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EDITOR'S NOTE: The Senate Judiciary Committee's 12-day hearings on the nomination of Robert M. Bork to be an Associate Justice of the Supreme Court were a remarkable seminar on the Constitution and the role of the Supreme Court as protector of our rights and liberties. Civil rights groups and others contributed to the dialogue through reports and analyses of the nominee's views and opinions on a wide variety of important issues.

In this issue of the MONITOR, Karen McGill Arrington summarizes major issues in the debate, drawing on testimony and several of the major reports.

Readers may obtain more information by writing to the Senate Document Office for a copy of the Judiciary Committee's report. William Taylor, Senior Editor

BORK NOMINATION REPORTED NEGATIVELY OUT OF COMMITTEE

NOMINEE STAYS IN

"In the ebbing summer of our Bicentennial, the Constitution must become more than the object of celebration — it is once again to become the center of a critical national debate over what it is and what it must become, especially on where the rights of the individual end and the powers of the government begin. And so let us make no mistake about the unique importance of this nomination, at this particular moment in our history" (Opening Statement of Senator Joseph Biden (D-DEL), Chair, Senate Judiciary Committee, Hearings on the Nomination of Robert Bork to the Supreme Court).

On October 6, 1987 the Senate Judiciary Committee voted 9-5 to report with a negative recommendation the nomination of Judge Robert Bork to the Supreme Court of the United States. The committee's action was a major blow to the nomination. As the MONITOR went to press 54 senators had announced opposition to the nomination. Following the committee vote, the official White House word was that the President was in it to the end, and Judge Bork on October 9, surprised most observers by stating that he would not ask that his nomination be withdrawn. "Were the fate of Robert Bork the only thing at stake, I would ask the President to withdraw my nomination," said Bork. But stating that he was fighting for the independence of the Court, he asserted that his nomination should be given a "full debate and final Senate decision." Senate floor debate on the nomination is expected to begin on October 20.

Voting against the nomination in committee were Senators Joseph Biden (D-DEL), Edward Kennedy (D-MA), Robert Byrd (D-WVA), Howard Metzenbaum (D-OH), Dennis DeConcini (D-AR), Patrick Leahy (D-VT), Howell Heflin (D-AL), Paul Simon (D

IL), and Arlen Specter (R-PA). In support of the nomination were Senators Strom Thurmond (R-SC), Orrin Hatch (R-UT), Alan Simpson (R-WY), Charles Grassley (R-IA), and Gordon Humphrey (R-NH).

Why is the nomination in serious jeopardy?

When President Reagan announced the nomination of Robert Bork to the Supreme Court on July 1 his confirmation was seen as a sure thing, notwithstanding a Senate controlled by the Democrats.

What was not counted on was the passion with which civil rights, women's, labor, religious, environmental, disability, civil liberties, social action, educational and consumer groups would oppose the nomination. Also not expected was the extent to which Bork's massive criticisms of the Supreme Court's work of the past 40 years would trouble moderate senators. The groundswell of opposition from Americans across the country, concerned that elevation of Bork to the Supreme Court might turn the clock back on key civil rights issues and constitutional guarantees of privacy and free speech, was also not expected. Nor could anyone have predicted the extraordinary extent of public opposition from within the legal community -- nearly 2,000 members of the legal academic community wrote letters of opposition to the Committee, including 32 law school deans and 71 constitutional law professors (40 percent of the full-time professors at ABA accredited law schools).

A full week of testimony from Judge Bork did not assure key senators that Judge Bork would not attempt to overturn or undermine established Supreme Court precedents governing issues such as privacy, free speech, one person one vote, and even desegregation.

And they viewed this as a risk not worth taking.

Fair-minded Justices have understood that women and minorities do have the right to equal protection of the laws, that no person's vote should count more than any other's, and that the Ninth Amendment was included in the Bill of Rights for a purpose, and that the Constitution does protect individual citizens from gross intrusions of the government into our families and our private lives. Judge Bork, if he puts on the robes of Justice Bork, would place these basic values of our democracy and extraordinary achievements of our lifetime at genuine and substantial risk (Closing Statement of Senator Edward Kennedy (D-MA), Hearings on the Nomination of Robert Bork).

As Senator Patrick Leahy (D-VT) put it in announcing his opposition to the nomination, it came down to a question of Bork's judicial philosophy and whether as a Supreme Court Justice he would protect fundamental constitutional rights, the right of Americans "to think, speak and write as they please...", to make "the most intimate and private decisions of family life" free of government intrusion, the right "to be free of unfair discrimination by any branch or level of government."

Senator George Mitchell (D-ME) in the Democratic Response to the President's Saturday Radio Address (October 10, 1987) stated:

Judge Bork's views are inconsistent with two centuries of American

Constitutional law and the common understanding of the American people.

...The American people don't want to go backward on race, privacy, on one-man one-vote, on free speech. And they know that the Supreme Court is the one institution in our country that has historically preserved our Constitution and protected our individual liberties.

In this two hundredth year of our Constitution, those are valuable lessons to relearn.

The Hearings

Judge Bork's testimony before the committee raised more questions about his positions on a number of issues than it answered. On some issues he offered views significantly different from the views he had expressed in voluminous writings and speeches. He made changes in his approach to issues of free speech and discrimination on the basis of sex. On other matters, he said he would accept precedent, even though he disagreed with Supreme Court decisions.

For example, Judge Robert Bork had taken the position that the First Amendment right of free speech applied only to political speech. As a nominee, Bork expressed acceptance of a broader interpretation of the First Amendment. Similarly, Judge Bork had expressed a narrow interpretation of the 14th Amendment's guarantee of equal protection, holding that it applied only to racial minorities and not to women, illegitimates and aliens. During the hearings, he espoused a different view stating that he would apply the 14th Amendment to all persons using a "reasonable basis" standard. Opposing witnesses, however, testified that Judge Bork's "reasonable basis" test has been used in the past to uphold discriminatory classifications. One expert said:

[I]n Supreme Court jurisprudence of the past 100 years, reasonable basis has been a standard that has upheld state power to draw lines, to discriminate, if you will, if any state of facts can reasonably be conceived that would sustain the law... Since 1971, the Supreme Court has refused to apply that deferential reasonable basis standard to laws that discriminate on the basis of sex. The Court has made this charge because it recognized that women and other groups have historically been subject to irrational prejudice. Laws affecting such groups must be scrutinized carefully. (Testimony of Sylvia Law, Professor, New York University Law School, as reported in the Senate Judiciary Committee Report)

Bork's changing positions have led some of his critics to suggest that he changed his views to gain confirmation - "confirmation conversion" in Senator Leahy's phrase. Bork responded that the opinions expressed in articles and speeches were those of a professor whose responsibility it is to be provocative. His criticisms of major Supreme Court rulings and civil rights laws, the committee members were told, were professorial ponderings or views he now considers wrong.

When questioned about the predictability of his positions given his changing positions on Supreme Court decisions. Judge Bork stated: "I have expressed my views here and those views are now widely known. It really would be preposterous for me to sit here and say the things I have said to you and then

get confirmed and be on the Supreme Court and do the opposite. I would be disgraced in history." But among senators "doubts persist[ed] as to his judicial disposition in applying principles of law which he has so long decried" (Statement of Senator Arlen Specter Opposing the Confirmation of Robert Bork to the Supreme Court of the United States). While senators did not dispute his sincerity in saying he would not seek to overturn precedents he disagreed with, they worried about how he would apply principles he didn't believe in to future cases.

In raising these doubts about Judge Bork's application of settled law on equal protection and freedom of speech, it is not a matter of questioning his credibility or integrity, which I unhesitatingly accept, or his sincerity in insisting that he will not be disgraced in history by acting contrary to his sworn testimony, but rather the doubts persist as to his judicial disposition in applying principles of law which he has so long decried" (Statement of Senator Arlen Specter Opposing the Nomination of Robert Bork).

Some of the most compelling testimony against the nomination came on the first morning after Bork completed his testimony. William Coleman, a Republican and former Secretary of Transportation in the Ford Administration, stated:

I tried very hard to stay out of this controversy... As the public debate continued, however, it became apparent that I cannot sidestep the controversy... I urge this Committee not to send forward the nomination of Judge Robert H. Bork to be an Associate Justice of the Supreme Court of the United States... In rejecting major civil rights decisions, Judge Bork often asserts that the aggrieved and often unpopular minority should seek redress through the legislative process. But where such legislative redress has been won, Judge Bork sometimes has challenged the legitimacy of the legislative action. For example, when Congress was finally stirred to action by such catastrophic events as the death of Martin Luther King, Jr., the physical attacks on thousands of sit-in students and the death of President John F. Kennedy, and by the ascension of a southerner to the Presidency -- Lyndon Johnson -- who understood firsthand the blacks' yearning for equal justice, Judge Bork objected to the legislative action on the grounds that it invaded the "liberty" of whites, or was beyond the power of Congress [footnotes omitted].

Similarly compelling testimony was presented by Professor Barbara Jordan, former Congresswoman from Texas.

I am opposed to the confirmation of Robert Bork to the Supreme Court of the United States... [M]y opposition to this nomination is really a result of living 51 years as a black American born in the South and determined to be heard by the majority community. That really is the primary basis for my opposition to this nomination... I like the idea that the Supreme Court of the United States is the last bulwark of protection for our freedoms. The Supreme Court should be the ballast to keep the Ship of State from making wide, unanticipated swings. A new Justice should help us stay the course, not abort the course.

Arizona lawyer John Frank, who focused on Bork's record on the bench rather than his writings and speeches, said:

Pull together his whole career as a judge and it is a remarkable void: the life of no average American who works for a living, or his family, is better, richer, happier, safer or in any way more secure because of Judge Bork's years of judicial service. Judge Bork would not think this relevant to the decision now before the country. A reasonable citizen might disagree with him.

Background

As the Supreme Court ended its term on June 26th, Justice Louis Powell surprised the press and court watchers by announcing his retirement. With the retirement of Justice Powell, Reagan saw the opportunity to accomplish what he has not been able to do legislatively or through the Supreme Court -- turn the clock back on key civil rights issues.

The confirmation battle over the nomination of Judge Robert Bork was considered by some more important than the next presidential election. Opponents and proponents alike are well aware that this appointment to the Supreme Court could influence the social and economic agenda of the nation well into the next century.

Benjamin L. Hooks, Chair of the Leadership Conference on Civil Rights and Ralph Neas, Executive Director said in a prepared statement that:

The confirmation of Robert Bork, an ultra conservative, would dramatically alter the balance of the Supreme Court, jeopardizing the civil rights achievements of the past three decades. Well established law could overnight be substantially eroded or overturned.

This is the most historic moment of the Reagan Presidency. Senators will never cast a more important and far reaching vote. Indeed, this decision will profoundly influence the law of the land well into the 21st century.

White House political director Frank Donatelli was quoted as saying: "The Reagan nomination is another part of the Reagan Revolution," and Reverend Jerry Falwell wrote of the nomination: "President Reagan has the opportunity of the century. Through his selection of a new conservative Supreme Court justice, he can set the tone of the court for many years to come -- perhaps into the next century."

Judge Bork's decisions and opinions, articles, and speeches have been analysed by both sides. A summary of the major issues in this debate is provided below.

Bork's Civil Rights Record

Judge Bork has been criticized by his opponents for opposition he has expressed since 1963 to major civil rights laws and Supreme Court decisions. The NAACP Legal Defense and Educational Fund, Inc. summarized Judge Bork's views regarding racial discrimination in a report released in August 1987. The following summary borrows heavily from that report.

Opposition to Key Civil Rights Decisions

Judge Bork has contended that major civil rights cases decided by the Supreme Court were wrongly decided. These cases are:

- o Katzbach v. Morgan, 384 U.S. 641 (1966) and Oregon v. Mitchell, 400 U.S. 112 (1970), which upheld provisions of the Voting Rights Act that prohibited literacy tests. The prohibition of literacy tests barred states from disenfranchising citizens who are unable to read and write in English. Literacy tests had long been used in some states to disenfranchise large numbers of persons literate in English or other languages. The U.S. Commission on Civil Rights in its 1975 report, The Voting Rights Act: Ten Years After, wrote "...through the use of unfair tests or unfair administration of apparently fair tests, they also disenfranchised large numbers of literates as well." To the extent that Congress went beyond dealing with blatant racial discrimination, Judge Bork viewed the decision as "very bad, indeed pernicious, constitutional law" (Hearings on the Human Life Bill Before the Subcommittee of Powers of the Senate Judiciary Committee, 97th Congress, (1982)). His belief was that neither Congress nor the Courts have authority to deal with voting impediments not founded on intentional racial discrimination.

- o Shelley v. Kraemer, 334 U.S. 1 (1948) held that state courts may not enforce racially restrictive covenants in private deeds requiring that property not be sold or leased to non-whites. Judge Bork found insupportable the Supreme Court's decision in Shelley because in his view the decision extends an amendment whose text and history clearly show it to be aimed only at governmental discrimination to apply sweepingly to all private discrimination. (Indiana Law Journal 1971).

- o Harper v. Virginia Board of Elections, 383 U.S. 663 (1966), outlawed the use of poll taxes as a requirement to vote. Bork wrote that the case was "wrongly decided" and later asserted that the poll tax had very little impact as "it was a very small poll tax" and "it was not discriminatory." In testimony before the committee Judge Bork stated that he would have agreed with the Supreme Court's decision in Harper if there had been proof the Virginia poll tax was adopted for a discriminatory purpose. But, he asserted, there was no indication that there was any such purpose behind the Virginia poll tax.

While the Harper decision was not based on findings of racial discrimination, the Court noted that the "Virginia poll tax was born of a desire to disenfranchise the Negro." 383 U.S. 663, 666 (1966). Harper cited as authority the Supreme Court's 1965 decision in Harman v. Forssenius, 380 U.S. 528 (1965). Harman quoted the following statement by the original sponsor of the Virginia poll tax.

"Discrimination! Why, that is precisely what we propose; that, exactly, is what this Convention was elected for -- to discriminate to the very extremity of permissible action under the limitations of the Federal Constitution, with a view to the elimination of every negro voter who can be gotten rid of, legally, without materially impairing the numerical strength of the white electorate." 380 U.S. 543.

Apart from the issue of racial discrimination, William Coleman testified that Bork's view of the Harper case was wrong if analyzed in terms of economic discrimination.

As I read the case, it turns on poverty. But I also think it is very important in this country to say that a State statute which affects somebody merely because they are poor, that the Court has to use a heightened scrutiny to see whether you ought to have that type of statute.

One person One vote

Judge Bork has also disagreed with Supreme Court decisions requiring that legislative districts be apportioned so that the "power" of each person's vote is roughly equal ("one person one vote"). Baker v. Carr, 369 U.S. 186 (1962) and Reynolds v. Sims, 377 U.S. 533 (1964). In reference to the Reynolds case Judge Bork testified, "On no reputable theory of Constitutional adjudication was there an excuse for the doctrine it imposed." Former Congresswoman Barbara Jordan in testimony before the committee stated "Maybe there is no theoretical basis for "one person one vote". But, I'll tell you this much, there is a common sense, natural, rational basis for all votes counting equally."

Opposition to Civil Rights Laws

Judge Bork opposed key portions of the Civil Rights Act of 1964 at a time when the bill was being considered and hotly disputed. In a 1963 New Republic article he declared opposition to the public accommodations provision of the Act. Bork offered three reasons for his opposition, a position which he changed only several years later, in 1971. He argued that the provision would be difficult or impossible to enforce: "[I]t is ... appropriate to question the practicality of enforcing a law which runs contrary to the customs, indeed the moral beliefs, of a large portion of the country."

He also contended that the provision would lead to other anti-discrimination measures: "If it is permissible to tell a barber or a rooming house owner that he must deal with all who come to him regardless of race or religion, then it is impossible to see why a doctor, lawyer, accountant, or any other professional or business man should have the right to discriminate."

Basically, Bork disagreed with the provision because he believed it infringed on the freedom of whites to discriminate:

Few proponents of legislation such as the Interstate Public Accommodations Act seem willing to discuss the cost of freedom which must accompany it...There seems to be a strong disposition on the part of the proponents of the legislation simply to ignore the fact that it means a loss in a vital area of personal liberty. That it does so is apparent. The legislature would inform a substantial body of the citizenry that in order to continue to carry on the trades in which they are established they must deal with and serve persons with whom they do not wish to associate...Of the ugliness of racial discrimination there need be no argument...But...[t]he principle of such legislation is that if I find your behavior ugly by my standards, moral or aesthetic, and if you prove stubborn about adopting my view of the situation, I am justified in having

the state coerce you into more righteous paths. That is itself a principle of unsurpassed ugliness.

In the same article Bork denounced in harsh terms the civil rights leaders who were sitting in at whites-only lunch counters asking to be served:

[I]t is possible to be somewhat less than enthusiastic about the part played by "moral leaders" in participating in demonstrations against private persons who discriminate in choice of their patrons. It feeds the danger of the violence which they are the first to deplore. That might nevertheless be tolerable if they were demonstrating against a law that coerced discrimination. They are actually part of a mob coercing and disturbing other private individuals in the exercise of their freedom. Their moral position is about the same as Carrie Nation's when she and her followers invaded saloons.

Bork also raised objections to Title VII (which prohibits employment discrimination) of the Civil Rights Act:

It is not enough to be assured that some people use their freedom badly and that others are thereby affronted or even made to suffer. The same could be said of many other freedoms that we continue to retain.

Moreover, the intrusion upon freedom represented by a ... employment practices law would be of an extraordinary nature--for it is extraordinary that government should regulate the associations of private persons.

Affirmative Action

Judge Bork has also expressed opposition to the first Supreme Court ruling upholding affirmative action, referring to Justice Powell's tie-breaking separate opinion in University of California Regents v. Bakke, 438 U.S. 265 (1978) as an opinion "it is hard to take seriously. Justified neither by the theory that the [Fourteenth] amendment is pro-black nor that it is color blind, it must be seen as an uneasy compromise resting upon no constitutional footing of its own."

On July 2, 1987, the New York Times reported regarding Judge Bork:

Judge Bork has said little if anything publicly about current civil rights issues, in particular job preferences for women and minorities.

Administration officials privately express confidence, however that he would share its view that racial preferences benefiting women and minorities who cannot personally prove themselves victims of discrimination at the expense of white men are illegal.

School Desegregation

In 1971 the Supreme Court unanimously held that busing of students is "a normal and accepted tool of educational policy" and that "desegregation plans cannot be limited to the walk-in school," Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971). The next year, then-President Nixon proposed two bills intended to limit the effect of Swann, by curbing the

issuance by federal courts and agencies of busing orders, and establishing fixed time limits on the period during which desegregation orders, including those involving no busing whatever, could remain in effect. The legislation was rejected by Congress. Judge Bork was one of two professors who testified that the bills as originally introduced were constitutional. Other constitutional law experts were overwhelmingly of the view that the proposals were unconstitutional. Hearings on the Equal Educational Opportunity Act of 1972, 92nd Cong., 2d sess., pp. 1312-20 (1972); R. Bork, Constitutionality of the President's Busing Proposals (American Enterprise Institute, 1972).

As a witness last month, Judge Bork stated that he can find no constitutional basis for desegregation of the District of Columbia school system as ordered by a unanimous Supreme Court in 1954, Bolling v. Sharpe, 347 U.S. 497. Judge Bork's reasoning is based on his belief that the Constitution cannot be read as granting an individual right unless it is specifically expressed in a provision of the Constitution. In the Bolling case the Court was faced with the question of whether racial segregation of Washington, D.C. public schools was unconstitutional even though the Fifth Amendment (unlike the Fourteenth Amendment which was applied to states in the Brown case) contained no provision explicitly guaranteeing "equal protection of the laws." The Court held that segregation of school children deprived them of their "liberty" under the Fifth Amendment. The Court ruled that "liberty" cannot be "confined to mere freedom from bodily restraint" but "extends to the full range of conduct which the individual is free to pursue" (for a further discussion, see testimony of Lawrence Tribe, Tyler professor of constitutional law at Harvard Law School). As Tribe expressed it in his testimony:

...Judge Bork, in responding to Senator Specter's question, conceded that, under his "original intent" theory of the Fifth Amendment's liberty clause, there would have been no basis for striking down such desegregation. After all, the Fifth Amendment was ratified in 1791 -- roughly three-quarters of a century before the end of the Civil War, and long before any ban on race discrimination was enacted as constitutional law.

Bork indicated that he would accept Bolling as settled law although he continued to find it a "troublesome" case.

Women's Rights

Opponents of the nomination were also critical of Bork's disagreement with Supreme Court decisions protecting the right to privacy and guaranteeing women equal protection of the laws under the 14th Amendment to the Constitution. The following summary of Judge Bork's position on women's rights relies heavily on the National Women's Law Center's report, Setting The Record Straight: Judge Bork And The Future of Women's Rights (August 1987).

The Fourteenth Amendment and Equal Protection

In numerous articles and speeches Judge Bork has taken the position that the equal protection clause should be applied to racial minorities only. His theory that the Constitution and its amendments must be interpreted according to their historical context led him to preclude any specific Fourteenth Amendment protection against sex discrimination.

Since 1971 the Supreme Court has used a "heightened scrutiny" standard to test government sponsored sex discrimination under the Fourteenth Amendment's equal protection clause. The equal protection clause of the 14th Amendment reads "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

In his testimony, Judge Bork said that he would now grant that the Fourteenth Amendment applied to women, but would apply the "old standard" of reasonableness in determining whether distinctions based on sex are constitutional. In testimony Judge Bork stated: "Sometimes [sex discrimination] will be reasonable, sometimes it won't."

Professor Lawrence Tribe, Harvard Law School, told the committee that "Every law student learns that only the Supreme Court's development of much more closely structured forms of scrutiny of laws based on sex and race has led us predictably toward equality. [I]n 1924, the Court saw a reasonable classification in the decision of New York State to keep women from working in restaurants late at night; in 1961, all nine Justices thought it was reasonable to excuse all women from jury service unless they volunteered... It is clear that when the Supreme Court has struck down sex discrimination in medical education and in other areas, it has done so only by applying a more rigorous standard... And if you want to know how Judge Bork is likely to use that notion of reasonableness, which I think none of us can guess for sure, I simply point out to you that this summer he said that the Supreme Court has trivialized the Constitution when it struck down a law setting a different drinking age for men and women."

According to the National Women's Law Center, a long line of Supreme Court cases would have gone the other way if Judge Bork's standard prevailed. The cases include:

Reed v. Reed (1971) State's automatic preference for males over females to serve as executor of estates held invalid.

Frontiero v. Richardson (1973) Stricter requirements for servicewomen than servicemen to claim dependents held invalid.

Stanton v. Stanton (1975) State statute obligating parents to support sons to an older age than daughters held invalid.

Weinberger v. Wiesenfeld (1975) and Califano v. Goldfarb (1977) Different social security benefits for women and men held invalid.

Kirchberg v. Feenstra (1981) State statute giving husbands exclusive authority to manage community property jointly owned by the husband and wife held invalid.

The Right of Privacy

Harvard Law Professor Kathleen Sullivan in testimony before the committee said:

The constitutional right of privacy has a seventy-five year tradition in the United States Supreme Court. Since at least 1923, the Court has held that government may not interfere with our family lives, or our most intimate decisions, unless it has a very good reason... [T]he Court in 1923 struck down a ... law forbidding the teaching of foreign languages to children, noting that our tradition of liberty encompasses the right "to marry, establish a home and bring up children," among others... Two years later, the Court... [struck] down an Oregon law making it a crime to educate one's children in private or parochial schools... In 1942, the Court recognized a further strand in our fundamental personal liberty: the right to be free of compulsory sterilization by the state... In 1965, the Supreme Court struck down a state law... making it a crime for a husband and wife to use birth control devices in the privacy of their own bedroom...

Judge Bork in his writings, opinions and in testimony has asserted that the Constitution does not establish a right to privacy beyond those specifically mentioned in the Bill of Rights (such as the Fourth Amendment's guarantee against unreasonable searches and seizures), and that the entire line of Supreme Court decisions vindicating such rights is improper.

Bork has sharply criticized the Supreme Court's decision invalidating a Connecticut law banning the sale or use of contraceptives, even by married couples in the home, Griswold v. Connecticut 381 U.S. 479 (1965). In testimony Bork asserted that he believed in a right of privacy but found the Supreme Court's reasoning in the Griswold case lacking. "There is a lot of privacy in the Constitution," but there is no "generalized" right to privacy of the kind necessary to support Griswold and its progeny (Senate Judiciary Committee Report). He referred to the Connecticut law as "nutty," but asserted that it was harmless as it was never enforced. According to a letter from Planned Parenthood lawyers to the Judiciary Committee in response to this testimony, the law had been enforced to close down birth control clinics from 1940 to 1965.

Bork's view of the right to privacy has also led him to refer to the Roe v. Wade, 410 U.S. 113 (1973), case which invalidated state laws prohibiting abortion as "an unconstitutional decision, a serious and wholly unjustifiable usurpation of legislative authority." During the hearing Bork was questioned about his views on overturning an existing decision. In answering the questions he pointedly stated he was not applying his reasoning to the Roe decision. Bork answered that he would have to be convinced that the prior decision was "erroneous", and he would consider 1) "the development of private expectations on the part of the citizenry" and institutions, 2) the importance of "continuity and stability," and 3) "the preservation of confidence in the court by not saying this crowd just does whatever they felt like as the personnel changes."

In a case before his court, Judge Bork wrote a unanimous decision that upheld the Navy's discharge of a linguist and cryptographer for engaging in homosexual activities, Dronenberg v. Zech, 741 F.2d 1388 (1984). In the opinion Judge Bork asserted "we can find no constitutional right to engage in homosexual conduct and... we have no warrant to create one" and he took the opportunity to criticize the Supreme Court's principle of privacy:

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.

...When the Constitution does not speak to the contrary, the choices of those put in authority by the electoral process, or those who are accountable to such persons, come before us not as suspect because majoritarian but as conclusively valid for that very reason.

Professor Sullivan testified that Judge Bork's views on privacy place him well out of the mainstream:

On the scope of the right to privacy, good and reasonable, fair-minded men and women differ greatly, and in good faith...

But there has been no disagreement on the Supreme Court, for 75 years, that there exists some right to privacy, and it is that disagreement of Judge Bork that we are focusing on.

There are two sides to the issue on its scope, but there have not been, in our jurisprudence, two sides of the issue as to its existence, and that is what puts Judge Bork outside the mainstream.

Sexual Harassment

In the lead case concerning sexual harassment as a violation of the federal equal employment opportunity law, Vinson v. Taylor, 106 S.Ct. 2399 (1986), Judge Bork took a position rejected by a unanimous Supreme Court. A panel of the court of appeals not including Bork ruled that a female employee subjected to demands for sex and other harassment by her supervisor could sue for sex discrimination. The employer's petition for rehearing was denied by the full court. Judge Bork dissented, expressing the view that an employer should be allowed to show that a sexual relationship was "voluntary," which could be a complete defense. Bork's view was rejected by a unanimous Supreme Court. Chief Justice Rehnquist wrote that the proper test in such a case was whether the employer had created "an intimidating, hostile, or offensive working environment," and with respect to the asserted defense of voluntariness, that the "correct inquiry is whether [the plaintiff] by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation" in sexual activity was "voluntary."

Free Speech

Bork has also been criticized for his narrow interpretation of the First Amendment, an interpretation which he modified somewhat in testimony before the committee. In his 1971 Indiana Law Journal article then Professor Bork wrote that the First Amendment protection of free speech applied only to political speech.

There is no occasion, on this rationale, to throw constitutional protection around forms of expression that do not directly feed the democratic process. It is sometimes said that works of art, or indeed any form of expression, are capable of influencing political attitudes. But in these indirect and relatively remote relationships to the political process,

verbal or visual expression does not differ at all from other human activities, such as sports or business, which are also capable of affecting political attitudes, but are not on that account immune from regulation.

He further asserted in the article that political speech that advocated violation of law was not protected.

Constitutional protection should be accorded only to speech that is explicitly political. There is no basis for judicial intervention to protect any other form of expression, be it scientific, literary or that variety of expression we call obscene or pornographic. Moreover, within that category of speech we ordinarily call political, there should be no constitutional obstruction to laws making criminal any speech that advocates forcible overthrow of the government or the violation of any law.

Judge Bork has since then stated in speeches that he has modified his views and recognizes that free speech reaches beyond political expression to moral and scientific speech. In testimony before the committee he said that he was pretty much in line with the Supreme Court.

Bork had criticized the Supreme Court's decision in Brandenburg v. Ohio, 395 U.S. 444 (1969) which held that speech advocating violation of law is protected under the First Amendment unless it incites lawlessness that is imminent. Levelling harsh criticism against the "clear and present danger" test used by Justices Holmes and Brandeis to protect speech, Bork referred to the decision as a "fundamentally wrong interpretation of the First Amendment." Under questioning Bork stated that he was "about where the Supreme Court is" and "I simply do not have a narrow view." But his testimony left Senator Specter, his principal questioner on this subject, confused as to where he stood.

Most recently, Judge Bork dissented from his fellow judges on the U.S. Court of Appeals for the District of Columbia Circuit in a First Amendment case decided on October 2, 1987. The case involved the firing of a postal worker because of an article he wrote as editor of the local union's newsletter. The employee was fired because of his employer's concern that his column, which made reference to a "political mailing," might leave the impression that the "mailing" was read in the Post Office and thus undermine public confidence in the mails. In a 2-1 decision, the court held that the employee's writings were protected by the Constitution's guarantee of freedom of speech. Judge Bork in a 34 page dissent termed the dismissal of the employee unduly harsh, but berated his colleagues "for stretching the First Amendment guarantees of free speech to find a justification for reinstating" the employee (AFL-CIO NEWS, vol. 32, no. 41, Oct. 10, 1987).

Access to the Courts

The following discussion relies heavily on the Public Citizen Litigation Group Report, The Judicial Record of Judge Robert H. Bork.

Judge Bork has used technical requirements of law to deny plaintiffs the right to have their law suits decided on the merits of the case. Courts have the authority to dismiss cases because the plaintiff does not have standing (a sufficient interest in the case); the claim is not timely (was not filed

within a specified period of time); or the case is barred by the doctrine of sovereign immunity (a limitation on lawsuits against the government). Judge Bork would also limit the right of prevailing plaintiffs to recover attorneys fees pursuant to federal statutes.

Judge Bork has used these and a variety of other requirements to argue that courts should dismiss lawsuits without reaching the merits. He has voted to dismiss lawsuits brought by the United States Senate, the State of Massachusetts, veterans, an Iranian hostage, social security claimants, prison inmates, citizens of Japanese descent who were interned during World War II, Haitian Refugees, handicapped citizens, an airline, the United Presbyterian Church, homeless citizens in the District of Columbia, and consumer groups. Each of these individuals or organizations filed their claim in federal court, but in each case Judge Bork voted in favor of closing the courthouse door.

On the issue of standing, the Supreme Court has determined that individuals have standing to sue, even if they seek a nonmonetary benefit, such as cleaner food, or a safer environment. Judge Bork has adopted an extremely restrictive approach to standing, and would exclude from the courts many plaintiffs who are currently permitted to pursue their claims. Examples follow:

In Haitian Refugee Center v. Gracey, 809 F.2d 794 (1987) Judge Bork voted to deny standing to Haitian refugees who sought to challenge the government's policy of interdicting ships to prevent Haitians from entering the country. Relying on the separation of powers doctrine, Judge Bork argued that the Executive Branch should be immune from suit even where there is a claimed violation of the Constitution, a statute, or international law. In dissent, Judge Edwards noted that Judge Bork "seeks to abandon the Supreme Court's consistently articulated test" for standing in "the absence of any precedent to support its new test." The standing issue has been reargued before the full Court of Appeals.

Judge Bork has expressed the opinion that consumer groups have no standing to challenge agency action, even where Congress sought to protect the consumer. Thus, in Center for Auto Safety v. Thomas, 806 F.2d 1071 (1986), a consumer group challenged an Environmental Protection Agency rule that made it easier for automobile manufacturers to comply with the fuel economy standards in the Energy Policy Conservation Act of 1975. The court ruled that EPA had violated the Act, which will force car manufacturers to improve fuel efficiency or pay substantial fines. Judge Bork filed a separate opinion, however, making it clear that he believed consumers have no standing to challenge an EPA rule, even though he thought automobile manufacturers would always have standing to sue. The standing issue has been reargued before the full Court.

In testimony before the committee, Professor Judith Resnik, University of Southern California Law Center, said:

While a law professor, Robert Bork developed a theory of government that has strong preferences for legislative and executive decisionmaking and deep suspicions about the legitimacy of judicial decisionmaking. Since becoming a judge, this philosophical agenda has led Judge Bork to expand doctrines that insulate the government from legal challenges. Judge Bork has couched his decisions under a variety, and sometimes a melange, of

legal headings, including executive privilege, jurisdiction, sovereign immunity, standing, and causes of action. Judge Bork's interpretative choices produce a continual theme of deference: He believes that governmental decisionmaking should not be challenged by citizens who claim they have been harmed and that courts should not sit in judgment of the decisions made by the other branches of government.

In addition to the issues discussed above, Judge Bork's record on anti-trust issues, regulatory matters, executive authority, and the firing of Special Watergate Prosecutor Archibald Cox was closely examined during the hearing process. Copies of the Judiciary Committee Report are available from the Senate Document Office, United States Senate, Washington, D.C. 20510.

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