Collection:
Green, Max: Files, 1985-1988
Folder Title:
Bork (1 of 2)
Box: Box 5

THE WHITE HOUSE

REQUISITION FOR DUPLICATING

DATE: 8/1/27

FOR INFORMATION CONTACT

NAME: Max Green

DIVISION AND UNIT: OPL

PHONE: 6573

ROOM NO.: 196

BLDG.: OEOB

PROCESS (X)

- MULTILITH ☐
- MIMEOGRAPH ☐
- XEROX ☑

APPROVED

_____

Authorized Requisitioning Officer

LATEST DELIVERY DATE POSSIBLE: 8/2/87

TITLE OR SUBJECT HEADING OF MATERIAL

PAGES OF COPY	NO. OF COPIES OF EACH PAGE	ASSEMBLED
18	100	☐ YES ☐ NO

PAPER	COVER	FINISHED SIZE
COLOR	COLOR	

PRINT
- ☑ ONE SIDE
- ☐ BOTH SIDES

STAPLED → ☑
PADDED _____ COPIES TO PAD
PUNCHED _____ HOLES (Send Samples)

OTHER SPECIFICATIONS

[redacted] 100 copies

DISTRIBUTION OF MATERIAL TO BE MADE AS INDICATED

☑ WILL PICK UP JOB

☐ DELIVER ALL TO → ROOM NO. BLDG.

☐ PUBLICATIONS UNIT ☐ OTHER (Specify)

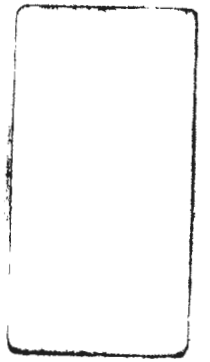
Time Completed: 9:00

_____
Duplicator

RECEIVED BY

_____

_____
Date



BORK NOMINATION

GENERAL OVERVIEW

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

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

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

  - Not one of his more than 100 majority opinions has been reversed by the Supreme Court.

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

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

  - The Supreme Court adopted the reasoning of several of his dissents when it reversed opinions with which he had disagreed. Justice Powell, in particular,

has agreed with Judge Bork in 9 of 10 cases that went to the Supreme Court.

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

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

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

- Justice Stevens, in a speech before the Eighth Circuit Judicial Conference, stated his view that Judge Bork was "very well qualified" to be a Supreme Court Justice. Judge Bork, Justice Stevens explained, would be "a welcome addition to the Court."

QUALIFICATIONS

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

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

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

- An experienced practitioner and partner at Kirkland & Ellis.

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

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

- As an appellate judge, he has an outstanding record: not one of his more than 100 majority opinions has been reversed by the Supreme Court.

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

GENERAL JUDICIAL PHILOSOPHY

Judge Bork has spent more than a quarter of a century refining a careful and cogent philosophy of law.

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

- He believes in neutral, text-based readings of the Constitution, statutes and cases. This has frequently led him to take positions at odds with those favored by

political conservatives. For example, he testified before the Senate Subcommittee on Separation of Powers that he believed the Human Life Bill to be unconstitutional; he has opposed conservative efforts to enact legislation depriving the Supreme Court of jurisdiction over issues like abortion and school prayer; and he has publicly criticized conservatives who wish the courts to take an active role in invalidating economic regulation of business and industry.

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

- Judge Bork believes that there is a presumption favoring democratic decisionmaking, and he has demonstrated deference to liberal and conservative laws and agency decisions alike.

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

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

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

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

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

- As The New York Times said in a December 12, 1981, editorial endorsing his nomination to our most important appellate court in 1981:

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

FIRST AMENDMENT

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

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

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

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

    Judge Bork's decision in this case was praised as "extraordinarily thoughtful" in a New York Times column authored by Anthony Lewis. Lewis further described the opinion as "too rich" to be adequately summarized in his column. Libel lawyer Bruce Sanford

said, "There hasn't been an opinion more favorable to the press in a decade."

- In McBride v. Merrell Dow and Pharmaceuticals Inc., Judge Bork stressed the responsibility of trial judges in libel proceedings to ensure that a lawsuit not become a "license to harass" and to take steps to "minimize, so far as practicable, the burden a possibly meritless claim is capable of imposing upon free and vigorous journalism." Judge Bork emphasized that even if a libel plaintiff is not ultimately successful, the burden of defending a libel suit may itself in many cases unconstitutionally constrain a free press. He wrote: "Libel suits, if not carefully handled, can threaten journalistic independence. Even if many actions fail, the risks and high costs of litigation may lead to undesirable forms of self-censorship. We do not mean to suggest by any means that writers and publications should be free to defame at will, but rather that suits--particularly those bordering on the frivolous--should be controlled so as to minimize their adverse impact upon press freedom."

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

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

- In 1971 Judge Bork wrote an article suggesting that the First Amendment is principally concerned with protecting political speech. It has been suggested that this might mean that Bork would seek to protect only political speech. But Judge Bork has repeatedly made his position on this issue crystal clear: in a letter published in the ABA Journal in 1984, for

example, he said that "I do not think...that First Amendment protection should apply only to speech that is explicitly political. Even in 1971, I stated that my views were tentative....As the result of the responses of scholars to my article, I have long since concluded that many other forms of discourse, such as moral and scientific debate, are central to democratic government and deserve protection." He also testified before Congress to this effect in 1982. He has made unmistakably clear his view that the First Amendment itself, as well as Supreme Court precedent, requires vigorous protection of non-political speech.

- On the appellate court, Judge Bork has repeatedly issued broad opinions extending First Amendment protection to non-political speech, such as commercial speech (FTC v. Brown and Williamson Tobacco Corp.), scientific speech (McBride v. Merrell Dow and Pharmaceuticals, Inc.) and cable television programming involving many forms of speech (Quincy Cable Television v. FCC).

CIVIL RIGHTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

  - In County Council of Sumter County, South Carolina v. United States, Judge Bork rejected a South Carolina county's claim that its switch to an "at-large" election system did not require preclearance from the Attorney General under the Voting Rights Act. He later held that the County

had failed to prove that its new system had "neither the purpose nor effect of denying or abridging the right of black South Carolinians to vote."

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

- In Laffey v. Northwest Airlines, Judge Bork affirmed a lower court decision which found that Northwest Airlines had discriminated against its female employees.

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

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

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

  - In Vinson v. Taylor, Judge Bork criticized a panel decision in a sexual harassment case, both because of evidentiary rulings with which he disagreed and because the panel had taken the position that employers were automatically liable for an

employee's sexual harassment, even if the employer had not known about the incident at issue. The Supreme Court on review adopted positions similar to those of Judge Bork both on the evidentiary issues and on the issue of liability.

- In Dronenberg v. Zech, Judge Bork rejected a constitutional claim by a cryptographer who was discharged from the Navy because of his homosexuality. Judge Bork held that the Constitution did not confer a right to engage in homosexual acts, and that the court therefore did not have the authority to set aside the Navy's decision. He wrote: "If the revolution in sexual mores that appellant proclaims is in fact ever to arrive, we think it must arrive through the moral choices of the people and their elected representatives, not through the ukase of this court." The case was never appealed, but last year the Supreme Court adopted this same position in Bowers v. Hardwick--a decision in which Justice Powell concurred.

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

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

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

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

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

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

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

LABOR

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

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

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

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

  - In Musey v. Federal Mine Safety and Health Review Commission, Judge Bork ruled that under the Federal

Coal Mine and Health and Safety Act the union and its attorneys were entitled to costs and attorney fees for representing union members.

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

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

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

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

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

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

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

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

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

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

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

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

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

CRIMINAL LAW

- As Solicitor General, Robert Bork argued and won several major death penalty cases before the United States Supreme Court. He has expressed the view that the death penalty is constitutionally permissible, provided that proper procedures are followed.

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

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

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

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

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

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

expensive trial ever held in a D.C. district court highlights his devotion to vindicating the constitutional rights even of criminal defendants.

ABORTION

- Judge Bork has never stated whether he would vote to overrule Roe v. Wade. Some have suggested, however, that Judge Bork ought not to be confirmed unless he commits in advance not to vote to overrule Roe v. Wade. Traditionally, judicial nominees do not pledge their votes in future cases in order to secure confirmation. This has long been regarded as clearly improper. Indeed, any judicial nominee who did so would properly be accused not only of lacking integrity, but of lacking an open mind.

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

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

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

  - Harvard Law Professors Archibald Cox and Paul Freund.

  - Stanford Law School Dean John Hart Ely.

  - Columbia Law Professor Henry Monaghan.

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

- Judge Ruth Bader Ginsburg, one of Judge Bork's colleagues on the D.C. Circuit, has written that Roe v. Wade "sparked public opposition and academic

criticism...because the Court ventured too far in the change it ordered and presented an incomplete justification for its action."

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

- If the Supreme Court were to decide that the Constitution does not contain a right to abortion, that would not render abortion illegal. It would simply mean that the issue would be decided in the same way as virtually all other issues of public policy--by the people through their legislatures.

WATERGATE

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

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

- After carrying out the President's instruction to discharge Cox, Bork acted immediately to safeguard the Watergate investigation and its independence. He promptly established a new Special Prosecutor's office, giving it authority to pursue the investigation without interference. He expressly told the Special Prosecutor's office that they had complete independence and that they should subpoena the tapes if they saw fit--the very action that led to Cox's discharge.

- Judge 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, i.e. that Agnew was subject to indictment. Agnew resigned shortly thereafter.

- In 1981, The New York Times described Judge Bork's decisions during Watergate as "principled."

BALANCE ON THE SUPREME COURT

- Judge Bork's appointment would not change the balance of the Supreme Court. His opinions on the Court of Appeals--of which, as previously noted, not one has been reversed--are thoroughly in the mainstream. In every instance, Judge Bork's decisions are based on his reading of the statutes, constitutional provisions, and case law before him. A Justice who brings that approach to the Supreme Court will not alter the present balance in any way.

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

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

  - No such standard has ever been used in evaluating nominees to the Court. The record indicates that the Senate has always tried to look to the nominee's individual merits--even when they have disagreed about them.

  - The issue of "balance" did not arise with respect to FDR's eight nominations to the Court in six years or LBJ's nominees to the Warren Court, even though, as Professor Tribe has written, Justice Black's

appointment in 1937 "took a delicately balanced Court...and turned it into a Court willing to give solid support to F.D.R.'s initiatives. So, too, Arthur Goldberg's appointment to the Court... shifted a tenuous balance on matters of personal liberty toward a consistent libertarianism...."

July 29, 1987

The Francis Boyer Lectures on Public Policy

TRADITION AND MORALITY IN CONSTITUTIONAL LAW

Robert H. Bork

American Enterprise Institute for Public Policy Research

TRADITION AND MORALITY IN CONSTITUTIONAL LAW

The Francis Boyer Lectures on Public Policy

TRADITION AND MORALITY IN CONSTITUTIONAL LAW

Robert H. Bork

American Enterprise Institute for Public Policy Research

ISBN 0-8447-1370-8

Library of Congress Catalog Card Number 84-62693

Printed in the United States of America

American Enterprise Institute
1150 Seventeenth Street, N.W., Washington, D.C. 20036

THE FRANCIS BOYER LECTURES ON PUBLIC POLICY

The American Enterprise Institute has initiated the Francis Boyer Lectures on Public Policy to examine the relationship between business and government and to develop contexts for their creative interaction. These lectures have been made possible by an endowment from the SmithKline Beckman Corporation in memory of Mr. Boyer, the late chairman of the board of the corporation.

The lecture is given by an eminent thinker who has developed notable insights on one or more aspects of the relationship between the nation's private and public sectors. Focusing clearly on the public interest, the lecture demonstrates how new conceptual insights may illuminate public policy issues and contribute significantly to the dialogue by which the public interest is served.

The man or woman delivering the lecture need not necessarily be a professional scholar, a government official, or a business leader. The lecture would concern itself with the central issues of public policy in contemporary America—pointing always in the direction of constructive solutions rather than merely delineating opposing views.

Lecturers may come from any walk of life—academia, the humanities, public service, science, finance, the

mass media of communications, business, and industry. The principal considerations determining the selection are the quality and appositeness of the lecturer's thought, rather than his or her formal qualifications.

The Francis Boyer Lecture is delivered annually in Washington, D.C., before an invited audience. The lecturer is selected by the American Enterprise Institute's distinguished Council of Academic Advisers, and the lectureship carries an award and stipend of $10,000. The American Enterprise Institute publishes the lecture as the Francis Boyer Lectures on Public Policy.

Francis Boyer Award Recipients

1977 The Honorable Gerald R. Ford
1978 The Honorable Arthur F. Burns
1979 Paul Johnson
1980 William J. Baroody, Sr.
1981 The Honorable Henry A. Kissinger
1982 Hanna Holborn Gray
1983 Sir Alan Walters
1984 The Honorable Robert H. Bork

Council of Academic Advisers of the American Enterprise Institute

FOREWORD

Judge Robert Bork of the United States Court of Appeals for the District of Columbia Circuit has long been a lonely but courageous voice within the American legal community, arguing vigorously against the imperialistic tendencies of the American judiciary, and for a return to a traditional, limited view of judicial responsibilities. The American Enterprise Institute's Council of Academic Advisers is pleased to recognize his distinguished contributions to the cause of sound jurisprudence by naming him the eighth recipient of the Francis Boyer Award. The award, named for the late chairman of the SmithKline Beckman Corporation, is given annually to an eminent thinker who has gained notable insights into public policy.

Judge Bork's insights will be needed more than ever in the future, given his description of the contemporary legal situation in this Boyer lecture. He warns us that we are entering a period in which our legal culture and constitutional law may be transformed, with judges assuming an ever larger role in the conduct of American public policy.

There are two reasons for this development, Judge Bork suggests. First, he notes that constitutional law has developed very little theory of its own, and is, therefore, notoriously open to the infiltration of ideologies from the larger society. He cites as an example the ease with which the doctrine of moral relativism moved from the realm of

moral theory into constitutional law. It is now, he notes, a widely accepted legal notion that the First Amendment permits individuals to hold whatever private moral beliefs they wish, but absolutely forbids them, as a community, to express those beliefs in law. The Constitution thus simply comes to reflect the notion popular in the intellectual world, that there are no grounds for deciding authoritatively what is right and what is wrong.

The second reason for the possible future transformation of constitutional law turns on the character of the ideologies being absorbed from society by the law, in part as a result of their widespread acceptance within and propagation by the law schools. Such theories, Judge Bork suggests, are dangerously abstract, universalistic, and philosophical. They therefore tend to encourage disrespect for the concrete and decidedly aphilosophical institutions of the American polity. They also encourage us to rely on abstract moral philosophy as the bulwark of constitutional liberty, rather than on the constitutional text and structure, the judicial precedent and history, that have traditionally and adequately protected our rights.

After the devotees of these new legal theories have exhausted themselves in the search for the one, true philosophy of justice, Judge Bork notes, a new danger arises—that of constitutional nihilism. If no universally acceptable idea of justice is available, the new theorists reason, then the judge is free to decide cases however he wishes—to substitute his own arbitrary judgment for the apparently equally arbitrary judgments of the legislature and the people. And that brings us to the final ominous dimension of the new legal theories, according to Judge Bork: their fundamental antipathy to popular government. The theories that prompt judges to substitute personal opinion for law and public

opinion are theories that deny the people the major freedom of our form of polity: the freedom of the people to choose and to enshrine in law a public morality.

The way to begin to displace these new and dangerous legal theories, Judge Bork argues, is to develop a counter-theory. That counter-theory would rest on the conviction that the intentions of the Founding Fathers are the sole legitimate premise from which constitutional analysis may proceed. The counter-theory would also insist that the moral content of the law be derived from the morality of the framer or legislator, and not from the morality of the legal theorist or judge. The true morality of the jurist, he concludes, is abstinence from giving his own desires free reign, and a rigorously self-disciplined renunciation of power.

Judge Bork's lecture is a concise summary of views developed over a long and distinguished career in the academy, in government service, and on the bench. He has been the Chancellor Kent professor of law and the Alexander M. Bickel professor of public law at the Yale Law School. He also has served as the Solicitor General of the United States from 1973 to 1977, and as acting Attorney General of the United States from 1973 to 1974. He is the author of *The Antitrust Paradox: A Policy at War with Itself,* and numerous articles on antitrust policy, government-business relations, and constitutional theory. He was appointed by President Reagan to the Court of Appeals for the District of Columbia Circuit in 1982.

Judge Bork has also rendered distinguished service over the years to AEI. He was appointed an adjunct scholar in the early 1960s, then became a resident scholar in 1977. He has also served as the chairman of AEI's Legal Policy Studies Advisory Board and as a member of the institute's Council of Academic Advisors. He now joins a distinguished

list of recipients of the Francis Boyer Award, which includes former President Gerald R. Ford, Ambassador Arthur F. Burns, British historian Paul Johnson, the late William J. Baroody, Sr., former Secretary of State Henry Kissinger, University of Chicago President Hanna Holborn Gray, and British economist Sir Alan Arthur Walters.

AEI is pleased to be able to present Judge Bork with the Francis Boyer Award, and we are grateful to the Smith-Kline Beckman Corporation for making possible the award and lecture. Judge Bork describes in this Boyer lecture the "sharply divergent ideas that are struggling for dominance within the legal culture," and thereby reminds us of the importance of the belief that is at the core of AEI's public policy research—the belief that the competition of ideas is fundamental to a free society.

Bill Baroody Jr.

WILLIAM J. BAROODY, JR.
President
American Enterprise Institute

TRADITION AND MORALITY IN CONSTITUTIONAL LAW

When a judge undertakes to speak in public about any subject that might be of more interest than the law of incorporeal hereditaments he embarks upon a perilous enterprise. There is always, as I have learned with some pain, someone who will write a story finding it sensational that a judge should say anything. There is some sort of notion that judges have no general ideas about law or, if they do, that, like pornography, ideas are shameful and ought not to be displayed in public to shock the squeamish. For that reason, I come before you, metaphorically at least, clad in a plain brown wrapper.

One common style of speech on occasions such as this is that which paints a bleak picture, identifies even bleaker trends, and then ends on a note of strong and, from the evidence presented, wholly unwarranted optimism. I hope to avoid both extremes while talking about sharply divergent ideas that are struggling for dominance within the legal culture. While I think it serious and potentially of crisis proportions, I speak less to thrill you with the prospect of doom—which is always good fun—than to suggest to you that law is an arena of ideas that is too often ignored by

intellectuals interested in public policy. Though it was not always so, legal thought has become something of an intellectual enclave. Too few people are aware of the trends there and the importance of those trends for public policy.

It is said that, at a dinner given in his honor, the English jurist Baron Parke was asked what gave him the greatest pleasure in the law. He answered that his greatest joy was to write a "strong opinion." Asked what that might be, the baron said, "It is an opinion in which, by reasoning with strictly legal concepts, I arrive at a result no layman could conceivably have anticipated."

That was an age of formalism in the law. We have come a long way since then. The law and its acolytes have since become steadily more ideological and more explicit about that fact. That is not necessarily a bad thing: there are ideologies suitable, indeed indispensable, for judges, just as there are ideologies that are subversive of the very idea of the rule of law. It is the sharp recent growth in the latter that is worrisome for the future.

We are entering, I believe, a period in which our legal culture and constitutional law may be transformed, with even more power accruing to judges than is presently the case. There are two reasons for that. One is that constitutional law has very little theory of its own and hence is almost pathologically lacking in immune defenses against the intellectual fevers of the larger society as well as against the disorders generated by its own internal organs.

The second is that the institutions of the law, in particular the schools, are becoming increasingly converted to an ideology of the Constitution that demands just such an

infusion of extraconstitutional moral and political notions. A not untypical example of the first is the entry into the law of the first amendment of the old, and incorrect, view that the only kinds of harm that a community is entitled to suppress are physical and economic injuries. Moral harms are not to be counted because to do so would interfere with the autonomy of the individual. That is an indefensible definition of what people are entitled to regard as harms.

The result of discounting moral harm is the privatization of morality, which requires the law of the community to practice moral relativism. It is thought that individuals are entitled to their moral beliefs but may not gather as a community to express those moral beliefs in law. Once an idea of that sort takes hold in the intellectual world, it is very likely to find lodgment in constitutional theory and then in constitutional law. The walls of the law have proved excessively permeable to intellectual osmosis. Out of prudence, I will give but one example of the many that might be cited.

A state attempted to apply its obscenity statute to a public display of an obscene word. The Supreme Court majority struck down the conviction on the grounds that regulation is a slippery slope and that moral relativism is a constitutional command. The opinion said, "The principle contended for by the State seems inherently boundless. How is one to distinguish this from any other offensive word?" One might as well say that the negligence standard of tort law is inherently boundless, for how is one to distinguish the reckless driver from the safe one. The answer in both cases is, by the common sense of the community. Almost all judgments in the law are ones of degree, and the law does not flinch from such judgments except when, as in the case of morals, it seriously doubts the community's right to define harms. Moral relativism was even more explicit in the major-

ity opinion, however, for the Court observed, apparently thinking the observation decisive: "One man's vulgarity is another's lyric." On that ground, it is difficult to see how law on any subject can be permitted to exist.

But the Court immediately went further, reducing the whole question to one of private preference, saying: "We think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual." Thus, the community's moral and aesthetic judgments are reduced to questions of style and those are then said to be privatized by the Constitution. It testifies all the more clearly to the power of ideas floating in the general culture to alter the Constitution that this opinion was written by a justice generally regarded as moderate to conservative in his constitutional views.

George Orwell reminded us long ago about the power of language to corrupt thought and the consequent baleful effects upon politics. The same deterioration is certainly possible in morality. But I am not concerned about the constitutional protection cast about an obscene word. Of more concern is the constitutionalizing of the notion that moral harm is not harm legislators are entitled to consider. As Lord Devlin said, "What makes a society is a community of ideas, not political ideas alone but also ideas about the way its members should behave and govern their lives." A society that ceases to be a community increases the danger that weariness with turmoil and relativism may bring about an order in which many more, and more valuable, freedoms

are lost than those we thought we were protecting.

I do not know the origin of the notion that moral harms are not properly legally cognizable harms, but it has certainly been given powerful impetus in our culture by John Stuart Mill's book *On Liberty.* Mill, however, was a man of two minds and, as Gertrude Himmelfarb has demonstrated, Mill himself usually knew better than this. Miss Himmelfarb traces the intellectual themes of *On Liberty* to Mill's wife. It would be ironic, to put it no higher, if we owed major features of modern American constitutional doctrine to Harriet Taylor Mill, who was not, as best I can remember, one of the framers at Philadelphia.

It is unlikely, of course, that a general constitutional doctrine of the impermissibility of legislating moral standards will ever be framed. So the development I have cited, though troubling, is really only an instance of a yet more worrisome phenomenon, and that is the capacity of ideas that originate outside the Constitution to influence judges, usually without their being aware of it, so that those ideas are elevated to constitutional doctrine. We have seen that repeatedly in our history. If one may complain today that the Constitution did not adopt John Stuart Mill's *On Liberty,* it was only a few judicial generations ago, when economic laissez faire somehow got into the Constitution, that Justice Holmes wrote in dissent that the Constitution "does not enact Mr. Herbert Spencer's Social Statics."

Why should this be so? Why should constitutional law constantly be catching colds from the intellectual fevers of the general society?

The fact is that the law has little intellectual or structural resistance to outside influences, influences that should properly remain outside. The striking, and peculiar, fact about a field of study so old and so intensively cultivated by

men and women of first-rate intelligence is that the law possesses very little theory about itself. I once heard George Stigler remark with some astonishment: "You lawyers have nothing of your own. You borrow from the social sciences, but you have no discipline, no core, of your own." And, a few scattered insights here and there aside, he was right. This theoretical emptiness at its center makes law, particularly constitutional law, unstable, a ship with a great deal of sail but a very shallow keel, vulnerable to the winds of intellectual or moral fashion, which it then validates as the commands of our most basic compact.

This weakness in the law's intellectual structure may be exploited by new theories of moral relativism and egalitarianism now the dominant mode of constitutional thinking in a number of leading law schools. The attack of these theories upon older assumptions has been described by one Harvard law professor as a "battle of cultures," and so it is. It is fair to think, then, that the outcome of this confused battle may strongly affect the constitutional law of the future and hence the way in which we are governed.

The constitutional ideologies growing in the law schools display three worrisome characteristics. They are increasingly abstract and philosophical; they are sometimes nihilistic; they always lack what law requires, democratic legitimacy. These tendencies are new, much stronger now than they were even ten years ago, and certainly nothing like them appeared in our past.

Up to a few years ago most professors of constitutional law would probably have agreed with Joseph Story's dictum in 1833: "Upon subjects of government, it has always appeared to me, that metaphysical refinements are out of place. A constitution of government is addressed to the common-sense of the people, and never was designed for trials of logical skill or visionary speculation." But listen to how Nathan Glazer today perceives the lawyer's task, no doubt because of the professors he knows: "As a political philosopher or a lawyer, I would try to find basic principles of justice that can be defended and argued against all other principles. As a sociologist, I look at the concrete consequences, for concrete societies."

Glazer's perception of what more and more lawyers are doing is entirely accurate. That reality is disturbing. Academic lawyers are not going to solve the age-old problems of political and moral philosophy any time soon, but the articulated premise of their abstract enterprise is that judges may properly reason to constitutional decisions in that way. But judges have no mandate to govern in the name of contractarian or utilitarian or what-have-you philosophy rather than according to the historical Constitution. Judges of this generation, and much more, of the next generation, are being educated to engage in really heroic adventures in policy making.

This abstract, universalistic style of legal thought has a number of dangers. For one thing, it teaches disrespect for the actual institutions of the American polity. These institutions are designed to achieve compromise, to slow change, to dilute absolutisms. They embody wholesome inconsistencies. They are designed, in short, to do things that abstract generalizations about the just society tend to bring into contempt.

More than this, the attempt to define individual liberties by abstract reasoning, though intended to broaden liberties, is actually likely to make them more vulnerable.

Our constitutional liberties arose out of historical experience and out of political, moral, and religious sentiment. They do not rest upon any general theory. Attempts to frame a theory that removes from democratic control areas of life the framers intended to leave there can only succeed if abstractions are regarded as overriding the constitutional text and structure, judicial precedent, and the history that gives our rights life, rootedness, and meaning. It is no small matter to discredit the foundations upon which our constitutional freedoms have always been sustained and substitute as a bulwark only abstractions of moral philosophy. The difference in approach parallels the difference between the American and the French revolutions, and the outcome for liberty was much less happy under the regime of "the rights of man."

It is perhaps not surprising that abstract, philosophical approaches to law often produce constitutional nihilism. Some of the legal philosophers have begun to see that there is no overarching theory that can satisfy the criteria that are required. It may be, as Hayek suggested, that nihilism naturally results from sudden disillusion when high expectations about the powers of abstract reasoning collapse. The theorists, unable to settle for practical wisdom, must have a single theoretical construct or nothing. In any event, one of the leading scholars has announced, in a widely admired article, that all normative constitutional theories, including the theory that judges must only interpret the law, are necessarily incoherent. The apparently necessary conclusion—that judicial review is, in that case, illegitimate—is never drawn. Instead, it is proposed that judges simply enforce

good values, or rather the values that seem to the professor good. The desire for results appears to be stronger than the respect for legitimacy, and, when theory fails, the desire to use judicial power remains.

This brings into the open the fundamental antipathy to democracy to be seen in much of the new legal scholarship. The original Constitution was devoted primarily to the mechanisms of democratic choice. Constitutional scholarship today is dominated by the creation of arguments that will encourage judges to thwart democratic choice. Though the arguments are, as you might suspect, cast in terms of expanding individual freedom, that is not their result. One of the freedoms, the major freedom, of our kind of society is the freedom to choose to have a public morality. As Chesterton put it, "What is the good of telling a community that it has every liberty except the liberty to make laws? The liberty to make laws is what constitutes a free people." The makers of our Constitution thought so too, for they provided wide powers to representative assemblies and ruled only a few subjects off limits by the Constitution.

The new legal view disagrees both with the historical Constitution and with the majority of living Americans about where the balance between individual freedom and social order lies.

Leading legal academics are increasingly absorbed with what they call "legal theory." That would be welcome, if it were real, but what is generally meant is not theory about the sources of law, or its capacities and limits, or the prerequisites for its vitality, but rather the endless exploration of abstract philosophical principles. One would suppose that we can decide nothing unless we first settle the ultimate questions of the basis of political obligation, the merits of contractarianism, rule or act utilitarianism, the nature of the

just society, and the like. Not surprisingly, the politics of the professors becomes the command of the Constitution. As Richard John Neuhaus puts it, "the theorists' quest for universality becomes simply the parochialism of a few intellectuals," and he notes "the limitations of theories of justice that cannot sustain a democratic consensus regarding the legitimacy of law."

Sometimes I am reminded of developments in another, perhaps parallel, field. I recall one evening listening to a rather traditional theologian bemoan the intellectual fads that were sweeping his field. Since I had a very unsophisticated view of theology, I remarked with some surprise that his church seemed to have remarkably little doctrine capable of resisting these trends. He was offended and said there had always been tradition. Both of our fields purport to rest upon sacred texts, and it seemed odd that in both the main bulwark against heresy should be only tradition. Law is certainly like that. We never elaborated much of a theory—as distinguished from mere attitudes—about the behavior proper to constitutional judges. As Alexander Bickel observed, all we ever had was a tradition, and in the last thirty years that has been shattered.

Now we need theory, theory that relates the framers' values to today's world. That is not an impossible task by any means, but it is a good deal more complex than slogans such as "strict construction" or "judicial restraint" might lead you to think. It is necessary to establish the proposition that the framers' intentions with respect to freedoms are the sole legitimate premise from which constitutional analysis may proceed. It is true that a willful judge can often clothe his legislation in sophistical argument and the misuse of history. But hypocrisy has its value. General acceptance of correct theory can force the judge to hypocrisy and, to that

extent, curb his freedom. The theorists of moral abstraction are devoted precisely to removing the judge's guilt at legislating and so removing the necessity for hypocrisy. Worse still, they would free the intellectually honest judge from constraints he would otherwise recognize and honor.

It is well to be clear about the role moral discourse should play in law. Neuhaus is entirely correct in saying

> whatever else law may be, it is a human enterprise in response to human behavior, and human behavior is stubbornly entangled with beliefs about right and wrong. Law that is recognized as legitimate is therefore related to—even organically related to, if you will—the larger universe of moral discourse that helps shape human behavior. In short, if law is not also a moral enterprise, it is without legitimacy or binding force.

To that excellent statement I would add only that it is crucial to bear in mind what kind of law, and which legal institutions, we are talking about. In a constitutional democracy the moral content of law must be given by the morality of the framer or the legislator, never by the morality of the judge. The sole task of the latter—and it is a task quite large enough for anyone's wisdom, skill, and virtue—is to translate the framer's or the legislator's morality into a rule to govern unforeseen circumstances. That abstinence from giving his own desires free play, that continuing and self-conscious renunciation of power, that is the morality of the jurist.

American Enterprise Institute

J. E. McArdle

2570 Riverwoods Road, Riverwoods, Illinois 60015

WR

October 8, 1987

President Ronald Reagan
The White House
1600 Pennsylvania Avenue
Washington, D. C. 20500-0001

E. Bond

Dear Mr. President:

Here is a copy of a letter I have sent to each member of the U. S. Senate, enclosing a copy of the October 5 Wall Street Journal editorial and voicing my request for fairness and a vote FOR confirmation of Judge Bork.

The letter was modified for Illinois Senators Dixon and Simon to identify myself as an Illinois constituent.

Also enclosed is a copy of a letter to Judge Bork thanking him for his willingness to serve.

I endorse your selection of Judge Bork and do hope that "thinking Senators" can indeed rise above the intemperance of personal attack that has recently ben leveled--unjustly--at the the judge.

Good Luck. (Stay well and happy for many years more.)

Respectfully,

Jack McArdle

J. E. McArdle

JEM/rg
Enclosures (3)

Home (312) 945-8342 Office (312) 825-8806

COPY

J. E. McArdle

2570 Riverwoods Road, Riverwoods, Illinois 60015

October 8, 1987

Judge Robert Bork
c/o The White House (Please Forward As Needed)
1600 Pennsylvania Avenue
Washington, D. C. 20500-0001

Dear Judge Bork:

Ours is a family laced with attorneys for many generations. My great-grandfather, grandfather, dad, uncle, aunt, brother, daughter, son-in-law and at last count, several nieces and nephews have all practiced law or are now in practice.

This long heritage has caused me to have great respect for reason, rational debate, honesty, integrity and for the basic concepts of law and the Constitution that glue our society together.

Conversely, I have great disgust when viewing the likes of Senators Biden and Kennedy, plus "Reagan administration bashing" television personalities attempting (I am afraid with much more success than they deserve) to discredit you.

Enclosed is a prototype of a letter (enclosing the October 5 Wall Street Journal editorial) which I have sent to the full Senate. I hope it will influence some Senators to return to reason.

Our country needs and deserves a jurist of your intellect and excellence. I hope we get you.

If we don't, please let me extend a large THANK YOU for your offer to serve. Let me also extend an APOLOGY to you for those who are so lacking in character, open-mindedness and honesty as to have treated you so unfairly in both the hearings and in the press.

Good luck, and thank you very much for your service to our legal system.

Sincerely,

J. E. McArdle

CC: President Reagan
JEM/rg
Enclosures

Home (312) 945-8342 Office (312) 825-8806

J. E. McArdle

2570 Riverwoods Road, Riverwoods, Illinois 60015

October 6, 1987

EXAMPLE OF LETTER SENT TO EACH MEMBER
OF THE UNITED STATES SENATE

Dear Senator:

As a concerned voter, even though I am not one of your constituents, may I ask you to rise above the "cry of the disinformers" (see Wall Street Journal editorial of Monday, October 5) and vote FOR the appointment of JUDGE BORK to the United States Supreme Court.

The Journal's editorial highlights the intellectual injustice associated with most of the attacks on Judge Bork and the efforts (apparently successful with many) to mislead both the public and the Senate.

Judge Bork's record as a jurist shows him to be thoughtful, rational and committed to the essence of the Constitution. His testimony before the Senate Committee shows him to be articulate, intelligent and not intemperate or bigoted -- and this testimony was in the face of questioning that was often insulting and intemperate.

By training, scholarship, experience and intellect Judge Bork is an excellent jurist.

Please vote FOR his appointment.

Sincerely,

J. E. McArdle

Enclosure: WSJ Editorial

Home (312) 945-8342 Office (312) 825-8806

The Bork Disinformers

As senators decide on Judge Bork, let's understand what former Chief Justice Warren Burger meant when he told the Judiciary Committee that there's never been a confirmation hearing "with more hype and more disinformation." Or what former University of Chicago Law Dean Gerhard Caspar meant by accusing the committee of "McCarthyite distortions." If Judge Bork loses, the lesson to us, and we're sure to important and well-informed parts of the public, will be that we have a political structure in which a group of intellectual charlatans can win by peddling mendacity and deceit on a massive scale.

Joe Biden, Teddy Kennedy and other moralizing senators relied on a tactic once called the big lie. They repeated their charges so often they sounded as if they must be true, when the truth is the precise opposite. In particular, they repeated to exhaustion that Judge Bork does not believe the 14th Amendment applies to women. What Judge Bork in fact said was that the due process and equal protection clauses apply to "all persons"—women, blacks, everyone. He said there should not be "strict scrutiny" of laws applied to blacks and a lower level of review for women, that the same test should apply to all.

The American Civil Liberties Union also used sleight of hand in a news release that "Judge Bork, in a 1985 speech, said it would be a good thing if religion were reintroduced into public schools." Judge Bork did give a speech observing that the "resurgence in the political assertiveness of religion-based movements" is a reaction to the court's "deliberate and thoroughgoing exclusion of religion." But nowhere did he endorse religion or school prayer. Asked to comment, an ACLU spokesperson said its claim was "merely an extrapolation" from Judge Bork's speech.

Some of this "extrapolation" is by people who truly should know better. Over the past several days we've had several discussions with Harvard Law's Laurence Tribe over the letter that appears opposite. The Biden material on which he initially relied gave an incorrect reference saying Judge Bork dismissed the Ninth Amendment as a "waterblot." In the hearings, Judge Bork did use the phrase "inkblot," as follows: "I do not think you can use the Ninth Amendment unless you know something of what it means. For example, if you had an amendment that says 'Congress shall make no' and then there is an inkblot, and you cannot read the rest of it, and that is the only copy you have, I do not think the court can make up what might be under the inkblot."

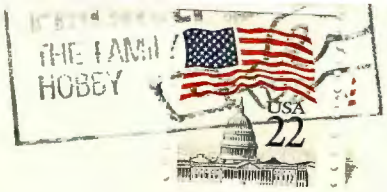
What is at issue here is Mr. Tribe's pet project of using the Ninth Amendment as carte blanche for judges to create whatever new constitutional rights fit their fancy. Judge Bork does reject the notion "that under the Ninth Amendment the court was free to make up more Bills of Rights." But it is Mr. Tribe who is out of the mainstream; he surely knows the Supreme Court has never used the Ninth Amendment in the way he advocates.

Watching the anti-intellectualism of the assault on Judge Bork, we're reminded of the campus anti-intellectualism of the 1960s. In reaction to the universities' failure to defend reason or free speech, those who treasured these values founded the neoconservative movement in this country. Significantly, many of the people who reacted to those times by embracing conservative political ideas became the men and women who stocked the brain trust of the Reagan revolution.

Whether or not Judge Bork is confirmed, this shabby treatment of the nation's most distinguished legal scholar and jurist will not soon be forgotten. Both conservatives and liberals who hold dear the ideals of rational discourse and honest scholarship will be passionate in their outrage, and that passion is likely to have lasting intellectual and political effects.

J. E. McArdle

2570 Riverwoods Road
Riverwoods, Illinois 60015



President Ronald Reagan
The White House
1600 Pennsylvania Avenue
Washington, D. C. 20500-0001

THE WHITE HOUSE
WASHINGTON

TO: Matt Zachary

FROM: OFFICE OF MEDIA RELATIONS
Charles Bacarisse.

We received this letter in our office but d can find nothing to indicate that it is media related. d thought you could either answer it or refer it to the proper place.

Thanks —

any questions? give me a call x2876.

perhaps only passing yet another continuing resolution.

Now, when Congress passes one of these continuing resolutions, it puts appropriated Federal funding into a huge lump. And when one of these massive continuing resolutions comes to my desk, it's a take-it-or-leave-it proposition. Sign the bill and, with it, accept the inability to get wasteful spending under some level of control or, reject it, and watch the United States Government run out of money and grind to a halt. I've felt for some time that no President should be placed in that position.

Our administration has proposed reforms that would fix the budget process: the line-item veto and a balanced budget amendment. But if we're going to run the Federal Government by continuing resolutions, then the very least Congress can do is this: Break them into separate parts, with each part dealing with a specific area of Federal funding. Doing so would provide me with at least some opportunity to exercise my rightful judgment as President—an opportunity I intend to insist on.

Until next week, thanks for listening, and God bless you.

Note: The President spoke at 12:06 p.m. from Camp David, MD.

Supreme Court of the United States

Statement by the President on the Senate Confirmation Hearings on Robert Bork. September 19, 1987

Judge Robert Bork has shown in his calm, direct, and candid answers that he is eminently qualified to sit on the Supreme Court. If the Senate uses the standards it should—integrity, qualifications, and temperament—it will certainly move quickly, once the Judiciary Committee hearings are completed, to confirm Judge Bork.

United Nations

Nomination of William W. Treat To Be an Alternate U.S. Representative to the 42d Session of the General Assembly. September 19, 1987

The President today announced his intention to nominate William W. Treat to be an Alternate Representative of the United States of America to the 42d Session of the General Assembly of the United Nations.

Since 1958 Mr. Treat has been chairman of the Bank of Meridian in Hampton, NJ. From 1958 to 1984, he also served as president of the Bank of Meridian.

He graduated from the University of Maine (A.B., 1940), Boston School of Law (J.D., 1946), and Harvard University (M.B.A., 1947). Mr. Treat was born May 23, 1918, in Boston, MA. He is married, has two children, and resides in Hampton, NJ.

United Nations

Statement by the Assistant to the President for Press Relations on President Reagan's Meetings With Secretary-General Perez de Cuellar and President Florin. September 21, 1987

President Reagan met with Secretary-General Perez de Cuellar in his private office for approximately 5 minutes. Accompanying the President on this courtesy call were Ambassador Walters, Secretary Shultz, Chief of Staff Baker, and National Security Adviser Carlucci. The Secretary-General welcomed the President to the United Nations. The President responded that his visit is meant to demonstrate the importance that the United States attaches to the United Nations. He told the Secretary-General that he admired his recent efforts to bring an end to the Iran-Iraq war and thanked him for making a personal trip to those two countries.

The President then moved to the private office of the new President of the U.N. General Assembly Peter Florin of the German Democratic Republic. The President congratulated President Florin on his recent election to this post and asked for impartiality as he assumes important responsibilities.

United Nations

Address Before the 42d Session of the General Assembly. September 21, 1987

Mr. President, Mr. Secretary-General, Ambassador Reed,[1] honored guests, and distinguished delegates, let me first welcome the Secretary-General back from his pilgrimage for peace in the Middle East. Hundreds of thousands have already fallen in the bloody conflict between Iran and Iraq. All men and women of good will pray that the carnage can soon be stopped, and we pray that the Secretary-General proves to be not only a pilgrim but also the architect of a lasting peace between those two nations. Mr. Secretary-General, the United States supports you, and may God guide you in your labors ahead.

Like the Secretary-General, all of us here today are on a kind of pilgrimage. We come from every continent, every race, and most religions to this great hall of hope, where in the name of peace we practice diplomacy. Now, diplomacy, of course, is a subtle and nuanced craft, so much so that it's said that when one of the most wily diplomats of the 19th century passed away other diplomats asked, on reports of his death, "What do you suppose the old fox meant by that?"

But true statesmanship requires not merely skill but something greater, something we call vision—a grasp of the present and of the possibilities of the future. I've come here today to map out for you my own vision of the world's future, one, I believe, that in its essential elements is shared by all Americans.

And I hope those who see things differently will not mind if I say that we in the United States believe that the place to look first for shape of the future is not in continental masses and sealanes, although geography is, obviously, of great importance. Neither is it in national reserves of blood and iron or, on the other hand, of money and industrial capacity, although military and economic strength are also, of course, crucial. We begin with something that is far simpler and yet far more profound: the human heart.

All over the world today, the yearnings of the human heart are redirecting the course of international affairs, putting the lie to the myth of materialism and historical determinism. We have only to open our eyes to see the simple aspirations of ordinary people writ large on the record of our times.

Last year in the Philippines, ordinary people rekindled the spirit of democracy and restored the electoral process. Some said they had performed a miracle, and if so, a similar miracle—a transition to democracy—is taking place in the Republic of Korea. Haiti, too, is making a transition. Some despair when these new, young democracies face conflicts or challenges, but growing pains are normal in democracies. The United States had them, as has every other democracy on Earth.

In Latin America, too, one can hear the voices of freedom echo from the peaks and across the plains. It is the song of ordinary people marching, not in uniforms and not in military file but, rather, one by one, in simple, everyday working clothes, marching to the polls. Ten years ago only a third of the people of Latin America and the Caribbean lived in democracies or in countries that were turning to democracy; today over 90 percent do.

But this worldwide movement to democracy is not the only way in which simple, ordinary people are leading us in this room—we who are said to be the makers of history—leading us into the future. Around the world, new businesses, new economic growth, new technologies are emerging from the workshops of ordinary people with extraordinary dreams.

Here in the United States, entrepreneurial energy—reinvigorated when we cut taxes and regulations—has fueled the current economic expansion. According to scholars

[1] *Peter Florin, Javier Perez de Cuellar de la Guerra, and Joseph V. Reed, Jr., respectively. Ambassador Reed is Under Secretary-General for Political and General Assembly Affairs.*

at the Massachusetts Institute of Technology, three-quarters of the more than 13½ million new jobs that we have created in this country since the beginning of our expansion came from businesses with fewer than 100 employees, businesses started by ordinary people who dared to take a chance. And many of our new high technologies were first developed in the garages of fledgling entrepreneurs. Yet America is not the only, or perhaps even the best, example of the dynamism and dreams that the freeing of markets set free.

In India and China, freer markets for farmers have led to an explosion in production. In Africa, governments are rethinking their policies, and where they are allowing greater economic freedom to farmers, crop production has improved. Meanwhile, in the newly industrialized countries of the Pacific rim, free markets in services and manufacturing as well as agriculture have led to a soaring of growth and standards of living. The ASEAN nations, Japan, Korea, and Taiwan have created the true economic miracle of the last two decades, and in each of them, much of the magic came from ordinary people who succeeded as entrepreneurs.

In Latin America, this same lesson of free markets, greater opportunity, and growth is being studied and acted on. President Sarney of Brazil spoke for many others when he said that "private initiative is the engine of economic development. In Brazil we have learned that every time the state's penetration in the economy increases, our liberty decreases." Yes, policies that release to flight ordinary people's dreams are spreading around the world. From Colombia to Turkey to Indonesia, governments are cutting taxes, reviewing their regulations, and opening opportunities for initiative.

There has been much talk in the halls of this building about the right to development. But more and more the evidence is clear that development is not itself a right. It is the product of rights: the right to own property; the right to buy and sell freely; the right to contract; the right to be free of excessive taxation and regulation, of burdensome government. There have been studies that determined that countries with low tax rates have greater growth than those with high rates.

We're all familiar with the phenomenon of the underground economy. The scholar Hernando de Soto and his colleagues have examined the situation of one country, Peru, and described an economy of the poor that bypasses crushing taxation and stifling regulation. This informal economy, as the researchers call it, is the principal supplier of many goods and services and often the only ladder for upward mobility. In the capital city, it accounts for almost all public transportation and most street markets. And the researchers concluded that, thanks to the informal economy, "the poor can work, travel, and have a roof over their heads." They might have added that, by becoming underground entrepreneurs themselves or by working for them, the poor have become less poor and the nation itself richer.

Those who advocate statist solutions to development should take note: The free market is the other path to development and the one true path. And unlike many other paths, it leads somewhere. It works. So, this is where I believe we can find the map to the world's future: in the hearts of ordinary people, in their hopes for themselves and their children, in their prayers as they lay themselves and their families to rest each night.

These simple people are the giants of the Earth, the true builders of the world and shapers of the centuries to come. And if indeed they triumph, as I believe they will, we will at last know a world of peace and freedom, opportunity and hope, and, yes, of democracy—a world in which the spirit of mankind at last conquers the old, familiar enemies of famine, disease, tyranny, and war.

This is my vision—America's vision. I recognize that some governments represented in this hall have other ideas. Some do not believe in democracy or in political, economic, or religious freedom. Some believe in dictatorship, whether by one man, one party, one class, one race, or one vanguard. To those governments I would only say that the price of oppression is clear. Your economies will fall farther and farther behind. Your people will become more restless. Isn't

it better to listen to the people's hopes now rather than their curses later?

And yet despite our differences, there is one common hope that brought us all to make this common pilgrimage: the hope that mankind will one day beat its swords into plowshares, the hope of peace.

In no place on Earth today is peace more in need of friends than the Middle East. Its people's yearning for peace is growing. The United States will continue to be an active partner in the efforts of the parties to come together to settle their differences and build a just and lasting peace.

And this month marks the beginning of the eighth year of the Iran-Iraq war. Two months ago, the Security Council adopted a mandatory resolution demanding a cease-fire, withdrawal, and negotiations to end the war. The United States fully supports implementation of Resolution 598, as we support the Secretary-General's recent mission. We welcomed Iraq's acceptance of that resolution and remain disappointed at Iran's unwillingness to accept it.

In that regard, I know that the President of Iran will be addressing you tomorrow. I take this opportunity to call upon him clearly and unequivocally to state whether Iran accepts 598 or not. If the answer is positive, it would be a welcome step and major breakthrough. If it is negative, the Council has no choice but rapidly to adopt enforcement measures.

For 40 years the United States has made it clear, its vital interest in the security of the Persian Gulf and the countries that border it. The oil reserves there are of strategic importance to the economies of the free world. We're committed to maintaining the free flow of this oil and to preventing the domination of the region by any hostile power.

We do not seek confrontation or trouble with Iran or anyone else. Our object is—or, objective is now, and has been at every stage, finding a means to end the war with no victor and no vanquished. The increase in our naval presence in the Gulf does not favor one side or the other. It is a response to heightened tensions and followed consultations with our friends in the region. When the tension diminishes, so will our presence.

The United States is gratified by many recent diplomatic developments: the unanimous adoption of Resolution 598, the Arab League's statement at its recent meeting in Tunis, and the Secretary-General's visit. Yet problems remain.

The Soviet Union helped in drafting and reaching an agreement on Resolution 598, but outside the Security Council, the Soviets have acted differently. They called for removal of our Navy from the Gulf, where it has been for 40 years. They made the false accusation that somehow the United States, rather than the war itself, is the source of tension in the Gulf. Well, such statements are not helpful. They divert attention from the challenge facing us all: a just end to the war. The United States hopes the Soviets will join the other members of the Security Council in vigorously seeking an end to a conflict that never should have begun, should have ended long ago, and has become one of the great tragedies of the postwar era.

Elsewhere in the region, we see the continuing Soviet occupation of Afghanistan. After nearly 8 years, a million casualties, nearly 4 million others driven into exile, and more intense fighting than ever, it's time for the Soviet Union to leave. The Afghan people must have the right to determine their own future free of foreign coercion. There is no excuse for prolonging a brutal war or propping up a regime whose days are clearly numbered. That regime offers political proposals that pretend compromise, but really would ensure the perpetuation of the regime's power. Those proposals have failed the only significant test: They have been rejected by the Afghan people. Every day the resistance grows in strength. It is an indispensable party in the quest for a negotiated solution.

The world community must continue to insist on genuine self-determination, prompt and full Soviet withdrawal, and the return of the refugees to their homes in safety and honor. The attempt may be made to pressure a few countries to change their vote this year, but this body, I know, will vote overwhelmingly, as every year before, for Afghan independence and freedom.

We have noted General Secretary Gorbachev's statement of readiness to withdraw. In April I asked the Soviet Union to set a

date this year when this withdrawal would begin. I repeat that request now in this forum for peace. I pledge that, once the Soviet Union shows convincingly that it's ready for a genuine political settlement, the United States is ready to be helpful.

Let me add one final note on this matter. Pakistan, in the face of enormous pressure and intimidation, has given sanctuary to Afghan refugees. We salute the courage of Pakistan and the Pakistani people. They deserve strong support from all of us.

Another regional conflict, we all know, is taking place in Central America, in Nicaragua. To the Sandinista delegation here today I say: Your people know the true nature of your regime. They have seen their liberties suppressed. They have seen the promises of 1979 go unfulfilled. They have seen their real wages and personal income fall by half—yes, half—since 1979, while your party elite live lives of privilege and luxury.

This is why, despite a billion dollars in Soviet-bloc aid last year alone, despite the largest and best equipped army in Central America, you face a popular revolution at home. It is why the democratic resistance is able to operate freely deep in your heartland. But this revolution should come as no surprise to you; it is only the revolution you promised the people and that you then betrayed.

The goal of United States policy toward Nicaragua is simple. It is the goal of the Nicaraguan people and the freedom fighters, as well. It is democracy—real, free, pluralistic, constitutional democracy.

Understand this: We will not, and the world community will not, accept phony democratization designed to mask the perpetuation of dictatorship. In this 200th year of our own Constitution, we know that real democracy depends on the safeguards of an institutional structure that prevents a concentration of power. It is that which makes rights secure. The temporary relaxation of controls, which can later be tightened, is not democratization.

And, again, to the Sandinistas, I say: We continue to hope that Nicaragua will become part of the genuine democratic transformation that we have seen throughout Central America in this decade. We applaud the principles embodied in the Guatemala agreement, which links the security of the Central American democracies to democratic reform in Nicaragua.

Now is the time for you to shut down the military machine that threatens your neighbors and assaults your own people. You must end your stranglehold on internal political activity. You must hold free and fair national elections. The media must be truly free, not censored or intimidated or crippled by indirect measures, like the denial of newsprint or threats against journalists or their families. Exiles must be allowed to return to minister, to live, to work, and to organize politically.

Then, when persecution of religion has ended and the jails no longer contain political prisoners, national reconciliation and democracy will be possible. Unless this happens, democratization will be a fraud. And until it happens, we will press for true democracy by supporting those fighting for it.

Freedom in Nicaragua or Angola or Afghanistan or Cambodia or Eastern Europe or South Africa or anyplace else on the globe is not just an internal matter. Some time ago the Czech dissident writer Vaclav Havel warned the world that "respect for human rights is the fundamental condition and the sole genuine guarantee of true peace." And Andrei Sakharov in his Nobel lecture said: "I am convinced that international confidence, mutual understanding, disarmament, and international security are inconceivable without an open society with freedom of information, freedom of conscience, the right to publish, and the right to travel and choose the country in which one wishes to live." Freedom serves peace; the quest for peace must serve the cause of freedom. Patient diplomacy can contribute to a world in which both can flourish.

We're heartened by new prospects for improvement in East-West and particularly U.S.-Soviet relations. Last week Soviet Foreign Minister Shevardnadze visited Washington for talks with me and with the Secretary of State, Shultz. We discussed the full range of issues, including my longstanding efforts to achieve, for the first time, deep reductions in U.S. and Soviet nuclear arms. It was 6 years ago, for example, that I proposed the zero-option for U.S. and Soviet longer range, intermediate-range nuclear

missiles. I'm pleased that we have now agreed in principle to a truly historic treaty that will eliminate an entire class of U.S. and Soviet nuclear weapons.

We also agreed to intensify our diplomatic efforts in all areas of mutual interest. Toward that end, Secretary Shultz and the Foreign Minister will meet again a month from now in Moscow, and I will meet again with General Secretary Gorbachev later this fall.

We continue to have our differences and probably always will. But that puts a special responsibility on us to find ways—realistic ways—to bring greater stability to our competition and to show the world a constructive example of the value of communication and of the possibility of peaceful solutions to political problems.

And here let me add that we seek, through our Strategic Defense Initiative, to find a way to keep peace through relying on defense, not offense, for deterrence and for eventually rendering ballistic missiles obsolete. SDI has greatly enhanced the prospects for real arms reduction. It is a crucial part of our efforts to ensure a safer world and a more stable strategic balance.

We will continue to pursue the goal of arms reduction, particularly the goal that the General Secretary and I agreed upon: a 50-percent reduction in our respective strategic nuclear arms. We will continue to press the Soviets for more constructive conduct in the settling of regional conflicts. We look to the Soviets to honor the Helsinki accords. We look for greater freedom for the Soviet peoples within their country, more people-to-people exchanges with our country, and Soviet recognition in practice of the right of freedom of movement.

We look forward to a time when things we now regard as sources of friction and even danger can become examples of cooperation between ourselves and the Soviet Union. For instance, I have proposed a collaboration to reduce the barriers between East and West in Berlin and, more broadly, in Europe as a whole. Let us work together for a Europe in which force of the threat—or, force, whether in the form of walls or of guns, is no longer an obstacle to free choice by individuals and whole nations. I have also called for more openness in the flow of information from the Soviet Union about its military forces, policies, and programs so that our negotiations about arms reductions can proceed with greater confidence.

We hear much about changes in the Soviet Union. We're intensely interested in these changes. We hear the word *glasnost,* which is translated as "openness" in English. "Openness" is a broad term. It means the free, unfettered flow of information, ideas, and people. It means political and intellectual liberty in all its dimensions. We hope, for the sake of the peoples of the U.S.S.R., that such changes will come. And we hope, for the sake of peace, that it will include a foreign policy that respects the freedom and independence of other peoples.

No place should be better suited for discussions of peace than this hall. The first Secretary-General, Trygve Lie, said of the United Nations: "With the danger of fire, and in the absence of an organized fire department, it is only common sense for the neighbors to join in setting up their own fire brigades." Joining together to drown the flames of war—this, together with a Universal Declaration of Human Rights, was the founding ideal of the United Nations. It is our continuing challenge to ensure that the U.N. lives up to these hopes.

As the Secretary-General noted some time ago, the risk of anarchy in the world has increased, because the fundamental rules of the U.N. Charter have been violated. The General Assembly has repeatedly acknowledged this with regard to the occupation of Afghanistan. The charter has a concrete practical meaning today, because it touches on all the dimensions of human aspiration that I mentioned earlier—the yearning for democracy and freedom, for global peace, and for prosperity.

This is why we must protect the Universal Declaration of Human Rights from being debased as it was through the infamous "Zionism is Racism" resolution. We cannot permit attempts to control the media and promote censorship under the ruse of a so-called "New World Information Order." We must work against efforts to introduce contentious and nonrelevant issues into the work of the specialized and technical agencies, where we seek progress on urgent problems—from terrorism to drug traffick-

ing to nuclear proliferation—which threaten us all. Such efforts corrupt the charter and weaken this organization.

There have been important administrative and budget reforms. They have helped. The United States is committed to restoring its contribution as reforms progress. But there is still much to do. The United Nations was built on great dreams and great ideals. Sometimes it has strayed. It is time for it to come home.

It was Dag Hammarskjold who said: "The end of all political effort must be the well-being of the individual in a life of safety and freedom." Well, should this not be our credo in the years ahead?

I have spoken today of a vision and the obstacles to its realization. More than a century ago a young Frenchman, Alexis de Tocqueville, visited America. After that visit he predicted that the two great powers of the future world would be, on one hand, the United States, which would be built, as he said, "by the plowshare," and, on the other, Russia, which would go forward, again, as he said, "by the sword." Yet need it be so? Cannot swords be turned to plowshares? Can we and all nations not live in peace?

In our obsession with antagonisms of the moment, we often forget how much unites all the members of humanity. Perhaps we need some outside, universal threat to make us recognize this common bond. I occasionally think how quickly our differences worldwide would vanish if we were facing an alien threat from outside this world. And yet, I ask you, is not an alien force already among us? What could be more alien to the universal aspirations of our peoples than war and the threat of war?

Two centuries ago, in a hall much smaller than this one, in Philadelphia, Americans met to draft a Constitution. In the course of their debates, one of them said that the new government, if it was to rise high, must be built on the broadest base: the will and consent of the people. And so it was, and so it has been.

My message today is that the dreams of ordinary people reach to astonishing heights. If we diplomatic pilgrims are to achieve equal altitudes, we must build all we do on the full breadth of humanity's will and consent and the full expanse of the human heart.

Thank you, and God bless you all.

Note: The President spoke at 11:02 a.m. in the General Assembly Hall at the United Nations in New York City.

At the conclusion of his address, the President met with Secretary-General Javier Perez de Cuellar de la Guerra in the Indonesian Lounge at the United Nations.

President Reagan then went to the U.S. Mission for a meeting with allied Foreign Ministers and bilateral meetings with Prime Minister Mohammed Khan Junejo of Pakistan, Prime Minister Yasuhiro Nakasone of Japan, and President Vinicio Cerezo Arévalo of Guatemala. Following the meetings, President Reagan returned to Washington, DC.

United States Air Strike in the Persian Gulf

Statement by the Assistant to the President for Press Relations. September 21, 1987

United States Forces took defensive action in the Persian Gulf Monday evening, when an Iranian landing craft was discovered laying mines in international waters 50 miles northeast of Bahrain. We have previously communicated with the Iranian Government the way in which we would respond to such provocative acts which present an immediate risk to United States ships and to all ships. United States Forces acted in a defensive manner and in accordance with existing rules of engagement.

Foreign Claims Settlement Commission of the United States

Nomination of Frank H. Conway To Be a Member. September 22, 1987

The President today announced his intention to nominate Frank H. Conway to be a member of the Foreign Claims Settlement Commission of the United States for the term expiring November 30, 1990. This is a reappointment.

Since 1987 Mr. Conway has been a sole practitioner of law in Wellesley, MA. Prior to this he was with the law firm of Jameson, Locke and Fullerton, 1980–1987.

Mr. Conway graduated from Providence College (Ph.B., 1935) and Boston University School of Law (J.D., 1952). He was born May 2, 1913, in Providence, RI. Mr. Conway served in the U.S. Army, 1942–1945. He is married, has four children, and resides in Wellesley, MA.

Department of the Treasury

Nomination of Cynthia Jeanne Grassby Baker To Be Superintendent of the U.S. Mint at Denver. September 22, 1987

The President today announced his intention to nominate Cynthia Jeanne Grassby Baker to be Superintendent of the Mint of the United States at Denver. She would succeed Nora Walsh Hussey.

Since 1985 Mrs. Baker has been a student in the M.B.A. program at the University of Colorado. She has also been Chairman of the Advisory Council on Historic Preservation, 1985–present. Prior to this she was deputy to the chairman for private partnership, National Endowment for the Arts, 1982–1985.

Mrs. Baker graduated from Colorado University (B.A., 1985). She was born June 25, 1946, in Denver, CO. Mrs. Baker is married and resides in Denver, CO.

Fire Prevention Week, 1987

Proclamation 5705. September 22, 1987

By the President of the United States of America

A Proclamation

Fire is most often preventable, but this past year it killed almost 6,000 Americans, injured 300,000, and caused more than $9.5 billion in direct property losses. Fire often affects the very young and the very old, and more than 80 percent of fires take place in the home. Such facts are exactly why our Nation observes a special week every autumn to remind ourselves that fire prevention and safety messages are vitally important to each of us and to our families.

This year the National Fire Protection Association, the originator of Fire Prevention Week, is encouraging families to be safe and to design and practice a home fire escape plan. Private sector initiatives in partnership with the public sector are complementing this effort. All who can should join with government officials at every level, fire service personnel, citizens' groups, and private citizens to develop and carry out public awareness and education programs about fires. Campaigns being formulated will reach high-risk populations, including inner city and rural residents, children, and the elderly.

On Sunday, October 11, 1987, at the National Fallen Fire Fighters Memorial Service at the National Fire Academy in Emmitsburg, Maryland, the tribute of a proud and grateful Nation will be paid to the 114 American fire fighters who died in the line of duty in 1986. Let us honor these heroes in prayerful remembrance.

Now, Therefore, I, Ronald Reagan, President of the United States of America, by virtue of the authority vested in me by the Constitution and laws of the United States, do hereby proclaim the week beginning October 4, 1987, as Fire Prevention Week, and I call upon the people of the United States to plan and actively participate in fire prevention activities during this week and throughout the year.

In Witness Whereof, I have hereunto set my hand this twenty-second day of September, in the year of our Lord nineteen hundred and eighty-seven, and of the Independence of the United States of America the two hundred and twelfth.

Ronald Reagan

[*Filed with the Office of the Federal Register, 4:13 p.m., September 22, 1987*]