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one or like *Filartiga*.²¹ As Justice Frank-
furter said in *Romero v. International Ter-
minal Operating Co.*, 358 U.S. 354, 379; 79
S.Ct. 468, 483, 3 L.Ed.2d 368 (1959):

The considerations of history and policy
which investigation has illuminated are
powerfully reinforced by the deeply felt
and traditional reluctance of this Court to
expand the jurisdiction of the federal
courts through a broad reading of juris-
dictional statutes. A reluctance which
must be even more forcefully felt when
the expansion is proposed, for the first
time, eighty-three years after the juris-
diction has been conferred.

In the case of section 1350, the period be-
fore the expansion was proposed is more
than twice eighty-three years.

Though it is not necessary to the decision
of this case, it may be well to suggest what
section 1350 may have been enacted to ac-
complish, if only to meet the charge that
my interpretation is not plausible because it
would drain the statute of meaning. The
phrase "law of nations" has meant various
things over time. It is important to re-
member that in 1789 there was no concept
of international human rights; neither was
there, under the traditional version of cus-
tomary international law, any recognition
of a right of private parties to recover.
See, e.g., Hassan, *International Human
Rights and the Alien Tort Statute: Past
and Future*, in *Human Rights Symposium:
Further Commentary*, 5 Hous.J.Int'l L. 131,
139 (1982); Oliver, *A Brief Replication:
The Big Picture and Mr. Schneebaum's Re-
ply*, in *Human Rights Symposium: Further
Commentary*, 5 Hous.J.Int'l L. 151, 153
(1982); 1 L. Oppenheim, *International Law*
§ 292 (2d ed. 1912), quoted in Hassan, *Pa-
nacea or Mirage? Domestic Enforcement
of International Human Rights Law:
Recent Cases*, 4 Hous.J.Int'l L. 13, 26-27
(1981). See also Hassan, *supra*, 4 Hous.J.

21. In nearly two hundred years, jurisdiction
has been predicated successfully under section
1350 only three times. *Filartiga v. Pena-Irala*,
630 F.2d 876 (2d Cir.1980) (jurisdiction over
allegation of official torture not ratified by offi-
cial's state); *Adra v. Clift*, 195 F.Supp. 857
(D.Md.1961) (child custody dispute between
two aliens; wrongful withholding of custody is

Int'l L. at 19-20. Clearly, cases like this
and *Filartiga* were beyond the framers' con-
templation. *Id.* at 24-26. That problem is
not avoided by observing that the law of
nations evolves. It is one thing for a case
like *The Paquete Habana* to find that a rule
has evolved so that the United States may
not seize coastal fishing boats of a nation
with which we are at war. It is another
thing entirely, a difference in degree so
enormous as to be a difference in kind, to
find that a rule has evolved against torture
by government so that our courts must sit
in judgment of the conduct of foreign offi-
cials in their own countries with respect to
their own citizens. The latter assertion
raises prospects of judicial interference
with foreign affairs that the former does
not. A different question might be
presented if section 1350 had been adopted
by a modern Congress that made clear its
desire that federal courts police the behav-
ior of foreign individuals and governments.
But section 1350 does not embody a legisla-
tive judgment that is either current or clear
and the statute must be read with that in
mind.

What kinds of alien tort actions, then,
might the Congress of 1789 have meant to
bring into federal courts? According to
Blackstone, a writer certainly familiar to
colonial lawyers, "the principal offences
against the law of nations, animadverted on
as such by the municipal laws of England,
[were] of three kinds; 1. Violation of safe-
conducts; 2. Infringement of the rights of
embassadors; and 3. Piracy." 4 W. Black-
stone, *Commentaries* 68, 72, quoted in 1
W.W. Crosskey, *Politics and Constitution in
the History of the United States* 459 (1953)
("Crosskey"). One might suppose that
these were the kinds of offenses for which
Congress wished to provide tort jurisdiction

a tort, and defendant's falsification of child's
passport to procure custody violated law of
nations); *Bolchos v. Darrel*, 3 F.Cas. 810 (D.S.
C.1795) (No. 1607) (suit for restitution of three
slaves who were on board a Spanish ship
seized as a prize of war; treaty with France
superseded law of nations; 1350 alternative
basis of jurisdiction).

for suits by aliens in order to avoid conflicts with other nations.²²

The Constitution, of course, gave particular attention to piracy and to the rights of ambassadors. Article I, section 8, links piracy and the law of nations by granting Congress power "to define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations." And Article III, section 2, gives the Supreme Court original jurisdiction over "all Cases affecting Ambassadors, other Public Ministers and Consuls." Section 9 of the Judiciary Act of 1789 (now section 1350) gave jurisdiction to district courts, concurrent with that of state courts and circuit

courts, over tort suits by aliens for violations of the law of nations. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76-77. This may well have envisaged a tort like piracy (a citizen could use diversity jurisdiction).²³

The idea that section 9 of the original Judiciary Act, now section 1350, was concerned with the rights of ambassadors (and other foreign representatives) is suggested by another provision of the statutes. Section 13 gave the Supreme Court such original and exclusive jurisdiction over all suits *against* ambassadors "as a court of law can have or exercise consistently with the law of nations" (emphasis added). Judiciary

22. That Blackstone refers to these three classes of offenses as not only violations of the law of nations, but censured as such by the municipal law of England does not require the conclusion that in America these three types of violations did not carry with them a private cause of action for which section 1350 gave the necessary jurisdiction to federal courts. The former colonies picked up the law of England as their own. As stated in the Preface to the American Edition of Blackstone: "The common law is as much the birth-right of an American as of an Englishman. It is our law, as well as the law of England, it having been brought thence, and established here as far forth as it was found fitted to our institutions and the circumstances of the country." W. Blackstone, *Commentaries* vii (1854) (emphasis in original). English statutes, which were, of course, part of the municipal law, were also adopted as part of American common law, to the extent that their "collective and equitable principles had become so interwoven with the common law, as to be scarcely distinguishable therefrom." *Fitch v. Brainerd*, 2 Conn. 163 (1805), quoted in Jones, *The Reception of the Common Law in the United States* in H. Jones, J. Kernochan, & A. Murphy, *Legal Method: Cases and Text Materials* (1980). And at least some offenses against the law of nations, such as violations of safe-conducts, resulted not only in criminal punishment but in restitution for the alien out of the offender's effects. W. Blackstone, *Commentaries* 69.

23. The crime of piracy was often defined as piracy *jure gentium*—piracy by the law of nations, as distinguished from piracy by municipal law. E.g., 2 J. Moore, *A Digest of International Law* § 311, at 951-52 (1906); Dickinson, *Is the Crime of Piracy Obsolete?*, 38 Harv. L. Rev. 334, 335-36 (1925) ("The Crime of Piracy"). The crime of piracy was thought to be sufficiently defined by the law of nations. *The Federalist* No. 42 (J. Madison) ("The definition of piracies might, perhaps, without inconveni-

ency, be left to the law of nations; though a legislative definition of them is found in most municipal codes. A definition of felonies on the high seas, is evidently requisite."). Although the Congress, in defining piracy in the Federal Crimes Act of 1790 confused the concepts of piracy defined by the law of nations and piracy defined by municipal law, Act of Apr. 30, 1790, ch. 9, § 8, 1 Stat. 112, 113-14; see *The Crime of Piracy* at 342-49, Congress later changed the definition in reaction to the very first Supreme Court case construing section 8, *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 4 L.Ed. 471 (1818). The new statute punished "the crime of piracy, as defined by the law of nations." Act of Mar. 3, 1819, ch. 77, § 5, 3 Stat. 510, 513-14. See *The Crime of Piracy* at 342-49. Thus, Justice Story, in *United States v. Smith*, 18 U.S. (5 Wheat.) 71, 75, 5 L.Ed. 57 (1820), wrote that "whether we advert to writers on the common law, or the maritime law, or the law of nations, we shall find, that they universally treat of piracy as an offence against the law of nations, and that its true definition by that law is robbery upon the sea." Furthermore, in a celebrated footnote of more than eight and one-half pages, Justice Story showed that "piracy is defined by the law of nations." *Id.* at 75-84, 5 L.Ed. 57.

Opening federal courts to tort suits based on piracy would not, apparently, have involved courts in foreign relations since piracy was, as stated in *United States v. Smith*, merely robbery on the high seas. It could not be committed by nations, or by anyone acting for reasons other than for plunder. According to Hackworth, "when the acts in question are committed from purely political motive, it is hardly possible to regard them as acts of piracy involving all the important consequences which follow upon the commission of that crime." G. Hackworth, *Digest of International Law* § 203, at 681 (1941).

Act of 1789, ch. 20, § 13, 1 Stat. 73, 80-81. That section, however, gave the Court original but not exclusive jurisdiction of "all suits brought by ambassadors, or other public ministers, or in which a consul, or vice consul, shall be a party" (emphasis added). This appears to tie in to the grant of tort jurisdiction for suits by aliens in what is now section 1350. (Section 1350's use of the broader term "aliens" may merely indicate that the torts of piracy and violations of safe-conduct, which would involve plaintiffs other than ambassadors, were included.)

An intent to protect the rights of ambassadors is also plausible historically. According to Crosskey, the Convention, in assigning to Congress the power to "define and punish . . . Offences against the Law of Nations" had in mind, aside from piracy, the rights of ambassadors. Crosskey at 459. He draws this conclusion from the notoriety of a case discussed by both Lord Mansfield, of the Court of King's Bench, and by Blackstone. An ambassador of the Czar had been arrested by his English creditors, and, was, in the process "somewhat roughed up before the arrest was accomplished." *Id.* He demanded of the Queen that his assailants be subjected to "severe 'corporal Punishment.'" *Id.* at 460. English law at the time, however, did not permit punishment severe enough to satisfy the offended ambassador, who protested to Czar Peter. The Czar demanded that the offenders be put to death. As a result, the law was changed, giving the Chief Justice of Queen's Bench, among other members of the "executive" branch, the power to try any offenses against ambassadors, and the Czar was placated. *Id.* at 461-62. This "slightly ridiculous affair," according to Crosskey, was well-known because of repeated comment upon it. *Id.* at 462. If this was indeed the incident the Convention considered in allocating to Congress the power to "define and punish . . . Offences against the Law of Nations," it may be that the First Congress, sensitive to the international ramifications of denying ambassadors redress, enacted section 1350 to give ambassadors the option of bringing tort actions in federal courts as well as in state courts.

These thoughts as to the possible original intention underlying section 1350 are admittedly speculative, and those who enacted the law may well have had additional torts in mind. I offer these possibilities merely to show that the statute could have served a useful purpose even if the larger tasks assigned it by *Filartiga* and Judge Edwards are rejected. Moreover, if the offenses against the law of nations listed by Blackstone constituted the torts the framers of section 1350 had in mind, then the creation of federal jurisdiction for the redress of aliens' grievances would tend to ease rather than inflame relations with foreign nations. That result comports with Hamilton's expressed desire. Whether evidence so slim as to the intended office of the statute provides materials from which courts today may properly make substantive law is a jurisprudential issue with which, given the grounds upon which I would place our decision, I need not grapple today. But when courts go beyond the area in which there is any historical evidence, when they create the substantive rules for topics such as that taken up in *Filartiga* or in Judge Edwards' formulations, then law is made with no legislative guidance whatever. When that is so, it will not do to insist that the judge's duty is to construe the statute in order not to flout the will of Congress. On these topics, we have, at the moment, no evidence what the intention of Congress was. When courts lack such evidence, to "construe" is to legislate, to act in the dark, and hence to do many things that, it is virtually certain, Congress did not intend. Any correspondence between the will of Congress in 1789 and the decisions of the courts in 1984 can then be only accidental. Section 1350 can probably be adequately understood only in the context of the premises and assumptions of a legal culture that no longer exists. Perhaps historical research that is beyond the capacities of appellate judges will lift the darkness that now envelops this topic, but that has not yet occurred, and we should not attempt to anticipate what may or may not become visible.

Congress' understanding of the "law of nations" in 1789 is relevant to a consideration of whether Congress, by enacting section 1350, intended to open the federal courts to the vindication of the violation of any right recognized by international law. Examining the meaning of the "law of nations" at the time does not, contrary to my colleague's charges, "avoid the dictates of *The Paquete Habana*" and "limit the 'law of nations' to its 18th Century definition." Edwards' op. at 29. The substantive rules of international law may evolve and perhaps courts may apply those new rules, but that does not solve the problem of the existence of a cause of action. If plaintiffs were explicitly provided with a cause of action by the law of nations, as it is currently understood, this court might—subject to considerations of justiciability—be required by section 1350 to entertain their claims. But, as discussed below, see *infra* pp. 816-819, international law today does not provide plaintiffs with a cause of action.²⁴

Recognition of suits presenting serious problems of interference with foreign relations would conflict with the primary purpose of the adoption of the law of nations by federal law—to promote America's peaceful relations with other nations. See *The Federalist* No. 80 (A. Hamilton); *The Federalist* No. 83 (A. Hamilton). Judge Edwards cites this rationale as a reason for reading section 1350 as creating a cause of action for private parties. The inference from that rationale seems to me, however, to run in precisely the opposite direction. Adjudication of international disputes of this sort in federal courts, disputes over international violence occurring abroad, would be far more likely to exacerbate tensions with other nations than to promote peaceful relations.

Under the possible meaning I have sketched, section 1350's current function would be quite modest, unless a modern statute, treaty, or executive agreement pro-

vided a private cause of action for violations of new international norms which do not themselves contemplate private enforcement. Then, at least, we would have a current political judgment about the role appropriate for courts in an area of considerable international sensitivity.

V.

Whether current international law itself gives appellants a cause of action requires more extended discussion. Appellants' claim, in Count II of their complaint, is that appellees have committed the "torts of terror, torture, hostage-taking and genocide," Brief for Appellants at 29, in violation of various customary principles of international law. Such principles become law by virtue of the "general assent of civilized nations." *The Paquete Habana*, 175 U.S. at 694, 20 S.Ct. at 297. Unlike treaties and statutes, such law is not authoritatively pronounced by promulgation in a written document but must be found in the "customs and usages of civilized nations" as evidenced by the works of "jurists and commentators." *Id.* at 700, 20 S.Ct. at 299; see Statute of the International Court of Justice, art. 38, 59 Stat. 1055 (1945), T.S. No. 993; *Restatement of the Foreign Relations Law of the United States (Revised)* §§ 102-103, at 24-38 (Tent. Draft No. 1, 1980). Consequently, any cause of action that might exist, like the precise meaning of the customary principles themselves, must be inferred from the sources that are evidence of and attempt to formulate the legal rules. The district court found, and appellants have not argued to the contrary, that none of the documents appellants have put forth as stating the international legal principles on which they rely expressly state that individuals can bring suit in municipal courts to enforce the specified rights. See 517 F.Supp. at 548-49. Moreover, we have been pointed to nothing in their language,

long recognized the right of private enforcement. That, as will be shown, is not universally true of international law and most particularly is not true of the area in which this case falls.

24. Nor is there any significance to the fact that in *The Paquete Habana* the court assumed a private cause of action to exist. That case involved a branch of the law of nations—prize jurisdiction under maritime law—which had

structure, or circumstances of promulgation that suggests that any of those documents should be read as implicitly declaring that an individual should be able to sue in municipal courts to enforce the specified rights. In any event, there is no need to review those documents and their origins in further detail, for, as a general rule, international law does not provide a private right of action, and an exception to that rule would have to be demonstrated by clear evidence that civilized nations had generally given their assent to the exception. Hassan, *supra*, 4 Hous.J.Int'l L. at 26-27.

International law typically does not authorize individuals to vindicate rights by bringing actions in either international or municipal tribunals. "Like a general treaty, the law of nations has been held not to be self-executing so as to vest a plaintiff with individual legal rights." *Dreyfus v. Von Finck*, 534 F.2d at 31 (quoting *Pauling v. McElroy*, 164 F.Supp. at 393). "[T]he usual method for an individual to seek relief is to exhaust local remedies and then repair to the executive authorities of his own state to persuade them to champion his claim in diplomacy or before an international tribunal." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. at 422-23, 84 S.Ct. at 937-38.

This general relegation of individuals to a derivative role in the vindication of their legal rights stems from "[t]he traditional view of international law . . . that it establishes substantive principles for determining whether one country has wronged another." 376 U.S. at 422, 84 S.Ct. at 937. One scholar explained the primary role of states in international law as follows:

Since the Law of Nations is based on the common consent of individual States, States are the principal subjects of International Law. This means that the Law of Nations is primarily a law for the

international conduct of States, and not of their citizens. As a rule, the subjects of the rights and duties arising from the Law of Nations are States solely and exclusively.

1 L. Oppenheim, *International Law: A Treatise* 19 (H. Lauterpacht 8th ed. 1955). Even statements of individuals' rights or norms of individual conduct that have earned the universal assent of civilized nations do not become principles of international law unless they are "used by . . . states for their common good and/or in dealings *inter se*." *Lopes v. Reederei Richard Schroder*, 225 F.Supp. 292, 297 (E.D.Pa. 1963) (footnote omitted). See *Cohen v. Hartman*, 634 F.2d 318, 319 (5th Cir.1981) ("The standards by which nations regulate their dealings with one another *inter se* constitute the 'law of nations.'"); *IIT v. Vencap, Ltd.*, 519 F.2d at 1015 (ten commandments not international law for this reason).²⁵

If it is in large part because "the Law of Nations is primarily a law between States," 1 L. Oppenheim, *supra*, at 636, that international law generally relies on an enforcement scheme in which individuals have no direct role, that reliance also reflects recognition of some other important characteristics of international law that distinguish it from municipal law. Chief among these is the limited role of law in the international realm. International law plays a much less pervasive role in the ordering of states' conduct within the international community than does municipal law in the ordering of individuals' conduct within nations. Unlike our nation, for example, the international community could not plausibly be described as governed by laws rather than men. "[I]nternational legal disputes are not as separable from politics as are domestic legal disputes. . . ." *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. at 775, 92

that protection: "if individuals who possess nationality are wronged abroad, it is, as a rule, their home State only and exclusively which has a right to ask for redress, and these individuals themselves have no such right." *Id.* (footnote omitted).

25. Further evidence that "the Law of Nations is primarily a law between States" is the key role played by nationality in the availability to individuals of international legal protection. 1 L. Oppenheim, *supra*, at 640. Even nationals however, cannot themselves generally invoke

S.Ct. at 1816 (Powell, J., concurring in the judgment).

International law, unlike municipal law (at least in the United States), is not widely regarded as a tool of first or frequent resort and as the last word in the legitimate resolution of conflicts. Nations rely chiefly on diplomacy and other political tools in their dealings with each other, and these means are frequently incompatible with declarations of legal rights. Diplomacy demands great flexibility and focuses primarily on the future rather than on the past, often requiring states to refrain, for the sake of their future relations, from pronouncing judgment on past conduct. *Cf. International Association of Machinists & Aerospace Workers v. OPEC*, 649 F.2d 1354, 1358 (9th Cir.1981), cert. denied, 454 U.S. 1163, 102 S.Ct. 1036, 71 L.Ed.2d 319 (1982). Since states adopt international law to improve their relations with each other, it is hardly surprising in the current world that they should generally retain for themselves control over the ability to invoke it. Nor is it surprising that international law is invoked less often to secure authoritative adjudications than it is to bolster negotiating positions or to acquire public support for foreign-relations policies. "By and large, nations have resisted third-party settlement of their disputes and adjudicative techniques have played a very limited role in their relations." Bilder, *Some Limitations of Adjudication as an International Dispute Settlement Technique*, 23 Va.J.Int'l L. 1, 1 (1982) (footnote omitted). One consequence is that international law has not been extensively developed through judicial decisions. See L. Henkin, R. Pugh, O. Schachter & H. Smit, *supra*, at 88 ("The strongly political character of many international issues accounts for the relative paucity of judicial decisions in contemporary international law.").

This remains true even as international law has become increasingly concerned with individual rights. Some of the rights specified in the documents relied upon by appellants as stating principles of international law recognizing individual rights are clearly not expected to be judicially enforced

throughout the world. *E.g.*, Universal Declaration of Human Rights, G.A.Res. 217, 3 U.N.GAOR, U.N.Doc. 1/777 (1948) (right to life, liberty, and security of person; right to freedom from arbitrary detention; right to leave country; right to practice religion; right to speak and assemble; right to freely elected government); International Covenant on Civil and Political Rights, Annex to G.A.Res. 2200, 21 U.N.GAOR Supp. (No. 16) at 52, U.N.Doc. A/6316 (1966) (similar list of rights); American Convention on Human Rights, Nov. 22, 1969, O.A.S. Official Records OEA/Ser. K/XVI/1.1, Doc. 65, Rev. 1, Corr. 1, reprinted in 9 I.L.M. 101 (1970), 65 Am.J.Int'l L. 679 (1971) (similar list of rights). Some of the key documents are meant to be statements of ideals and aspirations only; they are, in short, merely precatory. See 1 L. Oppenheim, *supra*, at 745; 19 Dep't St.Bull. 751 (1948) (Universal Declaration on Human Rights "is not a treaty; it is not an international agreement. It is not and does not purport to be a statement of law or of legal obligation.") (remarks of U.S. representative to U.N. General Assembly) (quoted in L. Henkin, R. Pugh, O. Schachter & H. Smit, *supra*, at 808). Some define rights at so high a level of generality or in terms so dependent for their meaning on particular social, economic, and political circumstances that they cannot be construed and applied by courts acting in a traditional adjudicatory manner. *E.g.*, Universal Declaration of Human Rights, *supra* (rights to work, to just compensation, to leisure, to adequate standard of living, to education, to participation in cultural life); Declaration of the Rights of the Child, G.A.Res. 1386, 14 U.N.GAOR Supp. (No. 16) at 19, U.N.Doc. A/4354 (1959) (rights to opportunity to develop in normal manner, to grow up in atmosphere of affection and of moral and material security, to develop abilities, judgment and sense of moral and social responsibility, and to play). Some expressly oblige states to enact implementing legislation, thus impliedly denying a private cause of action. *E.g.*, International Covenant on Civil and

Political Rights, art. 2, *supra*;²⁶ American Convention on Human Rights, art. 2, *supra*.

It may be doubted that courts should understand documents of this sort as having been assented to as law by all civilized nations since enforcement of the principles enunciated would revolutionize most societies. For that reason, among others, courts should hesitate long before finding violations of a "law of nations" evidenced primarily by the resolutions and declarations of multinational bodies. See Note, *Custom and General Principles as Sources of International Law in American Federal Courts*, 82 Colum.L.Rev. 751, 772-74, 780-83 (1982). In any event, many of the rights they declare clearly were not intended for judicial enforcement at the behest of individuals. The express provision in the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 25, 213 U.N.T.S. 221, E.T.S. 5, of an international tribunal to which individuals may bring claims, thus evidencing states' ability to provide private rights of action when they wish to do so, is an extraordinary exception that highlights the general absence of individual-complaint procedures. Even that exception, moreover, is a far cry from the authorization of ordinary municipal-court enforcement. Current international human rights law, in whatever sense it may be called "law," is doubtless growing. But it remains true that even that

branch of international law does not today generally provide a private right of action.

Appellants, therefore, are not granted a private right of action to bring this lawsuit either by a specific international legal right or impliedly by the whole or parts of international law.

VI.

In *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir.1980), the Second Circuit, which did not address the issue of the existence of a cause of action, held that section 1350 afforded jurisdiction over a claim brought by Paraguayan citizens against a former Paraguayan official. The plaintiffs, a father and daughter, alleged that the defendant had tortured his son, her brother, in violation of international law's proscription of official torture. To highlight what I believe should be the basis for our holding, it is worth pointing out several significant differences between this case and *Filartiga*.

First, unlike the defendants in this case, the defendant in *Filartiga* was a state official acting in his official capacity. Second, the actions of the defendant in *Filartiga* were in violation of the constitution and laws of his state and were "wholly unratified by that nation's government." 630 F.2d at 889. Third, the international law rule invoked in *Filartiga* was the proscription of official torture, a principle that is embodied in numerous international conventions and declarations, that is "clear and

It is worth noting that the Human Rights Committee established by article 41 of the Covenant provides for complaints about a state's conduct to be brought only by another state and then only if the "defendant" state consents to the Committee's jurisdiction. An Optional Protocol, Annex to G.A.Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), provides for individuals' complaints. As of 1980, it had been signed by thirty states; the United States is not among them. See L. Henkin, R. Pugh, O. Schachter & H. Smit, *Basic Documents Supplement to International Law* 336 (1980). See generally Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 Am.U.L.Rev. 1, 21-23 (1982).

26. The International Covenant on Civil and Political Rights directs states to provide a forum for private vindication of rights under the Covenant. That provision, however, should not be taken to suggest the Covenant grants or recognizes a private right of action in municipal courts in a case like this. First, the Covenant directs states to provide forums only for the vindication of rights against themselves, not for the vindication of rights against other states. It is only the latter that raises all the political, foreign relations problems that lie behind international law's general rule against private causes of action; thus, even if the Covenant suggests recognition of a private cause of action for the former, it does not do so for the latter. Second, the Covenant does not itself say individuals can sue; rather, it leaves to states the fulfillment of an obligation to create private rights of action.

unambiguous" in its application to the facts in *Filartiga*, *id.* at 884, and about which there is universal agreement "in the modern usage and practice of nations." *Id.* at 883.

Thus, in *Filartiga* the defendant was clearly the subject of international-law duties, the challenged actions were not attributed to a participant in American foreign relations, and the relevant international law principle was one whose definition was neither disputed nor politically sensitive. None of that can be said about this case. For these reasons, not all of the analysis employed here would apply to deny a cause of action to the plaintiffs in *Filartiga*.

I differ with the *Filartiga* decision, however, because the court there did not address the question whether international law created a cause of action that the private parties before it could enforce in municipal courts. For the reasons given, that inquiry is essential.

VII.

The opinions in this case are already too long and complex for me to think it appropriate to respond in detail to Judge Edwards' and Judge Robb's arguments. A few points ought to be made, however, with respect to each of the other concurring opinions.

A.

First, Judge Edwards attributes to me a number of positions that I do not hold. See Edwards' op. at 777. For example, far from rejecting the four propositions he extracts from *Filartiga*, I accept the first three entirely and also agree with the fourth, but in a more limited form—namely, "section 1350 opens the federal courts for adjudication of rights already recognized by international law" but only when among those rights is that of individuals to enforce substantive rules in municipal courts.

Second, as noted earlier in this opinion, section 1350 provides jurisdiction for tort

actions alleging violations of the "law of nations" and "treaties of the United States." No process of construction can pry apart those sources of substantive law; in section 1350, they stand in parity. If, as Judge Edwards states and *Filartiga* assumes, section 1350 not only confers jurisdiction but creates a private cause of action for any violation of the "law of nations," then it also creates a private cause of action for any violation of "treaties of the United States." This means that all existing treaties became, and all future treaties will become, in effect, self-executing when ratified. This conclusion stands in flat opposition to almost two hundred years of our jurisprudence, and it is simply too late to discover such a revolutionary effect in this little-noticed statute. This consideration alone seems to me an insuperable obstacle to the reading Judge Edwards and *Filartiga* give to section 1350.

Third, the implications of Judge Edwards' theory—that section 1350 itself provides the requisite cause of action—cause him so much difficulty that he is forced to invent limiting principles. Thus, the law enunciated in *Filartiga* is said to cover only those acts recognized as "international crimes," a category which he supposes not to be as broad as the prohibitions of the law of nations. This restriction may allay some, though by no means all, apprehensions about what courts may get themselves and the United States into, but it comes out of nothing in the language of section 1350. According to that statute, jurisdiction exists as to any tort in violation of the law of nations.

The "alternative formulation" my colleague espouses requires even more legislation to tame its unruly nature. Recognizing that this "alternative formulation" would open American courts to disputes "wholly involving foreign states," the concurrence erects a set of limiting principles. Three kinds of suits only are to be allowed: (1) by aliens for domestic torts committed on United States territory and that injure "substantial rights" under international law; (2) by aliens for "universal crimes" (no matter where committed); and (3) by aliens

against Americans for torts committed abroad, "where redress in American courts might preclude international repercussions." Edwards' op. at 788. Aside from the unguided policy judgments which these definitions require, and whatever else may be said of them, it is clear that these limitations are in no way prescribed, or even suggested, by the language of section 1350. Rather, they are imposed upon that language for reasons indistinguishable from ordinary legislative prudence. The necessity for these judicially invented limitations merely highlights the error in the reading given section 1350.

Finally, in assessing a statute such as this—one whose genesis and purpose are, to say the least, in considerable doubt—some perspective is required. For a young, weak nation, one anxious to avoid foreign entanglements and embroilment in Europe's disputes, to undertake casually and without debate to regulate the conduct of other nations and individuals abroad, conduct without an effect upon the interests of the United States, would be a piece of breathtaking folly—so breathtaking as to render incredible any reading of the statute that produces such results.

It is anomalous to suggest that such a reading is supported by Alexander Hamilton's concern, expressed in *The Federalist* No. 80, that aliens' grievances be redressable in federal courts. Hamilton was defending judicial authority which extended "to all those [cases] which involve the PEACE of the CONFEDERACY, whether they relate to the intercourse between the United States and foreign nations, or to that between the States themselves." *The Federalist* No. 80 (A. Hamilton). His concerns were very largely met by federal diversity jurisdiction, and, it would seem, would be entirely met by a section 1350 which had the historical meaning I have suggested above as plausible.

If section 1350 had been designed to provide aliens with redress in order to place in federal courts all those disputes about treaties and international law that might provoke international incidents, the jurisdiction

given would not have been limited to torts only. The concurrence's response to this observation is to surmise a "compromise" for which there is absolutely no historical evidence.

But the trouble goes deeper than this. Judge Edwards' reading of the statute gives federal jurisdiction to suits between aliens for violations of international law and treaties of the United States. He suggests that this is proper because "[a] denial of justice might create the perception that the United States is siding with one party, thereby affronting the state of the other." Edwards' op. at 784 n. 13. This turns Hamilton's argument on its head. A refusal by a United States court to hear a dispute between aliens is much less offensive to the states involved than would be an acceptance of jurisdiction and a decision on the merits. In the latter case, the state of the losing party would certainly be affronted, particularly where the United States' interests are not involved. The United States would be perceived, and justly so, not as a nation magnanimously refereeing international disputes but as an officious interloper and an international busybody.

Indeed, it seems to me that Judge Edwards' interpretation would require us to hear this case, thus thrusting the United States into this improper and undesirable role. It can be argued that appellants here have alleged "official" torture: the complaint alleges that the PLO, in carrying out its attack, which the complaint alleges to have included torture, was acting at the behest of and in conjunction with Libya. Viewed this way, this case is indistinguishable from *Filartiga*, and as such, Judge Edwards' approach would force us to hear it. In entertaining such a suit, one of the issues would be whether the relationship between the PLO and Libya constituted that of agent and principal, so that Libya should be held responsible for the PLO's actions. The prospect of a federal court ordering discovery on such an issue, to say nothing of actually deciding it, is, or ought to be, little short of terrifying. If anything is likely to

disturb the "PEACE of the CONFEDERACY," this is.

If more needs to be said against the construction my colleague and the *Filartiga* court would give section 1350, it may be observed that their interpretation runs against the grain of the Constitution. It does so by confiding important aspects of foreign relations to the Article III judiciary despite the fact that the Constitution, in Article II and Article I, places that responsibility in the President and Congress. That is the fundamental reason I have argued that it is improper for judges to infer a private cause of action not explicitly granted.

B.

Judge Robb misapprehends my position, equating it, in many respects, with Judge Edwards'. I have not read section 1350 as authorizing the courts to enter into sensitive areas of foreign policy: quite the contrary. As I have suggested, the statute probably was intended to cover only a very limited set of tort actions by aliens, none of which is capable of adversely affecting foreign policy. Since international law does not, nor is it likely to, recognize the capacity of private plaintiffs to litigate its rules in municipal courts, as a practical matter only an act of Congress or a treaty negotiated by the President and ratified by the Senate could create a cause of action that would direct courts to entertain cases like this one. Should such an improbable statute or treaty come into existence, it will be time to ask whether the constitutional core of the political question doctrine precludes jurisdiction. That inquiry would necessarily be constitutional in scope, for the prudential aspect of

the doctrine would be insufficient to deny jurisdiction if Congress had tried to do what *Filartiga* supposes. Judge Robb apparently thinks that the constitutional core applies, since he invokes the political question doctrine without even inquiring whether the statute applies to a case like this.

Judge Robb chides me for stating that the PLO "bears significantly upon the foreign relations of the United States." He states that I thereby give that organization "more in the way of official recognition than [it] has ever before gained from any institution of the national government." As it happens, that is not correct. Numerous officials of the United States have discussed the problems posed by the PLO for American foreign policy, including the President and the Secretary of State.²⁷ Judicial circumspection is certainly an admirable quality, but a court need not be so demure that it cannot even mention what the world knows and the highest officials of our government publicly discuss. It is, moreover, particularly startling to see the case for such extraordinary prudence made in an opinion that itself contains clear implications of responsibility for worldwide terrorism. It is surely self-defeating to engage in such speculations in order to avoid making the milder observation that the PLO affects our foreign relations.

Were the matter mine to decide, I would probably agree that the constitutional core of the political question doctrine bars this or any similar action. But I am bound by Supreme Court precedent and that precedent, in general and as it bears in particular upon the constitutional component of the doctrine, is most unclear. For that reason,

27. See, e.g., Meeting with Hispanic, Labor, and Religious Press, 19 Weekly Comp.Pres.Doc. 1245, 1248-49 (Sept. 14, 1983) (President Reagan's response to question: "[O]ne of the reasons why we would never negotiate with the PLO, [is] because they openly said they denied the right of Israel to be a nation."); Foreign and Domestic Issues, Question-and-Answer Session with Reporters, 19 Weekly Comp.Pres.Doc. 643, 647-48 (May 4, 1983) (President Reagan's response to question: "[A]re they going to stand still for their interests being neglected on the basis of an action taken by this

group, the PLO, which, as I say, was never elected by the Palestinian people?"); N.Y. Times, Nov. 10, 1983, at A12, col. 5 (remarks of Under Secretary of State for Political Affairs Lawrence S. Eagleburger). And, most recently, the New York Times reported on its front page Secretary of State George P. Shultz's comments that "the outcome of the struggle within the Palestine Liberation Organization was certain to have 'major implications' for the future of the American-sponsored peace efforts in the Middle East." N.Y. Times, Nov. 20, 1983, at A1, col. 5.

Cite as 726 F.2d 774 (1984)

and others I have specified, see *supra* pp. 803 & note 8, it seems better to rest the case upon the grounds I have chosen. The result is the same. I would have said that this course has the additional virtue of giving guidance to the bar, but, as matters have turned out, the three opinions we have produced can only add to the confusion surrounding this subject. The meaning and application of section 1350 will have to await clarification elsewhere. Since section 1350 appears to be generating an increasing amount of litigation, it is to be hoped that clarification will not be long delayed. In the meantime, it is impossible to say even what the law of this circuit is. Though we agree on nothing else, I am sure my colleagues join me in finding that regrettable.

ROBB, Senior Circuit Judge:

I concur in the result, but must withhold approval of the reasoning of my colleagues. Both have written well-researched and scholarly opinions that stand as testaments to the difficulty which this case presents. Both agree that this case must be dismissed though their reasons vary greatly. Both look backward to *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir.1980), and forward to the future efforts of others maimed or murdered at the hands of thugs clothed with power who are unfortunately present in great numbers in the international order. But both Judges Bork and Edwards fail to reflect on the inherent inability of federal courts to deal with cases such as this one. It seems to me that the political question doctrine controls. This case is nonjusticiable.

A. *This case involves standards that defy judicial application.*

Tort law requires both agreement on the action which constitutes the tort and the means by which it can be determined who

1. See, e.g. *Implementation of the Helsinki Accords, Hearing Before the Commission on Security and Cooperation in Europe, The Assassination Attempt on Pope John Paul II*, 97th Cong., 2d Sess. 20 (Statement of Michael A. Ledeen) ("[M]any terrorist organizations get

bears responsibility for the unlawful injury. Federal courts are not in a position to determine the international status of terrorist acts. Judge Edwards, for example, notes that "the nations of the world are so divisively split on the legitimacy of such aggression as to make it impossible to pinpoint an area of harmony or consensus." Edwards Opinion at 795. This nation has no difficulty with the question in the context of this case, of course, nor do I doubt for a moment that the attack on the Haifa highway amounts to barbarity in naked and unforgivable form. No diplomatic posturing as represented in sheaves of United Nations documents—no matter how high the pile might reach—could convince me otherwise. But international "law", or the absence thereof, renders even the search for the least common denominators of civilized conduct in this area an impossible-to-accomplish judicial task. Courts ought not to engage in it when that search takes us towards a consideration of terrorism's place in the international order. Indeed, when such a review forces us to dignify by judicial notice the most outrageous of the diplomatic charades that attempt to dignify the violence of terrorist atrocities, we corrupt our own understanding of evil.

Even more problematic would be the single court's search for individual responsibility for any given terrorist outrage. International terrorism consists of a web that the courts are not positioned to unweave. To attempt to discover the reach of its network and the origins of its design may result in unintended disclosures imperiling sensitive diplomacy. This case attempts to focus on the so-called P.L.O. But which P.L.O.? Arafat's, Habash's, or Syria's? And can we conceive of a successful attempt to sort out ultimate responsibility for these crimes? Many believe that most roads run East in this area.¹ Are courts prepared to travel

support from the Soviet Union and its many surrogates around the world. I do not think there should be much doubt about the matter. The Russians train PLO terrorists in the Soviet Union, supervise the training of terrorists from all over the world in Czechoslovakia—or at

these highways? Are they equipped to do so? It is one thing for a student note-writer to urge that courts accept the challenges involved.² It is an entirely different matter for a court to be asked to conduct such a hearing successfully. The dangers are obvious. To grant the initial access in the face of an overwhelming probability of frustration of the trial process as we know it is an unwise step. As courts could never compel the allegedly responsible parties to attend proceedings much less to engage in a meaningful judicial process, they ought to avoid such imbroglios from the beginning.

- B. *This case involves questions that touch on sensitive matters of diplomacy that uniquely demand a singlevoiced statement of policy by the Government.*

Judge Bork's opinion finds it necessary to treat the international status of the P.L.O., and to suggest that that organization "bears significantly on the foreign relations of the United States." Bork Opinion at 805. This is considerably more in the way of official recognition than this organiza-

tion has ever before gained from any institution of the national government. I am not in a position to comment with authority on any of these matters. There has been no executive recognition of this group, and for all our purposes it ought to remain an organization "of whose existence we know nothing . . ." *United States v. Klintock*, 18 U.S. 144, 149 (5 Wheat.) 5 L.Ed. 55 (1820). As John Jay noted: "It seldom happens in the negotiations of treaties, of whatever nature, but that perfect secrecy and immediate dispatch are sometimes requisite." *The Federalist*, # 64, Jay (Paul L. Ford, ed.). What was then true about treaties remains true for all manner of modern diplomatic contacts. It may be necessary for our government to deal on occasion with terrorists. It is not, however, for courts to wonder aloud as to whether these negotiations have, are, or will be taking place. Western governments have displayed a near uniform reluctance to engage in much discussion on the organization and operation of terrorist groups, much less on any hidden contacts with them.³ When a genre

least they did until recently, according to a leading defector, General Jan Sejna—and work hand in glove with countries like Libya, Cuba, and South Yemen in the training of terrorists.") See also Adams, *Lessons and Links of Anti-Turk Terrorism*, Wall St.J., Aug. 16, 1983, at 32, col. 6 (The Armenian Secret Army for the Liberation of Armenia "remains a prime suspect for the charge of KGB manipulation of international terror. But in this area, one researcher in the field advises, 'You will never find the smoking gun.'"); Barron, *KGB 151*, 255-257 (1974); Barron, *KGB Today: The Hidden Hand*, 21-22, 255-256 (1983).

2. Note, *Terrorism as a Tort in Violation of the Law of Nations*, 6 Fordham Int'l L.J. (1982).
3. C. Sterling, *The Terror Network* (1981). Sterling repeatedly points out, and often criticizes, the reluctance of Western governments to openly detail the international cooperation that girds most terrorist activities. She writes:

No single motive could explain the iron restraint shown by Italy, West German, and all other threatened Western governments in the face of inexorably accumulating evidence. . . . Both, and all their democratic allies, also had compelling reasons of state to avoid a showdown with the Soviet Union. . . . All were certainly appalled at the thought of tangling with Arab rulers. . . .

[P]olitical considerations were almost certainly paramount for government leaders under seige who . . . wouldn't talk.

Id. at 291, 294. Whatever the merits of Sterling's criticisms of this near uniform silence, the fact remains that our government, like those of its closest allies, is extremely wary of publicity in this area. Commenting on the refusal of Western governments to openly discuss the possibility of Soviet complicity in the attempt to assassinate Pope John Paul II, Congressman Ritter, a member of the bipartisan commission drawn from both the executive and legislative branches which is charged with monitoring compliance with the Helsinki Accords, commented that "[t]he involved governments have stayed away from this hot potato for a variety of reasons." *Implementation of the Helsinki Accords, Hearing Before the Commission on Security and Cooperation in Europe, The Assassination Attempt on Pope John Paul II, supra*, at 16. Both Sterling's book and the hearings in which Congressman Ritter participated are indispensable background reading for a court confronted with a question such as the one before us. These and other texts bring home the hopelessness of any attempt by an American court to trace a reliable path of responsibility for almost every terrorist outrage. These labyrinths of international intrigue will admit no judicial Theseus.

of cases threatens to lead courts repeatedly into the area of such speculations, then that is a signal to the courts that they have taken a wrong turn. The President may be compelled by urgent matters to deal with the most undesirable of men. The courts must be careful to preserve his flexibility and must hesitate to publicize and perhaps legitimize that which ought to remain hidden and those who deserve the brand of absolute illegitimacy. By jumping the political question threshold here, my colleagues appear to be leading us in just the opposite direction.

C. *Questions connected to the activities of terrorists have historically been within the exclusive domain of the executive and legislative branches.*

The conduct of foreign affairs has never been accepted as a general area of judicial competence. Particular exceptions have, of course, arisen. When the question is precisely defined, when the facts are appropriately clear, the judiciary has not hesitated to decide cases connected with American foreign policy.⁴

But cases which would demand close scrutiny of terrorist acts are far beyond these limited exceptions to the traditional judicial reticence displayed in the face of foreign affairs cases. That traditional deference to the other branches has stemmed, in large part, from a fear of undue interference in the affairs of state, not only of this nation but of all nations. Judge Mulligan, writing in *Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (2d Cir.), cert. denied 434 U.S. 984, 98 S.Ct. 608, 54 L.Ed.2d 477 (1977), warned that a "Serbian Bog" awaits courts that inquire into the policies of foreign sovereigns. *Id.* at 77. A model of judicial deference, appropriately invoked, is *Diggs v. Richardson*, 555 F.2d 848 (D.C.Cir.1976). In that case this court was asked to enforce a United Nations Security Council Resolution. This court ruled in effect that the matter was nonjusticiable, and a part of the reasoning supporting that conclusion was that the Resolution did not provide specific standards suitable to

"conventional adjudication". *Id.* at 851. The court added that the standards that were supplied were "foreign to the general experience and function of American courts". *Id.* In refusing to allow the case to be jimmied into our judicial process, the court was fully aware that its deference did not abdicate all American participation in the issues raised by the Resolution. Our nation's involvement in the diplomatic arena was in no way circumscribed by judicial circumspection.

Similarly, the issues raised by this case are treated regularly by the other branches of the national government. One need only review the work of the Subcommittee on Security and Terrorism of the Senate Committee on the Judiciary to recognize that the whole dangerous dilemma of terrorism and the United States response to it are subjects of repeated and thorough inquiry. See, e.g., *Historical Antecedents of Soviet Terrorism Before the Subcomm. on Security and Terrorism of the Senate Comm. on Judiciary*, 97th Cong., 1st Sess. 1 (1981). See also, *Extradition Reform Act of 1981: Hearings on H.R. 5227 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 97th Cong., 2d Sess. 1 (1982). The executive branch is also deeply involved in the monitoring and attempted control of terrorist activities. See, e.g., *The Role of Cuba in International Terrorism and Subversion, Intelligence Activities of the DGI, Before the Subcomm. on Security and Terrorism of the Senate Comm. on Judiciary*, 97th Cong., 2d Sess. 85 (1982) (statement of Fred C. Ikle, Undersecretary of Defense for Policy). The President has repeatedly demonstrated his concern that terrorism be combated, both in his statements at home, and in the declarations that have accompanied his meetings with our allies. See 18 *Weekly Compilation of Presidential Documents*, 35, 575, 763, 783, 1352 (1982). It is thus obvious that even with this declaration of nonjusticiability by the court, the work of tracing and assessing responsibility for terrorist acts will continue by those parts of the government which by

4. See, e.g., *Haig v. Agee*, 453 U.S. 280, 292, 101 S.Ct. 2766, 2774, 69 L.Ed.2d 640 (1981) ("Matters intimately related to foreign policy are

rarely proper subjects for judicial intervention."); *Dames & Moore v. Regan*, 453 U.S. 654, 101 S.Ct. 2972, 69 L.Ed.2d 918 (1981).

tradition and accumulated expertise are far better positioned than the courts to conduct such inquiries.

D. *Cases such as this one are not susceptible to judicial handling.*

As noted above in section A, the pragmatic problems associated with proceedings designed to bring terrorists to the bar are numerous and intractable. One other note must be added. Courts have found it extremely difficult to apply the "political exception" doctrine in extradition proceedings when those proceedings have concerned prisoners who are accused of terrorist activities. See *Abu Eain v. Adams*, 529 F.Supp. 685 (N.D.Ill.1980) and *McMullen v. Immigration and Naturalization Service*, 658 F.2d 1312 (9th Cir.1981). This difficulty is so pronounced that one member of the executive branch has testified to Congress that there is simply "no justiciable standard to the political offense," and that when courts have been confronted with such situations, "there has been a tendency for a breakdown in the ability of our courts to process extradition questions," with the result that courts "tend to beg the question ...". *Extradition Reform Act of 1981, Hearings on H.R. 5227 Before Subcomm. on Crime of the House Comm. on the Judiciary*, 97th Cong., 2d Sess. 24-25 (Testimony of Roger Olson, Deputy Asst. Attorney General, Criminal Division, U.S. Dept. of Justice). If courts are vexed by these questions within the limited context of extradition proceedings—an area in which there is considerable judicial experience—it is easy

to anticipate the breakdowns that would accompany proceedings under 28 U.S.C. § 1350 if they are allowed to go forward. Sound consideration of the limits of judicial ability demands invocation of the political question doctrine here. This is only common sense and a realistic measure of roles that courts are simply not equipped to play.

E. *The possible consequences of judicial action in this area are injurious to the national interest.*

The certain results of judicial recognition of jurisdiction over cases such as this one are embarrassment to the nation, the transformation of trials into forums for the exposition of political propaganda, and debasement of commonly accepted notions of civilized conduct.

We are here confronted with the easiest case and thus the most difficult to resist. It was a similar magnet that drew the Second Circuit into its unfortunate position in *Filartiga*.⁵ But not all cases of this type will be so easy. Indeed, most would be far less attractive. The victims of international violence perpetrated by terrorists are spread across the globe. It is not implausible that every alleged victim of violence of the counter-revolutionaries in such places as Nicaragua and Afghanistan could argue just as compellingly as the plaintiffs here do, that they are entitled to their day in the courts of the United States. The victims of the recent massacres in Lebanon could also mount such claims. Indeed, there is no obvious or subtle limiting principle in sight. Even recognized dissidents who have es-

5. I do not doubt for a moment the good intentions behind Judge Kauffman's opinion in *Filartiga*. But the case appears to me to be fundamentally at odds with the reality of the international structure and with the role of United States courts within that structure. The refusal to separate rhetoric from reality is most obvious in the passage which states that "for the purposes of civil liability, the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind." 630 F.2d at 890. This conclusion ignores the crucial distinction that the pirate and slave trader were men without nations, while the torturer (and terrorist) are frequently pawns, and well controlled ones, in international politics. When Judge Kauffman concluded

that "[o]ur holding today, giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence," *id.*, he failed to consider the possibility that *ad hoc* intervention by courts into international affairs may very well rebound to the decisive disadvantage of the nation. A plaintiff's individual victory, if it entails embarrassing disclosures of this country's approach to the control of the terrorist phenomenon, may in fact be the collective's defeat. The political question doctrine is designed to prevent just this sort of judicial gambling, however apparently noble it may appear at first reading.

caped from the Soviet Union could conceivably bring suit for violations of international law having to do with the conditions of their earlier confinements. Each supposed scenario carries with it an incredibly complex calculus of actors, circumstances, and geopolitical considerations. The courts must steer resolutely away from involvement in this manner of case. It is too glib to assert simply that courts are used to dealing with difficult questions. They are not used to this kind of question.

The more arcane aspects of international law connected to this case are dealt with by my colleagues. Their reviews of the subject are quite exhaustive and their speculations on the riddle of § 1350 are innovative. But it is all quite unnecessary. Especially inappropriate is their apparent reliance for guidance on the distinguished commentators in this field. I agree with the sentiment expressed by Chief Justice Fuller in his dissent to *The Paquete Habana*, 175 U.S. 677, 20 S.Ct. 290, 44 L.Ed. 320 (1900), where he wrote that it was "needless to review the speculations and repetitions of writers on international law. . . . Their lucubrations may be persuasive, but are not authoritative." *Id.* at 720, 20 S.Ct. at 307 (Fuller, J. dissenting). Courts ought not to serve as debating clubs for professors willing to argue over what is or what is not an accepted violation of the law of nations. Yet this appears to be the clear result if we allow plaintiffs the opportunity to proceed under § 1350. Plaintiffs would troop to court marshalling their "experts" behind them. Defendants would quickly organize their own platoons of authorities. The typical judge or jury would be swamped in citations to various distinguished journals of international legal studies, but would be left with little more than a numbing sense of how varied is the world of public international "law".

Judge Edwards writes that "[t]his case deals with an area of law that cries out for clarification by the Supreme Court. We confront at every turn broad and novel questions about the definition and application of the 'law of nations'." Edwards Opinion at 775. I must disagree. When a case presents broad and novel questions of

this sort, courts ought not to appeal for guidance to the Supreme Court, but should instead look to Congress and the President. Should these branches of the Government decide that questions of this sort are proper subjects for judicial inquiry, they can then provide the courts with the guidelines by which such inquiries should proceed. We ought not to parlay a two hundred years-old statute into an entree into so sensitive an area of foreign policy. We have no reliable evidence whatsoever as to what purpose this "legal Lohengrin", as Judge Friendly put it, was intended to serve. *ITT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir.1975). We ought not to cobble together for it a modern mission on the vague idea that international law develops over the years. Law may evolve, but statutes ought not to mutate. To allow § 1350 the opportunity to support future actions of the sort both countenanced in *Filartiga* and put forward here is to judicially will that statute a new life. Every consideration that informs the sound application of the political question doctrine militates against this result. My colleagues concede that the origins and purposes of this statute are obscure, but it is certainly obvious that it was never intended by its drafters to reach this kind of case. Accordingly, I concur in the decision to affirm the dismissal of this case.



Ayub K. OMMAYA, Petitioner,

v.

NATIONAL INSTITUTES OF HEALTH,
Department of Health and Human
Services, Respondents.

No. 82-1818.

United States Court of Appeals,
District of Columbia Circuit.

Argued Dec. 14, 1983.

Decided Feb. 3, 1984.

Government physician petitioned for review of decision of the Merit Systems

THE WHITE HOUSE

WASHINGTON

August 24, 1987

MEMORANDUM FOR C. CHRISTOPHER COX

PETER D. KEISLER

PATRICIA M. BRYAN

FROM:

BENEDICT S. COHEN *BSC*

SUBJECT:

Bork Speeches

Attached are the summaries of Robert Bork's antitrust and other speeches.

Attachments

"Business and the Courts"
U.S. Chamber of Commerce
October 17, 1986 (4)

On the Attitude of the Courts Towards Business: The courts are no longer either distinctly pro-business or distinctly anti-business. "Business litigants are looked on as other litigants, with no presumption either in their favor or against them. That, of course, is as it should be." (Page 2)

On Economic Analysis and the Law: There has been a spread of economic understanding among judges. This is likely to affect business litigation. "The most obvious candidate for change is antitrust.... We are witnessing now, I think, the slow but sure transformation of antitrust jurisprudence to reflect a far more sophisticated understanding of competition and the relation of business efficiency to competition than the law has displayed in many years. Much remains to be done, but courts are beginning to identify the relevant questions and beginning to give better answers." Economic analysis is likely to have less of an impact in the area of administrative law, where agencies "take into account more factors than microeconomics. They engage in legislative tradeoffs between economic efficiency and other goals--worker safety, environmental integrity, and the like. Here the role for the judge is much smaller. He or she may think a choice unfortunate, the economic costs too great, or whatever, but that is not the judge's business." (Pages 3-4)

Judge Bork noted that there are "wide areas" in which price theory has no relevance at all. "There are people who seem to think that any subject lends itself to economic analysis but I do not." (Page 5)

On Modern Law Schools: Judge Bork stated that "the student disruptions of the 1960s have left a permanent mark on many major law schools.... The students have grown older and joined the faculty, without significantly changing their views. As somebody said, the revolution has been tenured. This has meant both a marked decline in intellectual rigor and a rise in the view that judges should make law free of the constraints of the Constitution and of statutes. An increasing body of academic opinion appears to hold that judges are to be preferred to democracy." Judge Bork went on to note that it was "quite possible that some major law schools are in very deep trouble. It is also possible that, as the graduates of these schools grow older and achieve positions of influence, the law and the courts will be in trouble." (Pages 6-7)

"Untitled Speech--No. 13"

General Theme: "This is an exciting time in the history of antitrust because there appears to be a distinct chance that a massive shift of doctrine is taking place." (Page 1)

On Republican Administrations and the Antitrust Laws:

"Republican administrations historically have been very sensitive to the charge that they are friends of big business and that has led some of them to overcompensate by launching ill-advised antitrust campaigns. You remember Richard McLaren's assault upon conglomerate mergers. Or to continue law suits left to them by Democrats in the hope of creating political embarrassment--law suits like the IBM case--the Antitrust Divisions' Vietnam." (Page 2)

On Bill Baxter: Bill Baxter "has been willing to risk the charge that Republicans don't care about antitrust. He has been willing to do that precisely because he does care. He cares about antitrust too much to let it continue as an incoherent, indeed, in places, a degenerate, policy." (Page 2)

On Victory in the Intellectual Debate: Bork said that it is "significant that men like Baxter and Jim Miller cannot only be appointed but can say the things they have and still survive politically. That would not be true if the antitrust community--academics and practitioners alike--had not been significantly altered by the intellectual victory of free market ideology....[T]he major and fundamental intellectual battles of antitrust policy have been won and...those victories are final." (Pages 2-3)

On the Goals of Antitrust Law: "Antitrust cannot properly pursue goals other than economic efficiency. When that is recognized, economics becomes the only relevant mode of analysis. The only qualification to that is that the analysis and the rules it derives must be capable of administration through courts." (Page 3)

On Vertical Integration: "All of the real concerns of a rational antitrust policy are horizontal. Vertical and conglomerate phenomena do not threaten competition." (Page 3)

On Supreme Court Precedent in Antitrust: "In the foreseeable future, at least, Congress will not rewrite the laws to remove their more pernicious features. Nor will the law be rewritten to overturn its more pernicious interpretations--if you care to call what took place 'interpretation' by the courts. A great body of wrong and damaging Supreme Court precedent remains on the books. This is what the senatorial critics refer to when they demand that the Department of Justice enforce 'the law.' In their view, changes in law may only properly be initiated by Congress or, possibly, the Supreme Court." (Page 4)

On the Vagueness of the Antitrust Laws: "At their most specific, those laws say little, if anything, more than: Avoid monopoly, preserve competition. The task of making the rules to accomplish those results was delegated to the federal judiciary. It remains a close question whether a delegation so vast and unstructured should have been considered constitutional. That is a matter now of only academic curiosity." (Page 4)

On the Legitimacy of Bill Baxter's Enforcement Policies: It is legitimate for Bill Baxter not to bring certain suits despite the fact that prior Supreme Court precedent would seem to authorize them. Those Supreme Court decisions were the product of an overly political Supreme Court. "That Supreme Court put into practice what had been taught at the Yale Law School of the 1930s and after, which was a vulgar and debased form of legal realism.... It was a philosophy, as one political scientist has pointed out, the systematic carrying out, through the judiciary, of the New Deal agenda. In antitrust that agenda involved holding for the plaintiff in almost all cases.... If that description is accurate, it may be a delicate jurisprudential question what duty a prosecutor has to enforce law so made--a law made in ways that the conventional view of the judge's duty would hold illegitimate--what duty a prosecutor has to enforce such law when he knows it to be damagingly anticompetitive and counter to the historic thrust of antitrust. At a far less important level, the question is somewhat reminiscent of what obligation the body politic had to carry out this principle which undergirded the Supreme Court's Dred Scott decision. The legal order, at least our legal order, does not require every other actor in the process to continue replicating the worst mistakes of the Supreme Court forever or until that Court corrects its mistakes. The interactions that create a living, organic jurisprudence are more complex than that and discretion is assumed to exist elsewhere in the legal hierarchy." (Pages 5-7)

On the Warren Court Antitrust Decisions: "It is not at all clear that Warren Court antitrust decisions are the law today. They may be as much historical curiosities as the pre-1936 commerce clause decisions are today. They are probably not law at all, if by law we mean a prediction of what the Supreme Court will in fact hold on similar cases today." (Page 7)

"Antitrust" (Speech No. 104)

Economic Analysis and the Development of Antitrust Law:

"[E]conomic analysis will continue to evolve and, as it does, the rules of antitrust follow." (Page 1)

On the Legislative History of the Sherman Act: Bork contested the assertion that political values such as the fear of excessive concentration of economic power, as opposed to the economic value of consumer welfare, underlie the Sherman Act. "[N]othing in the legislative history of the Sherman Act and little or nothing in that of any other statute suggests for one moment that judges are to base decisions on such factors." (Page 3) Furthermore, "the texts of the statutes are to the contrary and...the structural features of the laws, the distinctions made between forms of behavior, contradicts the notion that anything other than consumer welfare may inform judicial decision." (Page 4)

On Constitutional Considerations: Even if the above-referenced evidence did not exist, and even if the legislative history revealed that the framers of the Sherman Act were motivated by multiple political and economic goals, "it would not matter. Once it is admitted that a major component of antitrust policy is the welfare of consumers, and that is almost universally accepted, it follows that consumer welfare must be the exclusive goal of the law. The argument here is constitutional. I speak, of course, of the basic doctrine of separation of powers. In our jurisprudence it is a [sic] commonplace that the separation of powers requires that courts refuse to do some things that Congress specifically and explicitly directs them to do." (Pages 4-5) Bork explained that the absence of standards for enforcing the sorts of political goals that are frequently advanced "require[s] the court to strike a compromise between producers and consumers,...a task that is clearly legislative rather than judicial in nature." (Page 5)

"Economics and Antitrust: Response"
(Annual Western Economic Association International Conference,
Las Vegas, Nevada, June 24-28, 1984)

On Attitudes Towards Business: "Antitrust is both a symbol of the free market and...a conduit for populist envy and self-pity. Many people probably believe that antitrust restrains the excesses of capitalism sufficiently to make socialism unnecessary. Others probably think that it punishes the successful sufficiently. But that is not the only impact of an antitrust policy which is at once vigorous and mistaken. When business is regularly pronounced by the courts to be guilty of violating basic norms of competition and fairness, the public is likely to learn the lesson that business is not to be trusted with a free market." (Page 1)

On the Costs of Mistaken Antitrust Policy: "[A]ntitrust has been an expensive policy. It uses up an enormous amount of time of judges, lawyers, and business executives. Moreover, to the extent that its rules are wrong, antitrust destroys or prevents the achievement of a great deal of efficiency." (Pages 1-2)

On Constitutional Considerations: Judge Bork stated that the "core" of his argument that consumer welfare is the only proper goal of the antitrust laws "rests on a theory of democratic government under the Constitution. This theory determines how the laws should be interpreted." (Page 2) Judge Bork went on to state that "courts are required by a range of considerations which are essentially constitutional to prefer consumer welfare to other values in all cases of conflict." This is because the political tradeoffs that a court would be required to make were the other values dominant would be made in the absence of congressionally enacted standards for decision. "It is because Congress has not given any other directions, and a principled court must either adopt the position I suggest or decide that the laws are not constitutional. That conclusion calls for price theory, and it calls for those rules, and only those rules, that can be justified by price theory." (Page 4)

On the Legislative History of the Sherman Act: In that legislative history, Bork noted, "there is much concern for consumers and for small business. However, there is not one word suggesting that the interests of small producers or any other value is to be preferred to consumer welfare....[N]ever once, so far as I know, did any congressman suggest that the purpose of the laws was not to protect consumers or that the consumer interest was ever to be sacrificed to other values. Congress simply assumed that all good things are compatible. This means that courts in interpreting the statutes have no legislative mandates to prefer other values to consumer welfare." (Page 3)

On Cartels: Bork endorses the use of the antitrust law to prohibit price-fixing cartels. Most cartels, he notes, have restriction of output as their dominant aim. Furthermore, the per se rule against cartels promotes administrative efficiency by short-cutting litigation. "This is not to say that the per se rule against price-fixing does not have serious problems. The main difficulty is that judges and juries are sometimes not competent to identify the presence of price-fixing....The courts are sometimes so bad at identifying price-fixing, and the stakes are so enormous, that I am tempted to think that liability should never be found unless there is direct evidence of a conspiracy. Probably a better solution would be to improve the economic theory of cartel behavior and then educate judges so that they do not confuse common forms of competition with collusion."
(Page 5)

On Mergers: Bork would retain a "vestigial merger policy" because "when a merger of monopoly proportions occurs, we can only hope that there are efficiencies, but we can be sure of restriction of output." (Page 5)

"Developments in Antitrust Law"
William Mitchell College of Law
May 25, 1984 (Text and Handwritten Notes)

Sponsor's Summary: The sponsor of this address prepared a summary of Judge Bork's remarks, which Judge Bork then edited. Our copy indicates Judge Bork's handwritten changes to the draft summary. In many instances, he softened the language, which may have been taken directly from his speech. Since the full text of the speech is unavailable, it is impossible in some instances to know. The summary originally stated that Bork's view was that the Warren Court "practiced a corrupt form of legal realism in trying to serve the constituency of the New Deal." Bork changed that to "a primitive form of legal realism under which plaintiffs almost never lost on antitrust issues." Furthermore, the summary originally stated that "[a]n antitrust policy that asks a judge to weigh political values against economic efficiency is unconstitutional in Bork's view." Bork changed that to read: "An antitrust policy that asks a judge to weigh political values against economic efficiency verges on an unconstitutional delegation of legislative powers in Bork's view." The summary further notes that Judge Bork recommended that the antitrust laws be administered in a manner so as to be more sensitive to the foreign policy implications of antitrust policy. The summary noted: "This may require the administration to step into an antitrust case being pursued by the Department of Justice and ask that the issue be softened or dropped for the sake of foreign policy." Bork changed this to read: "This may on occasion require the Department of State to step into an antitrust case...."

On Constitutional Law Generally: Bork described constitutional law as "at least as badly in need of reform as antitrust."
(Page 1)

On Antitrust Law in the 50s and 60s: Bork notes that when he began practice, the law was "hopeless." There was "no analysis." The consensus was that industry should be broken up, and that the current law was not strict enough. (Page 3A)

On the Warren Court: Judge Bork in his handwritten notes explicitly refers to a "corrupt form of legal realism."
(Page 3A) (See Sponsor's Summary above.)

On the Development of the Chicago School: Bork noted that "no good price theorist ever looked at antitrust" and that "economists assumed" that the "law did what it claimed--preserved competition." (Page 4) Bork then told the story of Aaron Director and the development of the Chicago School. Bork notes that the academic world began to listen, and that "the change in the intellectual world made possible a shift in the political world." (Page 5)

On the Future of Antitrust Law: Bork states that in the short term, the future of antitrust law depends on the elections and the composition of the Supreme Court over the next twenty years. It also depends, he notes, on the willingness of Congress not to reverse the current trend with "bad legislation"--"so maybe we don't want to win too fast." However, in the long term, the future of antitrust law "depends on who wins the intellectual battles that still lie ahead." (Page 6)

On Constitutional Law Generally: Judge Bork's notes describe constitutional law as "one of the most intellectually corrupt fields of law in academic world--and in some courts." (Page 5)

On the Goals of Antitrust: Bork notes: "Throughout most of the history of antitrust, assumed and then asserted that antitrust had non-economic goals that a judge could apply as criteria in deciding a case." Bork observes that there are arguments against this both from the legislative history and from constitutional principles. "The sentiment that the law must enforce social and political goals as very strong." (Page 7) "The social and political goals theme is no more than an enterprise designed to justify or camouflage judicial usurpation of power to legislate." (Page 8)

On "Marxist" Constitutional Scholars: "Judicial powers pressed by non-judges who have a social and political agenda in mind that they can never achieve through political democracy--part of it was and is attacking the legitimacy of business and hence capitalism and antitrust seemed ideally suited for that." (Page 8)

On Horizontal Restraints: "One of the areas of antitrust law still in need of major reform is the law of price-fixing. Per se rule--one of the glories of the law, but, unless we learn where and how to apply it, it can be disastrous." (Page 9) "Area urgently needs work." (Page 10)

Criticizes Sealy: Notes that ASCAP "may come close to overruling Sealy." (Page 9) Bork notes that the law of conspiracy is "a mess." (Page 10) "Per se rule against price fixing" is "valuable" "but if we can accurately identify price fixing." (Page 10)

On the Judicial Process: The Jefferson Parish Hospital case was "an attempt to get at a bad doctrine while pretending to stick to precedent." It contained "labyrinthian reasoning." Judge Bork notes that in the area of tying arrangements and exclusive dealing, the "old doctrine remains so long as the court does not make a clean break." (Page 12)

On Vertical Price-Fixing: "Should be per se legal." (Page 10)

Intellectual Change in Antitrust Law: Bork discusses signs of the shift to "procompetitive" antitrust law, including Baxter's and Miller's appointments to the Antitrust Division and FTC, respectively. He argues that while he believes that the "major intellectual battles have been won," many hurdles to sound antitrust law remain, including Congress' refusal to revise some of the more pernicious laws and the remaining "thoroughly perverse" Supreme Court precedent that lower court continue to apply.

According to Bork, antitrust policy has been schizophrenic from the beginning, with part of the law fostering competition but another part protecting competitors from competition. The anticompetitive strain led to the concepts of inherently suspect practices and incipency, and these two concepts led to the only test possible: whether the challenged action would make life harder for some other businessman--a test which also captures many efficient business practices as well as anticompetitive ones. Antitrust law began to change for the better when Aaron Director began to work out theories consistent with sound economic theory and antitrust law began to employ the "powerful" language of microeconomics.

Bork states that the current Supreme Court, albeit in non-merger cases, has said the purpose of antitrust law is the protection of consumer welfare, so "that the creation of efficiency is a justification for a business practice." According to Bork, the bad law about vertical structures and practices and conglomerable mergers has been abandoned, so that the current problems involve horizontal mergers and conspiracies. Bork argues that true reform requires a series of Supreme Court cases, but notes the reluctance of the current Supreme Court to take antitrust cases. He suggests this reluctance is due to the lack of a clear majority position on the Court, as illustrated by the Sylvania opinion, which reads like a compromise (i.e., vertical market divisions examined under a rule of reason test, vertical price fixing under a per se test).

Clayton and FTC Acts and Protectionism: According to Bork, protectionist philosophy achieved its "first major victory with the passage of the Clayton Act and the Federal Trade Commission Act in 1914." (pp. 2-3)

Robinson-Patman Act: Bork refers to it as "pornography"--"a statute no man should let his daughter read." (p. 3)

Defense of Assistant Attorney General Baxter Enforcement Policies: Bork notes that "Not only Senator Metzenbaum but several Republicans, including Senator Danforth who took my antitrust course but seems to have lost his class notes, have accused this Administration of not enforcing 'the law.'" (p. 6).

Bork argues that while Baxter is not bringing cases he could under existing law, it is because the Supreme Court, by changing the focus to consumer welfare, has effectively undercut the reasoning of those past cases which sought to achieve "social and political objectives."

Criticism of Baxter Enforcement Policies in the Horizontal Arena: Bork states that Baxter is not leading much reform in the horizontal merger arena, "partly due to political problems" but also "because concentration worries him at much lower levels than it should." (p. 9) He argues that the theory of oligopoly that predicts a lessening of competition in markets with ten, twenty, or fifty competitors is disproven by actual practice; he concludes "there is almost certainly little danger in allowing mergers that leave three, four, or five significant firms in a market." (p. 10)

Criticism of Law of Conspiracy: Bork claims that "the per se rule against conspiracy is the most valuable rule in antitrust," but argues that courts are inferring conspiracies where they do not exist. (p. 10)

Introduction
18 Stanford Journal of International Law, 1982.

International Enforcement of American Antitrust Law and the Appropriate Role of Courts: Bork begins by noting that when the policies of foreign governments are involved in allegedly anticompetitive activities that violate U.S. antitrust laws, an obvious conflict arises between antitrust principles and American foreign policy concerns. While the Executive Branch can examine and balance those interests before bringing a U.S. challenge before the courts, in a lawsuit initiated by a private party, such a balance must be performed initially by a district court, if it is performed at all. Bork notes that a private litigant can take advantage of the situation by alleging little or no foreign government involvement and then seeking full discovery on such involvement which the foreign government will likely refuse to provide. This places the district court in the difficult position of assessing how much is at stake in terms of economic efficiency and foreign relations, a task Bork concludes "cannot be done well." Judges sometimes pick one extreme--allow full discovery, complete with decisive sanctions for failure to comply which ensure victory for the plaintiff--or the other--rely on the act of state doctrine to defeat the plaintiff's case. Judge Bork notes that the court's themselves have developed balancing tests to avoid either extreme (e.g., Timberlane, Mannington Mills), but concludes that the follow-up articles will show that "the effort to transmute a raw policy judgment into a judgment according to law is, in the end, unsuccessful. Many of the criteria remain amorphous and their relationship to one another unclear." (p. 604) Bork concludes that "the task is inherently impossible" and suggests that "political [i.e., legislation or treaties] rather than judicial solutions may be needed." (p. 605)

University of Chicago Law School Alumni Annual Luncheon--
Mayflower Hotel, May 15, 1986.

Constitutional Law at "Tipping Point": Bork's thesis for this speech is that constitutional law is at a tipping point--either it will continue on its present course, which means that judges' personal values will increasingly intrude on their decisionmaking, or "it may begin a process of intellectual reform." Bork finds the later prospect more likely, apparently because the debate between interpretivists and noninterpretivists has entered the public arena thanks to Justice Brennan and Attorney General Meese. (p. 1)

Comparison of Today's Constitutional Law Debate with Antitrust Law Reform: Bork claims he is "hopeful" that constitutional law will undergo intellectual reform because the current debate "almost exactly parallels the process by which the intellectual reform of antitrust law began." He states that while 20 or 25 years ago antitrust seemed to be in a "state of hopeless intellectual corruption," that attitude underestimated "the power of ideas." According to Bork, antitrust law went through three stages: (1) an era of "practical" versus "theoretical" judges, where judges failed to recognize the implications of their decisions; (2) the first wave of antitrust theorists "who accepted the notion of multiple goals [for antitrust law] and also the premises of the law's Rube Goldberg version of economics"; (3) the second generation of theorists, who reexamined the relation of multiple goals to legitimate judicial performance, brought the basic ideas of real price theory to bear on examining business behavior, and "wrought a revolution in antitrust law." Bork argues that constitutional law appears to be going through the same stages: (1) it has gone through the period of the non-intellectual judge "who decided cases on unexamined notions of equity and desirable social reform"; (2) the first wave of theorists began, after World War II, to explain what the courts had done, thereby beginning the theory of non-interpretivism, "now the dominant theory among constitutional academics"; (3) there is now the "tiny beginning" of the second wave of theorists with people asking fundamental questions, like "What entitles the judge to govern in the name of the constitution?" (pp. 2-5)

Rule of Law and Interpretivism: Bork concludes that judges take their power from law and the only way to treat the Constitution as law is to apply it in accordance with the intentions of those who drafted, proposed, and ratified it. Unlike noninterpretivist theories, interpretivism keeps judges within certain bounds. Bork states that while we may not be able to determine exactly what was in the minds of the framers and ratifiers we can know the principles they intended; the Constitution gives us premises, not conclusions. (pp. 5-6)

National Legal Center Talk, April 8, 1986.

Philosophy and Law: Bork notes the importance of "ideas and traditional values" in law, stating that law brings philosophy into the marketplace. (p. 1)

Recent Resurgence of Conservative Philosophy: Bork notes that "for a long time" public interest groups, law schools and the judiciary were liberal, but today there is a change, with a greater number of conservative public interest groups and a "significant [conservative] minority" on the bench. Only the law schools and universities remain predominantly liberal. (p. 1)

Judicial Restraint: Bork notes that judicial restraint is not a liberal-conservative issue--in the early 30s liberals were for judicial restraint, while in the 60s and 70s conservative favored it. Bork notes that he favors judicial restraint "not because it is conservative but because it is the only legitimate view of judicial authority in a democracy." (p. 2)

Comparison of Today's Revitalization of Constitutional Law with that of Antitrust Law which Began 25 Years Ago: Both areas of law became extremely confused because the courts made up the law. He notes that a second wave of theorists of antitrust law did not blindly follow the courts but examined the goals of the law, applied sound economic principles and "wrought a revolution." He notes that constitutional law "may be like that." Like antitrust law, whose ideas and symbols go to the heart of the ideology of capitalism, constitutional theory is extremely crucial: ~~W~~its ideas and symbols go to heart of democratic theory and practice." (pp. 3-4)

Original Intent and Constitutional Interpretation: Bork notes that a "judge who looks outside the constitution looks inside himself and nowhere else." For him, only the original intent of those who drafted and ratified the Constitution can be used to ascertain constitutional law; nothing else can constrain the judge or can justify overriding democratic choice. (p. 3)

Lack of Importance of Judicial Appointments: Judge Bork notes that victory for interpretivism will not come by the appointment of a few judges; it "will be decided by the victory of one set of ideas or the other." (p. 4)

No. 9 -- Undated Transcript of Unknown Event.

Emerging Substantive Standards, Developments and Need for Change

Possible Beginning of Historic Shift in Antitrust Law: Bork discusses the schizophrenic nature of antitrust law, which he attributes to erroneous economic theories and a Warren Court majority that had little interest in competition or consumer welfare but had a political and social agenda of its own. While the intellectual war in favor of a free market ideology that was begun by Aaron Director has been won, the legal war is just beginning. Bork claims that while "not a great deal will change perhaps until the Supreme Court revisits some of the doctrines created during the Warren Court era," Baxter's promised new merger guidelines would help. (pp. 8-12)

Criticism of the Warren Court: Bork claims that it was unfortunate that amended Section 7 of the Clayton Act, passed in 1950, was given shape by the Warren Court "which was a very odd court in our history." (p. 9) According to Bork, a majority of the Warren Court subscribed to a philosophy then dominant at Yale Law School, "a degenerate form of legal rulism, known to its devotees at Yale as value jurisprudence which essentially means which side are you on?" (p. 9) Because the Warren Court "disliked big business and particularly disliked business efficiency which it saw as a threat to small business," its "sympathies were almost invariably with the plaintiff." (p. 9) That is why "the government always won." (p. 10)

Warren Court Decisions as Precedent: Noting that decisions like Brown Shoe, Lorens Grocery, Procter and Gamble, etc., were rendered by the Warren Court, which did not understand relevant economics or care about consumer welfare, Bork states "It is a bad mistake, therefore, to sanctify those cases as the law. To do so is to abandon hope of rational pro-consumer antitrust." (p. 10)

Support for Baxter's Vertical and Conglomerate Merger Policies: Bork supports Baxter's statements that vertical or conglomerate mergers can only pose antitrust problems if they worsen horizontal concentration. Bork states "there is no way that a vertical merger can foreclose rivals so as to harm competition" given horizontal merger standards. (p. 15) Nor, he argues, is there any way "that transfer of capital from a giant to a pygmy in a market characterized by pigmies can harm competition." (p. 16) Bork also states that Baxter's policies tear not "a corner of antitrust merger law but a major portion of its overall theoretical structure." (pp. 16-17)

Criticism of Baxter's Statements on Horizontal Policies: Bork states that Baxter's statements that he does not plan to change the law or policy on mergers between competitors caused his orange juice to curdle. Bork claims that the existing horizontal merger guidelines prevent the free working of capital markets and realization of efficiencies by outlawing levels of concentration that are too low to harm competition. Bork states "there is no evidence that markets with as many as three competitors total or more display any of the characteristics of lessened competition or monopoly." (p. 18)

Justice Department Obligations Under the Antitrust Laws: Bork takes exception to a statement by Steve Axinn, another panelist, that the Justice Department would lose credibility with the courts for not enforcing the law Congress provided if it does not challenge mergers of some significant size. Bork argues that all Congress did in amended section 7 was say "Preserve competition, avoid monopoly or a tendency towards it! It did not give them any figures." According to Bork, the figures come from old Supreme Court cases in the fifties and early sixties which gave content to the statute but are not "justified by the legislative history or by the language of the statute." (pp. 86-87) He argues that the Justice Department should simply state it knows better than the Justices who decided these old cases and is going to try to get the courts to reverse them. (p. 87)

Defense of Antitrust Laws as Only Pro-Consumer Welfare Statutes: Bork responds to the arguments of other panelists that the legislative history of the Sherman and Clayton Acts provide evidence of concerns in addition to protecting consumer welfare, by arguing that these other concerns are silly, and if they must be addressed by the courts, they also make the law unconstitutional by delegating complete power to judges. Under such a delegation, he states, judges have become legislators; the judge "is doing precisely the same thing as if you handed him the power and said, Look, you go out and write some tariff laws for us. We don't know what industries, what products or how high they should be. You write them. No judge would accept a delegation like that, and he ought not accept a delegation to think about the good of society defined no more sharply than that in a merger case." (p. 90)

Comments on Professor Morawetz's Paper

Critical Legal Studies: Robert H. Bork originally described Critical Legal Studies as "that strange hangover of '60's radicalism . . . we pass over this last phenomenon as we hope that it will pass over, too." [This passage was stricken.]

Limitations of constitutional law and moral philosophy vs. law and economics: "[B]oth are being extended well beyond their usefulness. In this overextension lies the possibility of the creation of fresh sources of intellectual corruption, particularly in judge-made law. We have enough sources of that already." [p.1] "[I]n antitrust law, we must frame rules that require knowledge of only the most basic economic precepts. Much of the writing in this field, which would assign judges tasks requiring sophisticated economic analysis, not to mention a mastery of calculus, is therefore useless, if not pernicious." [p. 2].

Bork's judicial philosophy isn't moral relativism: "I am sick and tired of hearing my position described as moral relativism My objection to judicial review according to moral philosophy has nothing to do with moral relativism. I happen to believe very strongly in a hierarchy of moral values, and I do not think all human desires and gratifications are equal, nor do I think they are matters of taste. What I do think, and have written, is that moral values are not susceptible to logical proof and, for that reason, a judge has no way of demonstrating that his moral choice on a topic is superior to that of the legislature. Morality does not come out of logic, though it may be refined by it. Morality probably has its ultimate source in religion, which is at bottom a matter of faith rather than logic. That seems to me enough to demonstrate both that my position does not in any way rely upon moral relativism and that a judge cannot demonstrate that his morality is superior to that of a majority of the public. If he cannot make such a demonstration, he has no warrant for displacing the majority's moral choices with his own." [p. 4].

Judicial preferences vs. constitutionalism: "The Constitution . . . guarantees the right of democratic choice in many areas quite as much as it guarantees in other areas the right of freedom from that choice. It is impossible to imagine where a judge, who is commissioned only to keep this system operating, can find a mandate to invade the area of democratic choice and govern in his own name because his morality is superior. The Constitution guarantees a republic, not a morally perfect society. I can think of no way to justify judges in destroying the one in order to achieve the other except to proclaim that authoritarianism in a good cause is entitled to triumph over both democracy and law." [p. 5].

No. 66--Haifa Speech (undated)

Value of "law and economics"; character of law and economics: "[T]he law and economics movement is, in my opinion, the most sensationally fruitful means ever devised for understanding, criticizing and reforming law." [p. 1]. "[T]he law and economics movement . . . has provided a series of stunning demonstrations of the failure of ["generally socialistic"] interventions [in the economy] and the general superiority of unregulated markets." [p. 3]. "This is a Darwinian theory of natural selection among legal rules." [p. 12].

Bork and socialism: Director "was, I believe, originally something of a socialist, as was I before I met him" [p. 4].

Prior antitrust doctrine: "The economic theory being used was a sort of primitive folklore [in the 1940's and early 1950's]." [p. 5].

Development of law and economics' primacy: Director started a 20-year debate "and those of us who espoused what was called the Chicago approach gradually went from being regarded as a crazed set of fanatics to something approaching intellectual hegemony." [pp. 8-9].

Leftist bias of American academics: "For reasons that are not entirely clear, the American professoriate is to the left of the public at large. Much of it has socialist inclinations of a not very programmatic sort." [p. 14].

Reagan antitrust policies and Congress: Reagan's FTC and Antitrust Division heads "drastically altered the government's antitrust enforcement policy . . . [and] . . . were backed up so thoroughly in the intellectual field that they were able to resist political attack from members of Congress." [p. 10].

Antitrust precedent vs. other precedent; judicial vs. legislative lawmaking: "[J]udges are not properly as free in some of these [other] areas [of law] to modify the law as they are in antitrust. The United States has a tradition of common law development in areas such as contracts and torts and it is quite possible that the law of those subjects will be modified in accordance with the teachings of economics. But it is also dubious that judges should assume the authority to do that even if they can in fact create better rules. The common law tradition of judge-made law grew up in England at a time when the legislature was not a powerful policymaking body, when the specialization of functions between courts and legislatures was not clearly defined. Now that legislatures are the primary policymaking bodies, it is not obvious that the old common law tradition should continue. In areas such as labor law and

corporation law, which are primarily controlled by statute, the teachings of law and economics are necessarily directed more towards legislatures than towards judges." [p. 11].

Limitations of law and economics; zeal of converts thereto: "One of the pitfalls of the law and economics movement is that those who first come upon it, usually lawyers previously innocent of economic learning, tend to become converts and display the fanaticism often associated with sudden conversion. Some of the devotees of the law and economics movement apply economic analysis in areas where it seems not very useful or perhaps even misleading. Economic analysis is not powerful and most successful when it deals with markets and can use money as the unit of measurement. When economics is pressed beyond that, its utility rapidly diminishes. [In original language struck out by Robert H. Bork, he criticizes "one of the most notable of the professors involved in the law and economics movement" for sometimes pressing economics too far. The examples that follow in the article--economic analysis of the entrapment defense and a yarmulke case--were originally identified as the works of this professor, and Bork later says that "the analysis was [not] advanced in any important respect by the use of economic terms."] However, "the central ideas of economic analysis may be applied usefully to institutions that are not primarily economic in nature." [p. 13]. "It seems obvious that not all behavior is explainable in . . . terms [of the self-interest hypothesis]." [p. 14].

Roman Catholic leftism: Bork described Aaron Director as long having been interested in "why certain groups are persistently hostile to capitalism despite its superior record of achievement. Among the groups he analyzed from this perspective is the Roman Catholic church." [p. 13].

Seminar -- 7/5/83 (Outline Notes)

[Notes on Standard Oil, American Tobacco, American Can, U.S. Steel, and Alcoa cases].

Second Lecture--Salzburg (undated; notes)

Government antitrust prosecutions: "Major case is major warfare Dealing with government-consent decree-brute power-agree to all kinds of conditions that are merely punitive or stop doing legal things" [p. 1].

Prior antitrust doctrine: "Fifteen years ago--a really horrendous policy and body of law--improving slowly but much remains to be done." [p. 1]. Antitrust law has been "deformed badly" because "its theories of injury to competition are in major part wrong. The law is striking down business practices as a threat to competition, and hence to allocative efficiency, that are not a threat but are methods of creating productive efficiency. Dead loss to consumers." [Also,] "until recently the Supreme Court refused to consider productive efficiency as a justification for a practice--even condemned it as a 'competitive advantage.' It has begun to do so and that will help to reform the law." [p. 2].

Antitrust law stare decisis; role of the jury: "Important that the rules of law be corrected where they need it and that more topics be transferred from factual determinations to legal determinations." [p. 1].

Open texture of antitrust laws; purpose thereof: "Vague statutes--so judge needs to know what goal he is pursuing--consumer welfare--assume for today." [p. 1].

Specific bad precedents: "Three failures: (1) Loss of Taft's insight about ancillary restraints. So Sealy and Topco . . . (2) Incipency rule as applied to horizontal mergers--Brown Shoe; (3) Failure to make vertical restraints per se lawful--Dr. Miles, Schwinn, GTE Sylvania."

Bad prior precedent: One illegible case about price-fixing and market division was described as "mistaken." [p. 1].

Predation: "Size by growth--predation. Rarity. Importance that law not mistake hard competition for predation." [p. 2].

Foreclosure theory; DOJ merger guidelines; doctrinal changes: "Weakness of theory--foreclosure can't work; ease of entry What seems significant, even astounding is that the new guidelines do not provide for any challenge whatever to vertical mergers on a foreclosure theory. Brown Shoe and that whole line of cases has simply been dropped. This should imply

that all foreclosure reasoning has been dropped as a basis for enforcement policy--that means tying arrangements, reciprocity, exclusive dealing and requirements contracts. FTC is tending the same way, though majority uncertain . . . don't know response of courts and may not for years." [p. 4].

Robinson-Patman Act: "Whole attempt to deal with price discrimination is misguided in any event." [p. 6].

(Untitled, undated outline notes)

Antitrust law--it's generality; similarity to Constitution: Contention over meaning of antitrust laws is possible because of "the vagueness and generality of the statutory provisions--comparable in generality to the Constitution." [p. 1].

Anticapitalist ideology of antitrust: "The free market is the central idea of a liberal, capitalist order. If the law continually teaches that the free market does not work--that it is merely an arena for greed, force, and fraud--then it strikes at the heart of capitalist ideology. For a long time, antitrust did precisely that. In doing so, it both reflected and reinforced powerful emotional and intellectual forces that were anti-free market and, being statist in nature, perhaps also anti-freedom. That is why it is good to report that antitrust is today in a state of intellectual ferment. [Its] intellectual underpinnings--under attack for the past 20 years or so and that attack is beginning to be reflected in the law and in the enforcement agencies." [pp. 1-2].

Reagan antitrust enforcement policy: Robert H. Bork refers to "the turmoil over the government's recent refusal to bring cases that the case law suggests could be won without question." [p. 2].

Clayton Act; bad precedent: Clayton Act's "[c]ombination of exclusionary practice notion with incipency notion was dynamite--needed theory--why--did not have one--Frankfurter in Standard Stations, Clayton 3. Illegal exclusive dealing contracts because courts not able to handle economics." [p. 3].

FTC Act; FCT; constitutionality of independent agencies: FTC Act's goal of an expert agency (FTC) had "problems--did not develop expertise--instead developed zeal to stifle competition to protect small business . . . Independence-- . . . use of FTC as a prosecutorial arm not of Congress but of a single powerful Senator. Rises to level of a constitutional problem--Pres[ident] execute the laws." [p. 5].

Robinson-Patman Act: "Like Nazi and Fascist legislation of the time--protection of small business--strong whiff of anti-Semitism . . . not a price discrimination but a price difference law." [p. 6].

1950 Clayton Act amendments: These amendments addressed a holding company asset loophole, "[b]ut also suggested stricter law, discussed social and political themes--as hard to summarize as contents of a fruitcake." [p. 6].

The Conference Board, Antitrust Conference 1983;
Changing Antitrust Standards: Judicial Precedent Management
Responsibility and the New Economics

Prior antitrust precedent and doctrine: Bork states that "[f]or the entire formative period of antitrust law . . . by and large" antitrust law "made very little sense in economic terms. [It] was built on a kind of primitive folk economics." [p. 5].

Prior precedent; law and economics: Major question in antitrust law today is whether, or to what degree, it is proper for new economic understanding to change established judicial precedent. "It is entirely proper that many aspects of the law should change as economic understanding progresses." Very few or none of the antitrust statutes laid down "anything that might be called firm or detailed rules," as tax laws do. "The Sherman Act was deliberately made open-textured." "[P]recedent is less important in Sherman Act jurisprudence than elsewhere; and this is just as well. There is no particular reason why courts have to keep doing harm, rather than good, once they understand economic reality." [This originally read, "The precedent in this sense is really quite unimportant in the Sherman Act."] Clayton and Robinson-Patman Acts, though somewhat different, still only prohibit practices when they tend to injure competition: "If the judge sees that they do not tend to injure competition, I think it is entirely proper for him to say so and to change prior doctrine, unless he is constrained by a precedent from a higher court." [The original speech made no reference to such constraints.] "The judges made this law, and they made some of it badly. [Original: "and they made it really very badly.]" There is no particular reason why they should not begin to remake the law that is defective so that it serves an understandable social purpose." [p. 6].

Robinson-Patman Act; judicial interpretation of inconsistent statutes: Robinson-Patman states that price discrimination threatens competition and that judges are to strike down particular price discriminations only when they injure competition--which, in fact, is never. So judges should in all such cases declare that there is no injury to competition. [p. 9]. [Original speech: "I think the courts have been by and large just dreadful with the Robinson-Patman Act"] [p. 10].

Original intent vs. original meaning; Robinson-Patman Act: Even if Congress meant for the Act to protect small business rather than competition, judges should enforce the statute as written and not any sub rosa legislative intent: "I do not think it is a judge's business to enforce a legislative wink. That would be to help a legislature evade its proper political responsibility. Courts ought to enforce what the statute says on its face, so that the legislature must decide what it really wants, state it clearly, and take the political heat, if any." [p. 9].

Inferior court's duty to apply higher court precedent; its right to criticize such precedent which applying it; implied overruling of Supreme Court cases: "It is absolutely essential that a lower court follow the Supreme Court's precedent. Otherwise, there would be chaos in the legal system." "If the Supreme Court is doing things with which a lower court thoroughly disagrees, I think the lower court necessarily has to decide the case the way it thinks the Supreme Court would decide it. But when the disagreement is important . . . the responsible judge has an obligation to the law to explain why he thinks the rule is wrong That is a way of continuing a dialogue between the lower courts and the Supreme Court, so the Supreme Court can think again about the problem and, perhaps, change its rule." [p. 9]. "If the economic analysis of the Supreme Court was part of its rationale in deciding the case, then I think the lower court must adopt that same rationale, although it is free to be critical of it in the process." [p. 10]. "It may be that the Supreme Court has now, at least in principle, overruled a lot of reasoning that went into the old law. A lower court may ask itself whether it is clear that the Supreme Court has abandoned Brown Shoe because of subsequently announced principles. If so, the lower court may engage in anticipating overruling. But that is a dangerous game." [p. 10].

Law and economics; role of the jury: "I think the judge gets his economics not from an expert witness but by understanding basic microeconomic theory The system is entirely circular, which is its strength because circular logic is not rebuttable Unless he is bound by a higher court's decision, a judge should not give those questions [of microeconomics] to a jury when he is clear about the necessary answers." [pp. 10-11].

Trends in antitrust law; vertical restraints; r.p.m.: "I do not think that what is really an intellectual revolution in the academic world has been fully (or even very much) translated into the law as yet. It is only partly prosecutorial policy. The Supreme Court is much better than it used to be. The Sylvania case was really a dramatic turn-around The Court has not taken that principle all the way because the logical culmination of the principle involved is not to subject vertical market division to the rule of reason, but rather to make vertical market division per se legal. [Original: "And of course the Court has not taken the next step which is obviously required by its reasoning, which is to make resale price maintenance per se legal."] But I think that is very hard The Court has begun to move in the right direction, however." [p. 11].

Prior precedent; correctness vs. certainty: [Q: Should a court let bad economic theory stand as law in the interests of predictability and stability?] "If you accept some of the incorrect economic reasoning in antitrust law, you make the law inherently unknowable. You do not know how to advise your client because, if such a principle is extended, all kinds of perfectly

legitimate business behavior becomes illegal So I do not think we should let bad principles stay in the law in the interest of stability. We should substitute good principles I do not think stability requires us to keep harmful rules on the books; it requires their elimination." [p. 12].

American Corporate Counsel (Nov. 7, 1985)

Degeneracy of prior antitrust doctrine: "Antitrust policy started promisingly enough, but then, from about 1914 onward it grew steadily worse for about 60 years. We reached the state where the Supreme Court actually held business efficiency anticompetitive and it was hard to see what was behind decisions other than a sort of egalitarian populism. [Defendants virtually never won in the Supreme Court and when occasionally they did, it was for the wrong reasons.]" [p. 1] [bracketed material was stricken]. "During the years in which I wrote about and taught antitrust, I thought it impossible to stem the socialist drive that deformed the law. My philosophy was that if it was impossible to win, at least you could cause pain on the way out." [p. 2]. "Let me remind you just how degenerate antitrust had become by the 1960's. The economic rules made so little sense and could be twisted so easily that almost any challenged behavior could be held illegal. If the defendant did have a strong economic case, the courts would announce that antitrust also served social and political purposes and rule against the defendant anyway. The confusion about the values the law served was really spectacular." [p. 2].

"Social purposes of antitrust;" prior bad precedent: Robert H. Bork originally criticized Brandeis in Chicago Board of Trade for "seem[ing] to think that an agreement which produced leisure for traders could override the consumer interest in competition." He also originally stated that "[I]n Alcoa, Judge Hand said that great industrial firms are inherently undesirable, regardless of their economic results." In the speech as delivered, he criticized Learned Hand in Associated Press for saying that "judges could simply balance the opposing interests and enforce their view of public good. He actually found that the Sherman Act enforced the free speech clause of the first amendment against the press. Learned Hand claimed complete legislative power for judges under the antitrust laws. In Brown Shoe . . . Warren was explicit that small, locally-owned producers were preferred to consumers. Leisure, the free press, small producers, local ownership, the preservation of small towns-- The courts had created for themselves an inexhaustible reservoir of major premises from which they could reach almost any result. Whatever antitrust was, it did not deserve the name of law." [pp. 2-3].

Vertical arrangements-prior precedent: Bork criticized Kennecott Copper and "double foreclosure" theory: "What antitrust policy needed, apparently, was not a lawsuit but a singles bar for the copper industry." [pp. 2-3]. "Vertical arrangements, including vertical mergers, are no longer presumptively illegal and often seem presumptively legal." [p. 5].

Horizontal mergers-prior precedent; "signalling": "The law came close to a rule outlawing large or even moderate market shares created by growth." He described as "absolutely ridiculous" the idea that firms in concentrated industries could eliminate competition even without conspiring by exercising mutual self-restraint, taking each others' market moves as a "signal" to govern their own actions. [pp. 4-5]. "Horizontal arrangements and mergers are not lawful enough but the situation is vastly better than it once was." [p. 5].

New law on purposes of antitrust; implicit overruling of prior precedent: "The Supreme Court has made it clear that the antitrust laws are about consumer welfare. [Economics and nothing else is to be used in antitrust analysis.] I don't think it is yet generally appreciated how much of the precedent that nominally remains on the books has been undercut and rendered inoperative by that." [bracketed material not delivered] [p. 5].

Brennan's role in encouraging legal debate: "[M]uch more in law than economic regulation . . . needs reform. The next great debate is likely to swirl about the issue of the proper constitutional function of our courts. The issue has moved from the law reviews to the [popular press], and elsewhere. For this very considerable benefit we must thank among others Justice William J. Brennan, Jr. He has stepped into the arena of public debate in a way that judges too seldom have. In doing so he has not only clarified the contending ideas in constitutional law, but he has freed other judges to speak out, as I think they should." [p. 13].

Intentionalism: "The issue is whether a judge must be guided by the intentions of those who wrote, proposed and ratified the Constitution or whether he or she may bring some other set of values into play. I am one who thinks that only adherence to intention can provide law that constrains judges as well as the rest of society, only that can give us a government of law and not men. [sic]" The result of non-interpretivist judicial practice "is an enormous expansion of judicial power at the expense of democratic government." [p. 14].

THE WHITE HOUSE

WASHINGTON

August 28, 1987

MEMORANDUM FOR JAY B. STEPHENS

C. CHRISTOPHER COX

PATRICIA M. BRYAN

PETER D. KEISLER

JOSEPH D. RODOTA, JR.

FROM: BENEDICT S. COHEN 

SUBJECT: (1) Justice Powell's Death Penalty Jurisprudence;
(2) Judge Bork's Position on Katzenbach v. Morgan;
(3) Judge Bork's Position on One Man-One Vote

1. Justice Powell's Death Penalty Jurisprudence: Justice Powell has unwaveringly rejected the idea that capital punishment is per se unconstitutional through a long series of cases, beginning with his dissent in Furman v. Georgia (the case which originally declared the death penalty unconstitutional). Justice Powell joined the majority opinion in Gregg v. Georgia and Jurek and wrote the majority opinion in Proffitt v. Florida--the trilogy of cases which reestablished the proposition that the death sentence is not per se unconstitutional. (As Solicitor General, Judge Bork argued on behalf of the United States as amicus curiae in Gregg v. Georgia.) In the last term of the Court, Justice Powell wrote for the majority in the 5-4 decision in McCloskey, which rebuffed a constitutional challenge to the death penalty based on claims that it discriminated against defendants on the basis on their race and the race of their victims. These cases reflect Justice Powell's fundamental agreement with Judge Bork that capital punishment is not per se unconstitutional. As Judge Bork has stated, capital punishment is "explicitly assumed to be available three times in the Fifth Amendment to the Constitution and once again . . . in the Fourteenth Amendment."

It should be noted that Justice Powell has been a prominent exponent of the view that "death is different" and has voted to impose numerous procedural requirements in capital cases. In the Woodson and Roberts cases in 1976, Justice Powell voted to find states' mandatory death penalty statutes unconstitutional. In 1977, he voted with the majority to find that capital punishment was unconstitutionally disproportionate as punishment for the crime of rape. In Lockett v. Ohio, Justice Powell voted to strike statutes barring defendant's introduction of evidence concerning certain mitigating circumstances. Justice Powell has also voted to oppose mandatory death sentences for persons

serving life sentences, and in the last term of the Court Justice Powell voted to find that victim impact statements were unconstitutional in capital cases.

These cases, which Judge Bork has apparently never discussed, should not obscure the fact that Justice Powell's vote in the frequently very close cases that have reaffirmed the constitutionality of capital punishment has been crucial, and that his replacement by Judge Bork would ensure the continuation of this long line of precedents. (It should be noted that two current members of the Court, Justice Brennan and Justice Marshall, continue to reject the Gregg precedent and regularly vote to vacate all death penalties as per se unconstitutional.

2. Judge Bork's position on Katzenbach v. Morgan and literacy tests. Judge Bork's criticism of Katzenbach v. Morgan has given rise to ill-informed commentary to the effect that Judge Bork either approves of or does not object to racially discriminatory literacy tests. Such criticisms of Judge Bork wholly misapprehend the nature of his comments about Morgan. The Court in that case struck down New York State's literacy requirements, even though there was no evidence to suggest discriminatory use or intent and even though such requirements had earlier been upheld by the Court under such circumstances. In so doing, the Court relied upon Section 5 of the 14th Amendment, which--in a sharp departure from previous jurisprudence dating all the way back to Marbury v. Madison--it deemed to confer on Congress the power to determine definitively the content of the 14th Amendment's guarantees. Morgan represented a radical departure from earlier jurisprudence, and that aspect of the case has never since been followed by the Supreme Court. It was Morgan's unconstitutional abdication of judicial power to the legislature--threatening the independence of the judiciary and judicial review as established in Marbury--that troubled Judge Bork, not its effect on literacy requirements. Judge Bork's position on this matter is indistinguishable from that of Justice Powell. Moreover, Judge Bork has applauded a case decided one year earlier upholding Congress's suspension of such tests in cases where there was a history of discriminatory use. It is therefore entirely inaccurate to suggest that Judge Bork does not, or has not in the past, opposed the discriminatory use of literacy tests, or that he questions Congress' power to legislate against such discriminatory tests. It bears emphasis that the reasoning in Katzenbach could be used as easily to support a "conservative" result as a "liberal" one. For example, in 1981, Senator East relied upon Katzenbach as support for his proposed Human Life Bill, which would have extended the protections of the 14th Amendment to fetuses and thus legislatively overruled Roe v. Wade. Bork testified against this bill for the same reason he criticized Katzenbach: that it is for the Court, not the Congress, to define the meaning of constitutional protections. If critics claim that his position on Katzenbach means he is "anti-civil rights," then presumably they would argue that his

position on the Human Life Bill makes him "pro-abortion." Obviously, both views are caricatures of his jurisprudence. Rather, Bork has simply upheld a consistent position that the courts are the authoritative interpreters of the Constitution.

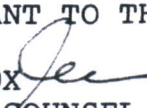
3. One man, one vote: Judge Bork has also been unfairly criticized for his comments on Reynolds v. Sims and the Warren Court's other malapportionment cases. Contrary to the suggestions of his critics, Judge Bork agrees with the position Justice Stewart took in those cases that the Supreme Court could properly act to remedy any malapportionment that systematically frustrated the will of the majority. Like Justice Stewart and Justices Frankfurter and Harlan, along with many distinguished commentators, Judge Bork believes that the Constitution does not require the rigid mathematical formula used by the Warren Court--a formula under which the United States Senate itself would be deemed unconstitutional.

THE WHITE HOUSE

WASHINGTON

August 31, 1987

MEMORANDUM FOR JOHN C. TUCK
DEPUTY ASSISTANT TO THE PRESIDENT AND
EXECUTIVE ASSISTANT TO THE CHIEF OF STAFF

FROM: C. CHRISTOPHER COX 
SENIOR ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Background Information and Talking Points for
Senator Baker's Meeting with AFBF Board

As requested, attached are the following:

1. Background information for tomorrow's AFBF Board meeting.
2. Bork Talking Points.

Please let me know if Senator Baker would like any additional information.

Attachments

cc: A.B. Culvahouse, Jr. (w/encs.)

BACKGROUND INFORMATION FOR MEETING WITH
AMERICAN FARM BUREAU FEDERATION BOARD

September 1, 1987 - O'Hare Marriott

Persons Attending. The following persons, representing each of the AFBF's four regions, will be attending:

Dean Kleckner (Iowa) -- President
Harry S. Bell (South Carolina) -- Vice President

Northeast Region:

John Tarburton (Delaware)
Keith Eckel (Pennsylvania)
Fred Butler (West Virginia)

Southern Region:

Hugh Arant (Mississippi)
Bob Delano (West Virginia) (former national president)
Jimmy Grangnard (Grun'yard) (Louisiana)
Jim Lockett (Oklahoma)
Carl Loop, Jr. (Florida)
Ray Mackey (Kentucky)
Bob Nash (Georgia)
S. M. True (Texas)
Andrew Whisenhunt (Arkansas)

Note: Jimmy Putnam, delegate from Tennessee, retired last year; he is for now replaced by Whisenhunt from Arkansas.

Western Region:

Cecil Miller (Arizona)
Henry Voss (California)
Keith Probst (Colorado) (Howard Probst, his brother, is Senator Armstrong's A.A.)

Midwest Region:

Richard Eckstrum (South Dakota)
C.R. "Dick" Johnston (Missouri)
Merlyn Lokensgard (Minnesota)
Doyle Rahjes (Kansas) (Rah'jess)
Marion Stackhouse (Indiana)
John White, Jr. (Illinois)

Women's Committee Representative:

Mrs. Gordon White (Mississippi)

Young Farmers and Ranchers Representative:

Zippy Duvall (Georgia)

Text of Resolution. On August 13, 1987, the Western Region, meeting in New Mexico, passed a resolution in support of Judge Bork. The text of that resolution is as follows:

By unanimous vote, those attending the Western Region Presidents and Administrators Conference at the Inn of the Mountain Gods in Ruidoso, New Mexico, August 12-14, 1987 adopted the following resolutions with instructions that they be forwarded to Mr. Dean Kleckner, President, American Farm Bureau Federation, for consideration and appropriate action:

Resolution No. 1. Confirmation of Judge Robert Bork for Supreme Court of the United States.

Whereas, Judge Robert Bork's addition to the Supreme Court of the United States has the potential of assisting the basic philosophical views of the American Farm Bureau through the protection of both human rights and personal property rights, and

Whereas, Judge Bork is being subjected to an extremely adverse press and the active opposition of many forces opposed to Farm Bureau philosophy:

Therefore, Be It Resolved, that the American Farm Bureau Federation Board of Directors develop a program to advance the confirmation of Judge Bork.

Facts about AFBF. This group is the largest agricultural organization in the U.S., with more than 3½ million members (and representing, when family members are included, several million more persons). Its basic philosophy is supportive of the Reagan agenda, including particularly fiscal conservatism. Other issues of current importance to the AFBF are the need for farm credit; the need to reduce the expense of federal farm programs and to make their application more uniform and fair; and the preservation of western states' water rights against intrusion by the federal government.

American Farm Bureau Policy Manual. The following are relevant excerpts from the AFB Policy Manual (bracketed material does not appear in original):

Section 502 -- The Constitution:

[Role of Courts in Preserving Limited Government; Federalism] Stable and honest government with prescribed and limited powers is essential to freedom and progress.

The Constitution of the United States is well designed to secure individual liberty by division of authority among the legislative, executive and judicial branches and the diffusion of government powers through retention by the states and the people of those powers not specifically delegated to the federal government.

[Original Intent]. The Constitution is the basic law of the land and changes in long established interpretations should be made only through constitutional amendments.

[Separation of Powers; Independence of Judiciary]. The constitutional prerogatives of each branch of the federal government should be preserved from encroachment by the other branches. We fully expect elected officials to fulfill their promise to uphold and defend the U.S. Constitution.

Section 507 -- The Judiciary:

[Judicial Restraint]. We believe in an independent judiciary, impartial administration of law without special privilege and government by law rather than by people. The judicial function should be performed by the judicial branch and not by executive agencies. The Supreme Court should confine itself to interpretations of the Constitution and should not perform a legislative function.

[Qualifications of Supreme Court Nominees]. We urge that appointees to the Supreme Court be selected from those best qualified with a minimum of ten years experience in a state supreme court or a federal court. [Note: Stress Judge Bork's combined experience as Solicitor General and U.S. Court of Appeals judge.] We oppose lifetime appointments to judgeships. We support a constitutional amendment to appoint federal judges, excluding U.S. Supreme Court Justices, for a term of ten years. All federal judges, including Supreme Court Justices, should be retired if they become physically or mentally incapable.

[Criminal Law; Victims' Rights; Death Penalty; Law and Order]. We are seriously concerned of the practice of many courts which overlook the rights of the injured party in an overzealous effort to protect the rights of the convicted. We recommend that stays of execution upon conviction of capital offenses be limited to one appeal and if the appeal fails that execution be carried out within one year. We recommend that all persons convicted of violent crimes, with specific emphasis on crimes committed with deadly weapons, serve their sentences without parole. We favor reform of the appeal system that presently allows guilty persons years of extra time to appeal their cases at the expense of the taxpayers. We feel that evidence used to convict a person of a felony should not be disallowed because of some

technicality. We support a change in the instructions given juries. If a jury finds a person guilty of a crime, then they should be informed of the person's past convictions, so that the jury takes into consideration all pertinent information when determining an appropriate sentence. We favor legislation allowing judges to inform jurors of parole regulations before sentencing criminals.

Bork Issues to Stress. The White House Talking Points on Judge Bork are perfectly suited to this occasion. In particular, the following areas should be stressed because of their commonality with the AFBF's policies:

- o Because of AFBF's members' concerns about maintaining a wholesome quality of family life, crime issues are important.
- o Judge Bork's interpretivist philosophy of judicial restraint, under which judges strive to interpret rather than make law, is important to preserve and defend the Constitution. Activist judges threaten an undemocratic expansion of the role of the federal government.
- o Judge Bork's impressive qualifications are an important factor in AFBF's support for him.
- o Property rights (which, according to the AFB Policy Manual "are among the human rights essential to the preservation of individual freedom") are explicitly mentioned in the Constitution. Judge Bork will uphold these rights, as all other rights expressly set forth in the Constitution.
- o Anti-business forces have mobilized against Judge Bork; now is the time for AFBF members to respond.
- o Leadership of the respective Farm Bureaus can bring pressure to bear on key U.S. Senators and can influence public discourse on this issue.