ROBERT H. BORK

Biographical Information

AGE: 60

BORN: March 1, 1927, Pittsburgh, Pennsylvania

COLLEGE: University of Chicago, B.A. 1950

LAW SCHOOL: University of Chicago, J.D., 1953

MILITARY: Marine Corps, 1945-46, Marine Corps Reserve 1950-52

PARTY: Republican

RELIGION: Not available

FAMILY: First wife died in 1980, remarried in 1982; three children.

RESIDENCE: Washington, D.C.

HEALTH: No negative indications

(See attached biographical materials.)

Judicial History

APPELLATE COURT: D.C. Circuit, appointed by President Reagan, 1982.

Professional Experience

Private practice in Washington, D.C., 1981-82.
Professor, Yale Law School, 1977-81, 1962-75, (on leave 1973-75).
Solicitor General, Department of Justice, 1973-77.
Acting Attorney General, Department of Justice, 1973-74.
Private practice Chicago, Illinois, 1955-62.
Private practice New York, New York, 1954-55.

General Considerations and Confirmability

Bork is usually described as brilliant, and a real intellectual powerhouse. Judge Bork, like Scalia, is recognized by all quarters to bear the "earmarks of excellence." Such kudos comes from Democratic Senator Biden, who has noted that he voted to confirm conservative nominees such as Bork, Scalia and Posner.

Bork has been considered the frontrunner for the next seat on the Supreme Court since the beginning of the first Reagan Administration.

Even liberals respect Bork's intellectual force. (See Legal Times, October 22, 1984, Tab A.) One month ago, Legal Times described Bork as the D.C. Circuit's "conservative stalwart," noting that his "written and oral views carry great weight" and that "[e]ven when Bork is not on a panel considering a case, . . . he can still affect its outcome." He is admired for his scholarship and the power of his writing. His book, The Antitrust Paradise, led to a revolution in antitrust law in the direction of free-market principles, and he is widely regarded as the leading academic and judicial spokesman on behalf of the doctrine of judicial restraint. He is a leading thinker whose logic is said to be impeccable. On the bench, he has been well prepared and an active questioner. Instead of being arrogant, he has been responsive, evenhanded and respectful to all counsel. He is also supposed to be a tremendously warm human being and very witty.

The press accounts do not describe Judge Bork's health, but there are no indications that he has any difficulties in this regard. He remarried in 1982 after the death of his first wife, who had been ill for many years.

As a professor and practitioner, Bork was recognized as an outstanding antitrust and constitutional lawyer. (Some have said, however, that his interest in the D.C. Circuit's heavy dose of administrative law cases has appeared to drop off on occasion. For a while, he had a backlog in producing opinions. The backlog is now cleared up and Bork says he is not "bored.") Given his stature in the legal community, Bork's involvement in the "Saturday night massacre" is not likely to diminish his confirmation prospects significantly. A New York Times editorial (December 10, 1981) labeled Bork "a legal scholar of distinction and principle" who "given President Reagan's philosophy, [is a] natural choice for an important judicial vacancy." The Times declined to hold the Watergate firing against Bork. Bork also received the highest possible rating from the ABA in connection with his D.C. Circuit nomination.

Bork is also described as more likely to be confirmed by even a Democratic Senate because he is "much older and less radical than some of the other alternatives." (See States News Service, April 10, 1986.) Most of the Democratic members of the Senate Judiciary Committee -- including Senators Biden, Kennedy, Metzenbaum and Leahy -- sat on that committee in 1982, when it unanimously approved his nomination to the Court of Appeals. At a luncheon for former Senate staffers last year, Senator Biden, who now chairs the Judiciary Committee, stated that he would vote to confirm Bork if Bork were nominated to the Supreme Court. The media will also be kind to Bork because of his

strong support for the First Amendment in a recent libel law decision, Ollman v. Evans and Novak.

If "separation of powers" is Justice Scalia's signature specialty, the doctrine of "original intent" would be Bork's. Bork is viewed as the intellectual proponent, or "godfather," of the original intent school that has been strenuously advanced by Attorney General Meese. Simply stated, this doctrine holds that judges have no authority to add rights to those in the original document being construed, particularly the Constitution. Bork does not believe that judges' own preferences and personal values should be imported into their constitutional interpretations. (See Policy Review, Tab B.)

Bork has said that "where Constitutional materials do not clearly specify the value to be preferred, there is no principled way [for the Supreme Court] to prefer any claimed human value to another." According to his philosophy, judges should not make moral judgments. Rather, he has a strong faith in the moral sense of the electorate, and believes that it is the job of elected representatives to express those moral choices. Thus, he would contend that legislatures have the power and responsibility to decide social values regarding pornography, capital punishment, etc. Bork's credo is that "The liberty to make laws is what constitutes a free people."

Conversely, he believes that courts should not run school systems through the guise of enforcing civil rights laws. Bork has also criticized the extension of a so-called Constitutional "right of privacy." He has written opinions holding that homosexuals do not possess a special Constitutional right to privacy and the military is therefore free to expel them for engaging in homosexual acts in the barracks. In Senate testimony, Bork described the Roe v. Wade abortion decision as "an unconstitutional decision, a serious and wholly unjustifiable usurpation of state legislative authority."

Bork has written that insofar as the Constitution does not speak clearly on many issues, "deference to democratic choice" means that courts should uphold the actions of the coordinate branches of government. In a famous law review article, "Neutral Principles and Some First Amendment Problems" (Tab C), Bork stated that judges "must accept any [social] value choice the legislature makes unless it clearly runs contrary to a choice made in the framing of the Constitution." Thus, "a court that makes rather than implements value choices cannot be squared with the presuppositions of a Democratic society." Bork has also said that courts focus too strongly on the rights of individuals and that communities should be allowed to enforce moral standards. He thinks judges should thus refrain from policy making and injecting their own morals from the bench. (See Washington Post, December 7, 1984, Tab D.)

In 1981, Bork criticized the Supreme Court for being "adrift and frequently performing not a Constitutional but a legislative function." In a recent speech, Bork says the Constitution does "not cover all possible or even all desirable liberties." Bork received a perfect score on the scorecard prepared by the Conservative Center for Judicial Studies. (See National Journal, December 1984, Tab E.)

On the other hand, Bork has criticized those who urge judges to pursue a conservative brand of activism, striking down government regulation of business as unconstitutional. He says that course recognizes "no law other than the will of the judge." While Bork opposes decisions of "the modern, activist, liberal Supreme Court" on such issues as abortion, school desegregation through busing, applying the First Amendment to "dancing in the nude", etc., he is opposed to bills that would strip federal courts of their jurisdiction to decide such cases.

He said, "What I object to is a court going beyond anything that was intended by the Constitution or by a statute. A judge's job is simply to enforce the will of the lawmaker as best the court can." He would thus defer to the policy choices of elected officials except where they conflict with the Constitution's language or reasonably unambiguous import.

Bork has been a conservative since his school days at the University of Chicago. Before that, he was a New Deal Democrat.

Positions on Critical Issues

Criminal Justice. The Court on which Bork currently sits hears relatively few criminal cases. In those criminal cases that have come before him, Bork voted to affirm the conviction in all but one. (In that one, he felt himself bound by prior precedent, and proceeded to vote to overrule that precedent for future cases.) In one case in which a convicted defendant argued that evidence used against him was wrongly seized and that using it therefore "shocked the conscience," Bork rejected that claim and wrote that "a decision to exclude probative evidence with the result that a criminal goes free to prey upon the public should shock the judicial conscience even more. . . ." As Solicitor General of the United States, Bork successfully argued the major death penalty cases before the Supreme Court.

Federalism. Bork is not particularly identified with the issue of states' rights. His views on the legislative prerogative to make policy choices, however, suggest that he would oppose efforts to strike down state laws on shaky Constitutional grounds. Furthermore, he believes that communities should be allowed to enforce moral standards. In the decision wherein he upheld the Navy's right to dismiss an officer for homosexual acts, Dronenburg v. Zech, 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 choices of the people and their elected representatives, not through the ukase of this court."

He also indicated in Senate testimony before appointment to the D.C. Circuit that the Roe v. Wade decision trenched on states' rights.

Separation of Powers. Although Bork is not identified with this area to the same extent as Justice Scalia, their views appear to be congruent. He defers to the power of the executive in the area of foreign policy. Accordingly, he dissented from the D.C. Circuit's decision rejecting the government's power to deny visas to Communists. He criticized the majority's decision as a "judicial incursion into the United States's conduct of its foreign affairs." The Supreme Court has since decided to hear the appeal from that decision.

He also dissented from the decision restricting the President's ability to exercise a "pocket veto." He said courts should refuse to "umpire" disputes between Congress and the President and found that the plaintiff members of Congress lacked standing. Courts threaten separation of powers by attempting to resolve such disputes. Courts would thus become an improper adjunct of the legislative process. The government adopted the rationale of Bork's dissent in its brief on certiorari.

Economic Matters. Bork was best known for his conservative, free market approach to antitrust law. His book, The Antitrust Paradox, became the Bible of the legal side of the Chicago School movement. He has praised the government's shift in antitrust policy under the Reagan Administration.

In a recent decision upholding the Nuclear Regulatory Commission's grant of a license for Diablo Canyon, Bork wrote that requiring the Commission to hold hearings on every circumstance that might conceivably affect emergency responses in a nuclear accident would permit opponents "to hold up licensing for many more years, and probably for a period long enough to make construction of nuclear power plants entirely economically infeasible."

Other Issues. In a recent decision under the Freedom of Information Act, Meeropol v. Meese, Bork held against the requests made by the sons of Julius and Ethel Rosenberg. He found that the government's file searches need only be "adequate" and not "perfect." He sided with the government because they had made sincere efforts to comply with the disclosure requirements.

In another decision, Telecommunications Research and Action Committee v. FCC, Bork held that the Fairness Doctrine had not

been codified into statutory law, and that the FCC was therefore free to repeal it. He criticized the argument that broadcasters were not entitled to the same First Amendment protections as those accorded print journalists.