Biden has indicated he could support Bork. That has left some observers wondering whether Biden, scrambling to climb the polls in a seven-way race for the Democratic nomination, has decided to oppose Bork to further his presidential aspirations.

Biden strongly denies that his position on Bork has ever changed. Nonetheless, he concedes that his earlier statements on Bork "may create a perceptual problem."

Last year, while the Senate was considering the nomination of conservative jurist Antonin Scalia to the high court, Biden told a newspaper reporter that he would "have to vote for [Bork]" if Bork presented the same sterling intellectual and personal qualifications as Justice Scalia. "If the groups [opposed to Bork's confirmation] tear me apart, that's the medicine I'll have to take," he said.

On July 1, the day President Reagan nominated Bork, Biden told reporters that he would not take a formal position on Bork's nomination until the judge had appeared before his committee.

Then, less than two weeks later, after meeting with some Senate colleagues and representatives of civil rights organizations opposed to Bork, Biden announced that he would lead the fight against Bork.

Biden insists that all of his statements reflect the same point of view. Last year's comment, he said, reflected his belief that either Bork or Scalia would be qualified to replace another conservative on the court. Scalia replaced conservative Justice William Rehnquist, who was elevated to chief justice to succeed Warren Burger. Bork, on the other hand, would replace Justice Lewis Powell, a centrist who frequently cast the swing vote on controversial issues.

The July statement, Biden said, was an off-the-cuff remark made when he was suddenly confronted by reporters demanding to know his position on the Bork nomination.

Biden's later statements, he added, accurately reflect his view of Bork's appointment. He said his opposition to the appointment would change only in the unlikely event that Bork recanted the judicial philosophy he has propounded over the past 35 years.

Some of Biden's Democratic colleagues have vowed to block Bork's confirmation, if necessary resorting to a filibuster to stall Senate action. In the meantime, Biden will not say whether he would participate in the filibuster.

Does the fate of Bork's nomination simply boil down to politics? "Sure," Biden said. "It's politics of the broadest sense – not partisan politics, but the politics of the Constitution."