EDWARD M. KENNEDY
MASSACHUSETTS

United States Senate

WASHINGTON, D.C. 20510

December 17, 1987

Dr. Hector P. Garcia
American G.I. Forum
1315 Bright Street
Corpus Christi, Texas 78405

Dear Dr. Garcia:

Thank you for your letter concerning the nomination of Judge Bork. I opposed Judge Bork, because of his extremely narrow reading of the Constitution. Unlike all 105 men and women who have served as Justices of the Supreme Court, Judge Bork rejects the principle that individual liberties are protected unless they are specifically listed in the Constitution itself. Reasonable people may differ about the limits of the constitutional right to privacy, but Judge Bork is unique in his rejection of any right to privacy at all.

Throughout his career, Judge Bork opposed measures advancing civil rights. His views on equal rights for women are also profoundly troubling. Shortly before his nomination, he stated that the Constitution's Equal Protection Clause should have been confined to banning discrimination on racial and ethnic grounds. That view would mean no constitutional prohibition at all against sex discrimination.

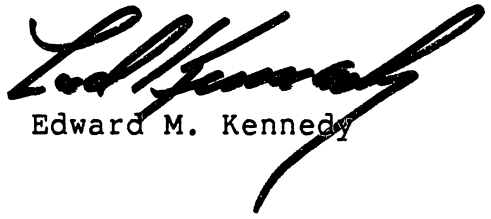
On freedom of speech, Judge Bork for many years held a narrow view of the First Amendment that would cut back a fundamental right of our democracy -- the tradition of vigorous dissent on which our nation was founded. In addition, he interprets the Constitution as giving excessive power to the President at the expense of Congress, a position that would upset the two century old tradition of checks and balances at the heart of the Constitution itself.

During confirmation hearings that were unprecedented for their careful examination of his views, Judge Bork had ample opportunity to explain his controversial positions. But following those hearings, a bipartisan majority of the Senate and the American people opposed the nomination, because his views on

questions of individual rights and liberties are inconsistent with our nation's sense of justice.

I am enclosing a more detailed analysis of my reasons for opposing the nomination, and I hope you will find it of interest.

Sincerely,



Edward M. Kennedy

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Enclosure

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Senate

NOMINATION OF JUDGE ROBERT H. BORK TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

Mr. KENNEDY. I thank the Senator.

Mr. President, It is no secret that I oppose the nomination of Judge Bork to the Supreme Court. I stated my opposition the day the nomination was announced—and I'm proud of it.

Although I strongly oppose Judge Bork, I have often supported conservative Supreme Court nominees by conservative Republican Presidents. I voted for the nominations of Chief Justice Burger, Justice Blackmun, and Justice Powell by President Nixon. I voted for the nomination of Justice Stevens by President Ford. And I voted for the nominations of Justice O'Connor and Justice Scalia by President Reagan. In fact, President Reagan has named over 300 judges to the Federal bench during the past 7 years, and I have supported all but eight.

But from the beginning, it was clear that the nomination of Judge Bork was more than the usual nomination—which is why it has attracted more than the usual controversy and attention. Virtually everyone, no matter where they are on the issue, recognizes that the Supreme Court is at a turning point, and that whoever fills this vacancy may play a large role in setting the Court's direction for a decade or even longer to come.

Rarely have we had such a combination of circumstance. The Supreme Court is closely divided—and the President has consciously sought to bend it to his will. The Justice who resigned defied any ideological category and he held the decisive balance on many critical issues—and the Justice who was nominated tilted so consistently toward one narrow ideological point of view.

No one disputes the President's right to try to force that tilt on the Supreme Court—and no one should dispute the right of the Senate to try to stop him. That's what advice and consent means in the Constitution. That was the original intent of the Founding Fathers, as that is the meaning of the constitutional role of the Senate today.

At the outset, the advocates of the nomination implicitly conceded that they had a hard case to make. They tried to discredit Judge Bork's opposition, on the foolish ground that all the Senate can or should do on a nomination is read the resume and FBI report—and if the nominee is smart enough, and has stayed out of trouble, the Senate is compelled to confirm him. Ideology shouldn't count, they said, and often it hasn't. But what is sauce for the goose is sauce for the gander. President Reagan obviously took Robert Bork's ideology into account in making the nomination, and the Senate has every right to take it into account in acting on the nomination.

This debate has been a timely lesson, in this bicentennial year of the Constitution, of our commitment to the rule of law, to the principle of equal justice for all Americans, and to the fundamental role of the Supreme Court in protecting the basic rights of every citizen.

In choosing Robert Bork, President Reagan selected a nominee who is unique in his fulminating opposition to fundamental constitutional principles as they are broadly understood in our society. He has expressed that opposition time and again in a long line of attacks on landmark Supreme Court decisions protecting civil rights, the rights of women, the right to privacy, and other individual rights and liberties. Judge Bork may be President Reagan's ideal ideological choice for the Supreme Court, but that ideology is not acceptable to Congress and the country, and it is not acceptable in a Justice of the Nation's highest court.

In analyzing the record of Judge Bork's long professional career, and in his testimony before the Senate Judiciary Committee, a number of themes have emerged:

Judge Bork is antagonistic to the role of the law and the courts in fundamental areas such as ensuring racial justice, protecting the rights of women, and preserving the right of privacy for individuals against oppressive intrusions by the Government.

Judge Bork is a true believer in concentrated power, whether it is big government in the form of unrestrained executive power, or big business in the form of corporations virtually unrestrained by antitrust laws and health and safety regulation.

Judge Bork is not only an enemy of the individual in confrontations with the Government, but he is equally an enemy of Congress in confrontations with the President or when the will of Congress is in conflict with his ideology.

Judge Bork has little respect for precedent. His habit of intemperate statements—some made this year, on the very eve of his nomination—suggests how eager Judge Bork is to rewrite the meaning of he Constitution. His numerous confirmation conversions, implying a newfound respect for precedent, are hardly reassuring.

Judge Bork's hostility toward individuals is nowhere clearer than in his attitude toward civil rights. People of great courage in this country endured great risks over the past three decades in the struggle against race discrimination in America. In the 1960's, while we sought to end segregated lunch counters and "Whites Only" want ads, Robert Bork stridently opposed legislation to end racial discrimination in public accommodations and employment.

Nor can Judge Bork's intemperate opposition be passed off as the under-

standable aberrations of a provocative professor confounded by the swiftly moving events of a quarter century ago. In 1964, a Senator or a scholar did not have to be a liberal to weigh the issue and judge it rightly. The Civil Rights Act of that year was an historic product of mainstream America, Republican as well as Democrat. It was overwhelmingly endorsed by constitutional experts and swiftly and unanimously sustained by the Supreme Court. And Judge Bork's mentor and colleague at Yale, one of the most respected advocates of conservative legal philosophy and judicial restraint, Alexander Bickel, was a forceful voice in favor of Federal action against discrimination, but Robert Bork disagreed—he said that the historic public accommodations legislation was based on a principle of "unsurpassed ugliness"—when most Americans thought that phrase better described Jim Crow.

It took 9 long years—and the pressure of his nomination to be solicitor general—for Mr. Bork to recant his opposition to that landmark measure. But that convenient retraction belies his consistent assault against other Supreme Court decisions mandating racial equality before the law.

He rejected the Supreme Court's unanimous 1948 decision outlawing court enforcement of racially restrictive clauses in deeds for the sale of property.

When voting rights were at issue, he condemned Supreme Court decisions enshrining the principle of one man, one vote, striking down poll taxes, and upholding the ban on literacy tests and other devices employed to deny the right to vote.

At the Judiciary Committee hearings, he even indicated he could find no constitutional support for the Supreme Court's 1954 decision banning segregated schools in the District of Columbia.

From the purchase of a home to the ballot box, to the job site, to the indignity of "whites only" signs in public places, to the schools of the Nation's Capital, Robert Bork has made a career of opposing simple justice, and he does not deserve a new career on the Supreme Court of the United States.

Judge Bork has been just as wrong on the rights of women. Three weeks before his nomination, he repeated his extremist view that "the equal protection clause probably should have been kept to things like race and ethnicity"—thereby reading out of the Constitution all protection against sex discrimination.

Under the pressure of these confirmation hearings, Judge Bork retreated from that indefensible position; but he rejected the notion that more vigorous scrutiny should be applied to sex discrimination. Instead, he would decide on a case-by-case basis whether sex discrimination is reasonable. But that is the very approach under which courts upheld sex discrimination in a long line of cases extending into the 1960's, before the current stricter standard of review was adopted. As in the case of civil rights, when the issue is equal rights from women, the jurisprudence of Judge Bork is an invitation to plow up settled ground and return to the injustices of the past.

In fact, Judge Bork has set himself at odds in other areas with Supreme Court decisions hardly doubted by anyone else—and broadly accepted as basic to constitutional rights.

Legal scholars differ about the degree to which the Constitution protects a general right to privacy, but few if any espouse the extreme position of Robert Bork that there is no such right to privacy at all.

He has condemned 60-year old Supreme Court precedents upholding the right of parents to send their children to religious schools, and striking down statutes barring the teaching of foreign languages—statutes inspired by anti-Catholic bigotry and the anti-German hysteria of World War I.

He has called improper and intellectually empty a Supreme Court opinion striking down the forced sterilization of convicted criminals.

His far-out theory against privacy would reject Justice Powell's ruling that a zoning ordinance may not bar a grandmother from living in the same home as her grandchildren.

He derided as unprincipled and unsupportable the Griswold decision upholding the right of married couples to decide for themselves whether to purchase and use birth control.

He has even said, in the intemperate rhetoric that is his trademark, that a husband and wife have no greater right to privacy than a smokestack has to pollute the air.

The point is not that Robert Bork attacked any one of these holdings on privacy, but that he instinctively reacted against all of them. None of the 105 Supreme Court Justices in our history has as narrow a view of the meaning of constitutional liberty as Judge Bork.

Robert Bork's Constitution preserves precious little freedom for the individual against government interference with fundamentally personal human activities. Real judicial conservatives like John Marshall Harlan and Lewis Powell rejected the Bork view—and it is one of the most important reasons why the Senate should now reject Judge Bork.

Equally disturbing is his roll-back-the-clock record on free speech. It is true that he authored one strong opinion, upholding Evans and Novak against a libel suit by a Marxist professor. But a single first amendment flower does not make a constitutional spring. And it must be remembered that the real threat to a free press comes not from individuals, but from an all-powerful government.

Both in his 1971 law review article and in a 1979 address, he stated unequivocally that no matter what the Supreme Court has said, the first amendment does not protect literature, art or scientific discourse from official censorship.

In 1984, after strong public criticism, this became another of Judge Bork's convenient recantations. But even today, the extent to which he would protect artistic and literary expression is unclear.

In the realm of political speech, Judge Bork persists in his criticism of the landmark opinions of Justices Holmes and Brandeis establishing the clear and present danger test before speech can be restricted. Under questioning at his hearing last month, he indicated his belief that the Supreme Court's Brandenburg decision adopting that test was wrong, but that he would apply it in future cases. The problem is that Judge Bork made clear that he would not apply Brandenburg the way the Supreme Court has. He rejected as wrong the Hess decision, the leading case in which the Court applied Brandenburg to uphold a free speech claim.

On the bench, Judge Bork has been quick to sacrifice the free speech of individuals to the preferences of the President. He dissented from the decision limiting the Government's ability to exclude controversial speakers from the United States—a decision affirmed this week by a divided Supreme Court. He has also been a persistent adversary of freedom-of-information claims. Justice Brandeis wrote that sunlight is the best disinfectant of arbitrary government—but Judge Bork leans toward secrecy and suppression.

Where Judge Bork has not found a way to curtail a right, he has often tried to cut off a remedy. He constantly invokes the doctrine of standing to stand in the way of constitutional claims. In one of his most recent dissents, he suggested that it would be constitutional for Congress to cut off all judicial review of the Government's denial of Medicare benefits. Judge Bork would deny older Americans their day in court, and the Senate should deny him his day on the Supreme Court.

During his recent confirmation hearings, Judge Bork professed a new respect for recent Supreme Court precedents. But as recently as last January, he told the Federalist Society that a judge with his so-called originalist views would have no problem whatever in overruling a precedent—because, as he said, "that precedent by the very basis of his originalist philosophy has no legitimacy."

And in the notorious words that Senator HEFLIN has often quoted, the passage from the so-called Bork Wave speech to the Philadelphia Society last April, Judge Bork used some of the most intemperate language ever uttered by a sitting Federal judge to describe his ideological vision of the future and what he has in store for

the country if he can only get his hands on the Constitution: "It may take 10 years," he said, "It may take twenty years, for the * * * wave to crest, but crest it will, and it will sweep the elegant, erudite, pretentious, and toxic detritus of nonoriginalism out to sea."

Respect for precedent—hardly. Judicial temperament—no thank you. If Robert Bork were on the Supreme Court, a vast body of fundamental Supreme Court decisions would be placed in jeopardy.

Yet another persuasive rationale for rejecting this nomination is Judge Bork's bias for concentrated power. The Bork apologists have attempted to transform his role in the Watergate scandal from obedient lackey of a current President to battling savior of the Department of Justice and staunch defender of the Watergate investigation. They say, in effect, that Robert Bork only did his duty when he fired Archibald Cox and precipitated the infamous Saturday Night Massacre of October 1973; they say that he kept the trains running on time at the Department of Justice, and that he was vigilant to ensure the integrity of the Watergate investigation.

But the only Court ever to examine the issue ruled that Robert Bork broke the law when he obeyed the President and fired Archibald Cox. Rather than doing his duty, he was a dutiful apparatchik of President Richard Nixon in his desperate bid to keep the Watergate coverup from unraveling.

And as Archibald Cox's deputies testified at the Judiciary Committee hearings, Judge Bork was no defender of the integrity of their investigation in the critical days after Cox was fired, when the rule of law in America was hanging in the balance. The investigation was saved, not because of any action by Solicitor General Robert Bork, but because of the pressure from the firestorm of public criticism that erupted across the Nation over what Richard Nixon and Robert Bork had done. As Henry Ruth testified, Judge Bork was irrelevant to the successful continuation of the Watergate investigation—and he has no right to try to rewrite that critical period of our recent history.

Judge Bork's role in the Saturday Night Massacre is the leading example of his profoundly troubling belief in virtually unrestrained Presidential power, but it is not the only example. He maintained in 1973 that the President had the inherent constitutional authority to dismiss Archibald Cox from his position as Watergate special prosecutor—despite legally binding regulations.

Under the Bork reading of Presidential power, the Constitution also forbids the enactment of legislation authorizing independent special prosecutors to be appointed by the Federal courts—such as the five court-appointed prosecutors now investigating alleged misconduct of Attorney General Ed Meese and other officials in the Reagan administration.

In the world according to Judge Bork, the checks and balances carefully structured in the Constitution are in disarray—he believes it is unconstitutional for Congress to take action to prevent a corrupt executive branch official from investigating himself.

The Bork view of unbounded Presidential power does not stop at Watergate's edge. In 1971, he expressed doubt that Congress could limit the scope of an undeclared war, and suggested that Congress could not even constitutionally exercise its power of the purse to forbid the invasion of Cambodia.

In 1978, he wrote that the War Powers Act is "probably unconstitutional." And that same year, ignoring the plain language of the fourth amendment, he contended that the Constitution prohibits Congress from limiting the President's inherent national security power to engage in wiretapping and electronic surveillance of U.S. citizens in their homes and offices.

It is bad enough that Judge Bork believes that the Constitution grants the President such vast and unrestrained authority. Even worse, he regards it as largely unreviewable. Given the chance, he would drastically restrict access to the courts by anyone, including Members of Congress, to challenge the constitutionality of Presidential action.

His extreme inclination to insulate the President from legal challenge culminated last year in his dissent in Barnes versus Kline, in which he issued a 30-page diatribe closing the courthouse door to challenges by Congress against Presidential abuse of the pocket veto power—even though the Reagan Justice Department itself conceded that Congress had standing to bring the case.

No person nominated to the Supreme Court in this century—or the last—has demonstrated a belief in so broad and unrestricted a view of Presidential power, even when it is exercised illegally. Nothing could be further from the original intent of the Founding Fathers—the last thing they intended at Philadelphia in 1787 was to create a President with the powers of George III.

Finally, the distressing pattern of Judge Bork's jurisprudence becomes complete when we examine his conception of antitrust—the field in which he has written most extensively. In the private as well as the public sector, he decisively favors concentrated power.

He would permit mergers between rival companies in situations where even the Meese Justice Department would object. He would let producers swallow up distributors and retailers, except in the rarest of circumstances. He would permit manufacturers to conspire with retail stores to fix prices and drive discount stores out of business; the Bork attitude on this latter point is so extreme and so contrary to congressional intent that Congress passed a law forbidding the Government to advance it—and Judge Bork's position was unanimously rejected by the Supreme Court in 1984.

The Bork antipathy toward antitrust demonstrates again the falsity of the claim that he is a practitioner of judicial restraint. He has urged the courts to ignore Federal statutes and expressions of legislative intent that conflict with his extremist notions of economic efficiency. And he has proposed that judges substitute their judgment for that of Congress in determining what in fact promotes competition in our society. The Senate and House of Representatives may not have the expertise of Robert Bork on antitrust, but we do have the constitutional power to write the antitrust laws—and we do not intend to cede that power to Robert Bork.

In recent days, some supporters of this nomination have tried to divert attention from the issue of Judge Bork's record by attacking the opponents of the nomination for the tactics used in this debate. Granted, we have been the messengers bringing the bad news about Judge Bork, and it is a natural, if deplorable, instinct to attack such messengers. But the Reagan administration's difficulties with this nomination are self-inflicted wounds. The administration itself invited this debate by launcing their no-holds-barred game of capture the Court. The Bork nomination was intended to be the long-anticipated millennium for the right-wing supporters of the administration, and it was widely hailed by them as such. But to the rest of us, it was the culmination of their concerted effort to wrench the Court from its moorings, out of the mainstream of its own precedents and history.

It is preposterous—and hypocritical—for the White House to complain that politics suddenly intruded to mar the confirmation process. For much of 1986, President Reagan himself barnstormed the country, calling for the election of Republican Senators who would confirm his judicial nominees. President Reagan failed in that campaign, and his failure there was a harbinger of the American people's rejection of Judge Bork.

It is ridiculous—and untrue—for the supporters of Judge Bork to suggest that politics has been confined to only one side of the current debate. From the day the nomination was announced, my Senate office was inundated by an unprecedented tidal wave of mail. I received over 29, letters of support for Judge Bork from across the country, and an even larger number of preprinted postcards expressing such support. And I was hardly a likely target of their affections. Who does President Reagan

think was orchestrating that massive political campaign throughout America for Judge Bork—the tooth fairy?

It is equally ridiculous for Judge Bork and the White House to make the dire assertions we have all heard in recent days that the politics of this debate have somehow endangered the independence of the judiciary. As the constitutional scholar he is, Judge Bork himself should certainly know better. As Justice Oliver Wendell Holmes once said, the Supreme Court is a quiet place, but it is the quiet at the center of the storm. This stormy confirmation debate and the repudiation of Judge Bork may have shaken the foundations of right-wing ideology in America, but it is only a passing gentle breeze in the long and often much more turbulent history of the Supreme Court in our society. Judge Bork himself was a far greater threat to the role of the Supreme Court than anything that happened in this debate. The simple truth is his nomination collided with the Constitution and with democracy in America, and the Supreme Court and the country have emerged the stronger for it.

As the record of this nomination demonstrates, the unseemly attacks by Judge Bork's supporters are baseless—the desperate responses of the losing side searching for scapegoats for their failure. In my 25 years in the Senate as a member of the Judiciary Committee, I have not participated in a confirmation process for a Supreme Court nominee that was more thorough or more fair than the hearings on Judge Bork. I commend our committee chairman, Senator BIDEN, for his leadership in conducting the hearings and guiding the committee review of the nomination.

It also comes with special irony, pettiness, and ill grace for the White House with its vast resources and access to the media, to complain that a 1-minute television message by Gregory Peck unfairly helped to turn the tide against Judge Bork. In this year, in this debate, Gregory Peck turned out to have a better and deeper understanding of what the Constitution means in America's daily life than either Robert Bork or Ronald Reagan.

The allegations that opponents of the nomination have mounted a smear campaign against Judge Bork are particularly inappropriate to this debate, which has been remarkable for its absence of personal attacks on the nominee. The frustration of the White House and the right-wing is understandable over the loss of their dream nominee. But I am confident that the Senate will not be diverted by this sideshow of sour grapes from the issue now awaiting us—which is to fill the large vacancy on the Supreme Court left by Justice Powell with a Justice who genuinely understands the meaning of justice in America.

The question is not, and never has been, loyalty to party but to the Constitution; not special interests but the national interest; not the person who would be Justice but the future of justice itself.

At similar moments in the past, when the issue has been the future of American justice and the fate of the Supreme Court as the ultimate guardian of that justice, Senators have risen above party. In 1937, a Democratic Senate defeated President Franklin Roosevelt's attempt to pack the Supreme Court. And, just 7 years earlier, a Republican Senate defeated President Herbert Hoover's nomination to the Supreme Court of the now-forgotten John J. Parker, who had expressed bias against blacks and working men and women.

During that debate, the great Republican Senator George Norris addressed the issue in words that speak to us today:

> When we are passing on a judge . . . we ought not only to know whether he is a good lawyer, not only whether he is honest . . . but we ought to know how he approaches these great questions of human liberty.

That is the standard by which Robert Bork must be measured—the standard by which any nominee for the Supreme Court should be judged, and the standard which the American people have always set for our highest court. And by that standard, Robert Bork's record does not paint the portrait of a man who should have the last word on what justice means in America.

There is no better way in this bicentennial year to commemorate the Constitution—and to secure its blessings for future generations—than for the Senate to reject the nomination of Robert Bork. And when the President and his advisers try once more, I urge them not to make the Bork mistake again—and to nominate someone who is in the mainstream of constitutional jurisprudence, who will deserve confirmation by the Senate.

I ask unanimous consent that a compilation of quotations from Judge Bork's decisions, speeches, and articles that I prepared for the Judiciary Committee hearings be printed in the RECORD.

There being no objection, the compilation was ordered to be printed in the RECORD, as follows:

BORK ON BORK—THE WORLD ACCORDING TO ROBERT BORK

On respect for precedent:

When asked whether he could identify any Supreme Court doctrines that he regarded as particularly worthy of reconsideration in the 1980's: "Yes I can, but I won't." (District Lawyer 1985.)

"The only cure for a Court which oversteps its bounds that I know of is the appointment power." (Senate Judiciary Committee 1982.)

"Well, we never really undid a lot of the New Deal, I'm afraid, did we?" (UCLA Oral History Interview with Friedrich von Hayek 1978.)

"Democratic responses to judicial excesses probably must come through the replacement of judges who die or retire with judges of different views." (Society Magazine 1986.)

"I have been as severe, as unsparing, as anyone here in my criticisms of the judiciary, and I take back not one word." (Virginia Bar Association, 1986.)

"[T]he role of precedent in constitutional law is less important than it is in a proper common law or statutory mode. . . . So if a constitutional judge comes to a firm conviction that the courts have misunderstood the intentions of the founders, he is freer than when acting in his capacity as an interpreter of the common law or of a statute to overturn a precedent. . . . [A]n originalist judge would have no problem whatever in overruling a non-originalist precedent, because that precedent by the very basis of his judicial philosophy, has no legitimacy." (Federalist Society, January 31, 1987.)

"What are the chances of restoring legitimacy to constitutional theory? I think they are excellent. My confidence is largely due to a law of nature I recently discovered. To future generations this will be known, and revered, as 'Bork's wave theory of law reform.' . . . [T]he courts addressed what they regarded as social problems after World War II and often did so without regard to any recognizable theory of constitutional interpretation. A tradition of looking to original intention was shattered. Constitutional theorists from the academies, in sympathy with the courts politically, began to construct theories to justify what was happening. So was non-originalism born. That was to become a tsunami and its intellectual and moral excesses are breathtaking. . . . [T]hese theorists exhort the courts to unprecedented imperialistic adventures. But the second wave is rising. When I first wrote on original intent in 1971, one of my colleagues at Yale told a young visiting professor not to bother with it because the position was utterly passe. And so indeed it was. But it was more than passe; it was, I think, the future as well. On the side of the issue there are now, to name but a few, Judges Ralph Winter and Frank Easterbrook, Professor Henry Monaghan, and former professor, now Chief Justice of the High Court of American Samoa, Grover Rees. There are many more younger people, often associated with the Federalist Society, who are of that philosophy and who plan to go into law teaching. It may take ten years, it may take twenty years, for the second wave to crest, but crest it will and it will sweep the elegant, erudite, pretentious, and toxic detritus of non-originalism out to sea." (Philadelphia Society, April 3, 1987.)

"Not to put too fine a point on the matter, what these [non-originalist] scholars are urging, and what an increasing number of students, lawyers, and judges are accepting, is civil disobedience by judges." (Canisius College 1985.)

"[Question] O.K. If I can follow that up. Now the relationship between the judge, the text, and precedent, what do you do about precedent?"

"Mr. BORK. I don't think that in the field of constitutional law, precedent is all that important. And I say that for two reasons. One is historical and traditional. The court has never thought constitutional precedent was all that important—the reason being that if you construe a statute incorrectly, the Congress can pass a law to correct you. If you construe the Constitution incorrectly, Congress is helpless. Everybody is helpless. You're the final word. And if you become convinced that a prior court has misread the Constitution, I think it's your duty to go back and correct it. Moreover, you will from time to time get willful courts who take an area of law and create precedents that have nothing to do with the meaning of the Constitution. And if a new

court comes in and says, "Well I respect your precedent, what you have is a ratchet effect, with the Constitution getting further and further and further away from its original meaning, because some judges feel free to make up new constitutional law and other judges in the name of judicial restraint follow precedent. I don't think precedent is all that important. I think the importance is what the framers were driving at, and to go back to that." (Excerpt from Questions and Answers Session at Canisius College 1985.)

"There are some constitutional decisions around which so many other institutions and people have built that they have become part of the structure of the nation. They ought not be overturned, even if thought to be wrong. The example I usually give, because I think it's noncontroversial, is the broad interpretation of the commerce power by the courts. So many statutes, regulations, governmental institutions, private expectations, and so forth have been built up around that broad interpretation of the commerce clause that it would be too late, even if a justice or judge became certain that that broad interpretation is wrong as a matter of original intent, to tear it up and overturn it." (District Lawyer 1985.)

On his judicial philosophy:

"These remarks are intended to be tentative and exploratory. Yet at this moment I do not see how I can avoid the conclusions stated. The Supreme Court's constitutional role appears to be justified only if the court applies principles that are neutrally derived, defined and applied. And the requirement of neutrality in turn appears to indicate the results I have sketched here." (Indiana Law Journal 1971.)

"I finally worked out a philosophy which is expressed pretty much in that 1971 Indiana Law Journal piece." (Conservative Digest 1985.)

When asked whether he had "eaten" his Indiana Law Journal article, he responded: "I haven't eaten the article—one little sentence." When asked which is the sentence, he responded "I'll never tell." (Federalist Society 1986.)

"It's always embarrassing to sit here and say no, I haven't changed anything, because I suppose one should always claim growth. But the fact is no, my views have remained about what they were. After all, courts are not that mysterious, and if you deal with them enough and teach their opinions enough, you're likely to know a great deal. So when you become a judge, I don't think your viewpoint is likely to change greatly. . . . Obviously, when you're considering a man or woman for a judicial appointment, you would like to know what that man or woman thinks, you look for a track record, and that means that you read any articles they've written, any opinions they've written. That part of the selection process is inevitable, and there's no reason to be upset about it." (District Lawyer 1985.)

"Teaching is very much like being a judge and you approach the Constitution in the same way." (Pittsburgh Television Interview 1986.)

"My own philosophy is interpretivist. But I must say that this puts me in a distinct minority among law professors. . . . By my count, there were in recent years perhaps five interpretivists on the faculties of the ten best-known law schools. And now the President has put four of them on courts of appeals. That is why faculty members who don't like much else about Ronald Reagan regard him as a great reformer of legal education." (National Review 1982.)

On the public accommodations and employment provisions of the Civil Rights Act of 1964:

"There seems to be a strong disposition on the part of proponents of the legislation simply to ignore the fact that it means a loss in a vital area of personal liberty. That it does is apparent. The legislature would inform a substantial body of the citizenry that in order to continue to carry on the trades in which they are established they must deal with and serve persons with whom they do not wish to associate. . . . The principle of such legislation is . . . a principle of unsurpassed ugliness." (New Republic 1963.)

"There are serious and substantial difficulties connected with the public accommodations and employment provisions. . . . The proposed public accommodations and employment practices laws, however, would . . . compel association even where it is not desired." (Chicago Tribune 1964.)

On the Supreme Court's decision in Katzenbach v. Morgan (1966), sustaining a section of the Voting Rights Act of 1965 barring literacy tests in English, and Oregon V. Mitchell (1970), sustaining a section of the Voting Rights Act of 1970 barring all literacy tests:

"These decisions represent a very bad and, indeed, pernicious constitutional law." (Senate Judiciary Committee 1981.)

On the Supreme Court's decision in Shelley V. Kraemer (1948), striking down racially restrictive covenants:

"Starting with an attempt to justify Shelley on grounds of neutral principles, the argument rather curiously arrives at a position in which neutrality in the derivation, definition and application of principle is impossible and the wrong institution is governing society." (Indiana Law Journal 1971.)

On the Supreme Court's decision in Harper v. Virginia Board of Elections (1966), striking down the poll tax:

"[T]hat case, an equal protection case, seemed to me wrongly decided. . . . As I recall, it was a very small poll tax, it was not discriminatory and I doubt that it had much impact on the welfare of the Nation one way or the other." (Senate Judiciary Committee 1973.)

On the Supreme Court's decision in University of California Regents v. Bakke (1978) upholding affirmative action programs:

"Justice Powell's middle position—universities may not use raw racial quotas but may consider race among other factors, in the interest of diversity among the student body has been praised as a statesmanlike solution to an agonizing problem. It may be. Unfortunately, in constitutional terms, his argument is not ultimately persuasive. . . . As politics the argument may seem statesmanlike, but as constitutional argument, it leaves you hungry an hour later." (Wall Street Journal 1978.)

On the Supreme Court's decision in Reynolds v. Sims (1964), the reapportionment case establishing the one-man, one-vote standard for election districts:

"On no reputable theory of constitutional adjudication was there an excuse for the doctrine it imposed." (Fortune Magazine 1968.)

"The state legislative reapportionment cases were unsatisfactory, precisely because the Court attempted to apply a substantive equal protection approach. Chief Justice Warren's opinions in this series of cases are remarkable for their inability to muster a single respectable supporting argument." (Indiana Law Journal 1971.)

"I think one man, one vote was too much of a straight jacket. I do not think there is a theoretical basis for it." (Senate Judiciary Committee 1973.)

"I think this court stepped beyond its allowable boundaries when it imposed one man, one vote under the Equal Protection Clause." (United States Information Agency, June 10, 1987.)

On the application of the Equal Protection Clause to women:

"The equal protection clause . . . does require that government not discriminate along racial lines. But much more than that cannot properly be read into the clause. . . . [C]ases of racial discrimination aside, it is always a mistake for the court to try to construct substantive individual rights under the due process clause or the equal protection clause." (Indiana Law Journal 1971.)

"This court winds up legislating in this area with . . . entirely made-up constitutional rights. This is a process that is going on. It happens with the extension of the Equal Protection Clause to groups that were never previously protected. When they begin to protect groups that were historically not intended to be protected by that clause, what they are doing is picking out groups which current morality of a particular social class regards as groups that should not have any disabilities laid upon them." (Federalist Society 1982.)

"It speaks volumes about the deterioration of the equal protection concept that it is even possible today to take seriously a challenge to the constitutionality of the male-only draft." (Seventh Circuit 1981.)

"Well, in this country, already our experience under the American Constitution is that for many years the Supreme Court of the United States struck down laws interfering with matters within states, on the grounds that they were not interstate commerce and that federal power extended only to interstate commerce. The political attitude of the country changed, and the country demanded more regulation—or the New Deal demanded more regulation. The court gave way. And the court has now almost completely abandoned that form of protection. It has now moved on [to the point]—and I think it's significant—that the most frequently used part of the Constitution now is the equal-protection clause, by which the court is enforcing the modern passion for equality. I wonder, given that kind of institutional history, whether any institutional innovation can save us, or whether it isn't really just an intellectual/political debate that will save us?" (UCLA Oral History Interview with Friedrich von Hayek 1978.)

"I do think the Equal Protection Clause probably should have been kept to things like race and ethnicity. When the Supreme Court decided that having different drinking ages for young men and young women violated the Equal Protection Clause, I thought that . . . was to trivialize the Constitution and to spread it to areas it did not address." (United States Information Agency, June 10, 1987.)

On Sexual harrassment:

"Perhaps some of the doctrinal difficulty in this area is due to the awkwardness of classifying sexual advances as 'discrimination.' Harassment is reprehensible, but Title VII was passed to outlaw discriminatory behavior and not simply behavior of which we strongly disapprove. . . . [The court's] bizarre result suggests that Congress was not thinking of individual harassment at all but of discrimination in conditions of employment because of gender." (Vinson v. Taylor 1985.)

On the Supreme Court's early decisions on the right to privacy in Meyer v. Nebraska (1922) (striking down a state law prohibiting schools from teaching foreign languages) and Pierce v. Society of Sisters (1925) (striking down an anti-Catholic law prohibiting parents from sending their children to private schools):

"[These cases] were also wrongly decided . . . perhaps Pierce's result could be reached on acceptable grounds, but there is no justification for the Court's methods." (Indiana Law Journal 1971.)

On the Supreme Court's decision in Skinner v. Oklahoma (1942) striking down a law requiring sterilization of persons convicted of robbery but not embezzlement:

"[The decision is] improper and as intellectual empty as Griswold v. Connecticut." (Indiana Law Journal 1971.)

"Well, I don't want to pursue this too far, but I'm reminded of a Supreme Court case which raised this in extreme terms. Oklahoma passed a statute which said, in effect, that criminals convicted for the third time for a crime of violence—a felony involving violence—should be sterilized. The theory was that it was genetic. Nobody knows. But the Supreme Court looked at that law and said, 'Well, a bank robber who robs for the third time will be sterilized, but an embezzler in the bank will not be.' Those people are alike; that's discriminatory; the law failed. That's my point. Once you give this power to define discrimination, that kind of thing will be done." (UCLA Oral History Interview with Friedrich von Hayek 1978.)

On the Supreme Court's decision in Griswold v. Connecticut, striking down a state law making it a crime for a married couple to use birth control:

"Griswold, then, is an unprincipled decision, both in the way in which it derives a new constitutional right and in the way it defines that right, or rather fails to define it . . . Every clash between a minority claiming freedom and a majority claiming power to regulate involves a choice between the gratifications of the two grounds. . . . Compare the facts in Griswold with a hypothetical suit by an electric utility company and one of its customers to void a smoke pollution ordinance as unconstitutional. The cases are identical. . . . Unless we can distinguish forms of gratification, the only course for a principled court is to let the majority have its way in both cases." (Indiana Law Journal 1971.)

"The most dramatic examples of noninterpretivist review in our history are Lochner, Griswold v. Connecticut, and Roe V. Wade, which struck down, respectively, a law providing maximum hours of work for bakers, a law prohibiting the use of contraceptives, and a law severely regulating abortions. In not one of those cases could the result have been reached by interpretation of the Constitution, and these, of course, are only a very small fraction of the cases about which that could be said." (Catholic University 1982.)

"I don't think there is a supportable method of constitutional reasoning underlying the Griswold decision." (Conservative Digest 1985.)

On the Supreme Court's decision in Roe v. Wade (1973), establishing a constitutional right to abortion:

"I am convinced, as I think most legal scholars are, that Roe v. Wade is, itself, an unconstitutional decision, a serious and wholly unjustifiable judicial usurpation of State legislative authority. . . . [It] is in the running for perhaps the worst example of constitutional reasoning I have ever read." (Senate Judiciary Committee 1981.)

"The public is coming to understand that decisions like Roe v. Wade rest on no constitutional foundation." (Seventh Circuit 1981.)

On the right of a divorced father to visit his minor child:

"I cannot agree that the Constitution of its own force establishes any such right for a non-custodial parent. . . . The [Supreme] Court has never enunciated a substantive right to so tenuous a relationship as visitation by a non-custodial parent. The reason for protecting the family and the institution of marriage is not merely that they are fundamental to our society but that our entire tradition is to encourage, support, and respect them. . . . That cannot be said to broken homes and dissolved marriages. In fact to throw substantive and not simply procedural constitutional protections around dissolved families will likely have a tendency further to undermine the institution of the intact marriage and may thus partially contradict the rationale for what the Supreme Court has been doing in this area." (Franz v. United States 1983.)

On the scope of the First Amendment's protection of free speech:

"Constitutional protection should be accorded only to speech that is explicitly political. There is no basis for judicial intervention to protect any other form of expression, be it scientific, literary or that variety of expression we call obscene or pornographic." (Indiana Law Journal 1971.)

"But there is no occasion . . . to throw constitutional protection around forms of expression that do not directly feed the democratic process. It is sometimes said that works of art, or indeed any form of expression, are capable of influencing political attitudes. But in these indirect and relatively remote relationships to the political process, verbal or visual expression does not differ at all from other human activities, such as sports or business, which are capable of affecting political attitudes, but are not on that account immune from regulation. . . . I will be bold enough to suggest that any version of the First Amendment not built on the political speech core, and confined by, if not to, it will either prove intellectually incoherent or leave judges free to legislate as they will, both mortal sins in the law." (University of Michigan 1977.)

"There is much more freedom in the area of sexual permissiveness. There is much more freedom—if you want to call these things freedom—in the area of things that may be said or written or shown on film or shown on the stage. Now, I suppose the latter could be evidences of depravity rather than freedom, but I take it you think——" (UCLA Oral History Interview with Friedrich von Hayek 1978.)

"My views on the First Amendment [in the 1971 article], I think, have changed only to the extent that in an effort to find a bright line for judges to follow, I said the First Amendment really ought to protect only explicitly political speech. It now strikes me that I purchased a bright line at the expense of a rather more sensible approach. There is a lot of moral and scientific speech which feeds directly into the political process. . . . I cannot tell you much more than that there is a spectrum of, I think political speech—speech about public affairs and public officials—is the core of the amendment, but protection is going to spread out from there, as I say, in the moral speech and in the scientific speech, into fiction and so forth. There comes a point at which the speech no longer has any relation to those processes. It is purely a means for self-gratification. When it reaches that level, speech is really no different from any other human activity which produces self-gratification. Where you draw the line there, I cannot state with great precision." (United States Information Agency, June 10, 1987.)

On freedom of the press:

"[It] seems plain that the press has done quite well before the Burger Court. In Pentagon Papers the press was permitted to publish state secrets it knew to have been taken from the government without authorization. In Miami Herald Publishing Co. v. Tornillo the Court struck down a right-of-reply statute that had significant scholarly support. In Cox Broadcasting Corp. v. Cohn a statute prohibiting publication of a rape victim's name was held invalid. In Landmark Communication v. Virginia the State was held disabled from punishing publication of material wrongfully divulged to it about a secret inquiry into alleged judicial misconduct."

In some of those cases, it is possible to believe, the press won more than perhaps it ought to have, though not many journalists are heard to express qualms. Surely, however, Pentagon Papers need not have been stampeded through to decision without either Court or counsel having time to learn what was at stake. The New York Times which had delayed publication for three months was able to convince the Court that its claims were so urgent, once it was ready to go, that the judicial process could not be given time to operate, even on an expedited basis. And one may doubt that press freedom requires permission to publish a rape victim's name or to publish the details of an investigation which the State may lawfully keep secret. These cases are instances of extreme deference to the press that is by no means essential or even important to its role." (University of Michigan 1977.)

On freedom of religion:

"One of those who spoke at Brookings in response to Bork said Bork essentially adopted Chief Justice William H. Rehnquist's dissent in an Alabama school prayer case in 1985. In that case, Rehnquist said the Founding Fathers intended only to ensure that one religious sect should not be favored over another, not that the government should be entirely neutral toward religion. Another member of the audience, the Rev. Kenneth Dean, pastor of the First Baptist Church of Rochester, N.Y., said he told Bork of his experience as a junior high school teacher in Florida where Bible reading began every school day. Dean said he told Bork of one occasion where he called upon a Jewish student to read from the New Testament but the boy declined, saying his parents did not want him to. Those who refused to read had the option of standing outside the classroom, he recalled. Dean said he felt he had treated the student badly by singling him out before his peers. Dean quoted Bork as responding, 'So what? I'm sure he got over it.' Bork, asked about Dean's account, said, 'I can't believe I would have said that.'" (Washington Post, July 28, 1987, referring to a dinner at the Brookings Institution for religious leaders in 1985.)

On the Supreme Court's decisions in Brandenburg v. Ohio (1969) and Hess v. Indiana (1973), establishing the clear and present danger test before political speech can be prohibited:

"There should, therefore, be no constitutional protection for any speech advocating the violation of law." (Indiana Law Journal 1971.)

"Hess and Brandenburg are fundamentally wrong interpretations of the First Amendment." (University of Michigan 1977.)

On the Holmes and Brandeis dissents in the Gitlow and Abrams cases, proposing the clear and present danger test:

"Actually, in those famous decisions, I thought the majority—I think it was Sanford, Justice Sanford—had a rather better logical argument than either Holmes or Brandeis. I don't think the clear and present danger test was an adequate test, no." (United States Information Agency, June 10, 1987.)

On Congress and antitrust law:

"Certain of the antitrust statutes, the Clayton Act and the Robinson-Patman Act, direct the courts' attention to specific suspect business practices. Though these practices are almost entirely beneficial, Congress has indicated its belief that they may—not always, but under circumstances deliberately left undefined—injure competition. Is a court that understands the economic theory free, in the face of such a legislative declaration, to reply that, for example, no vertical merger ever harms competition? The issue is not free from doubt, but I think the better answer is yes." (The Antitrust Paradox, p. 409-410, 1978.)

"It was, perhaps, never to be expected that Congress would create the details of a rational antitrust policy. As a body, it is capable of deciding questions that require a yes or no, of adopting correct broad general principles, or of writing codes reflecting detailed compromises; but whatever the merits of individual members, Congress as a whole is institutionally incapable of the sustained, rigorous and consistent thought that the fashioning of rational antitrust policy requires." (The Antitrust Paradox, p. 412, 1978.)

"[I]f everything said by the proponents of multiple goals, of political goals, of the antitrust laws, if all of that were true, it would not matter . . . if Congressmen explicitly said they wanted courts to weigh political values against the economic welfare of consumers, it would not matter. (Bar Association of the City of New York 1986.)

On horizontal mergers:

"[W]e are in an area of uncertainty when we ask whether mergers that would concentrate a market to only two firms of roughly equal size should be prohibited. My guess is that they should not and, therefore, that mergers up to 60 or 70 percent of the market should be permitted . . . Partly as a tactical concession to current oligopoly phobia and partly in recognition of Section 7's intended function of tightening the Sherman Act rule, I am willing to weaken that conclusion. Competititon in the sense of consumer welfare would be adequately protected and the mandate of Section 7 satisfactorily served if the statute were interpreted as making presumptively lawful all horizontal mergers up to market shares that would allow for other mergers of similar size in the industry and still leave three significant companies. In a fragmented market, this would indicate a maximum share attainable by merger of about 40 percent." (The Antitrust Paradox, pp. 221-222, 1978.)

On vertical mergers:

"These observations indicate that [v]ertical mergers are merely one means of creating a valuable form of integration and that there is no reason for the law to oppose such mergers." (The Antitrust Paradox, p. 231, 1978.)

On vertical price restraint (resale price maintenance):

"Analysis shows that every vertical restraint should be completely lawful." (The Antitrust Paradox, p. 288, 1978.)

"There is never a price discrimination that injures competition. . . . If the legislators tell a judge what to do, of course he has to do it, no matter what his personal views. But the Robinson-Patman Act does not do that. There is a theory that Congress did not mean what it said in the Robinson-Patman Act; that it said protect competition but really meant protect small business. That is the theory that Congress winked at when it enacted the statute. I do not think it is a judge's business to enforce a legislative wink." (Conference Board 1983.)

On conglomerate mergers:

"It seems quite clear that antitrust should never interfere with any conglomerate merger. Like the vertical merger, the conglomerate merger does not put together rivals, and so does not create or increase the ability to restrict output through an increase in market share. Whatever their other virtues or sins, conglomerates do not threaten competition, and they may contribute valuable efficiencies." (The Antitrust Paradox, p. 248, 1978.)

On executive power:

"I'm not sure that you would say that a system which is allowed to evolve freely will necessarily prevail over a system which operates on command and tyranny. That is, to the degree that the issue between the United States and the Soviet Union is still in doubt, a free system of law may not be conducive to the will and the military determination necessary—" (UCLA Oral History Interview with Friedrich von Hayek 1978.)

On the standing of members of Congress to bring actions in federal course to challenge unconstitutional actions by the President:

"We ought to renounce outright the whole notion of Congressional standing. . . . [W]hen federal courts approach the brink of general supervision of the government, as they do here, the eventual outcome may be even more calamitious than the loss of judicial protection of our liberties." (Barnes v. Kline 1985)

On restrictions by Congress on the CIA:

"A substantive charter that says what will be prohibited and what will be allowed . . . would seem to be a congressional attempt to control the President's power in this respect. It verges upon unconstitutionality, and may well be unconstitutional, because the President has broad powers, as commander-in-chief and as the executive who conducts our foreign relations in this area." (American Enterprise Institute 1979.)

"[A charter is] not merely unworkable. I think such a code is indeed unconstitutional." (ABA Workshop 1979.)

On the Foreign Intelligence Surveillance Act of 1978, limiting the inherent national security power of the President by requiring court-ordered warrants for wiretapping and electronic surveillance of American citizens in the course of national security investigations:

"I believe that the plan of bringing the judiciary, a warrant requirement, and a criminal violation standard into the field of foreign intelligence is, when analyzed, a thoroughly bad idea, and almost certainly unconstitutional as well. . . . [T]he law is very probably a violation of both Articles II and III of the Constitution." (House Judiciary Committee 1978.)

On the invasion of Cambodia: "President Nixon had ample Constitutional authority to order the attack upon the sanctuaries in Cambodia seized by North Vietnamese and Viet Cong forces. . . . The real question in this situation is whether Congress has the Constitutional authority to limit the President's discretion with respect to this attack. Any detailed intervention by Congress in the conduct of the Vietnamese conflict constitutes a trespass upon powers the Constitution reposes exclusively in the President." (American Journal of International Law 1971.)

On the War Powers Resolution:

"As expiation for Vietnam, we have the War Powers Resolution, an attempt by Congress to share in detailed decisions about the deployment of U.S. armed forces in the world. It is probably unconstitutional and certainly unworkable. But politically the resolution severely handicaps the President in responding to rapidly developing threats to our national interests abroad." (Wall Street Journal 1978.)

On Watergate and the firing of Archibald Cox:

"There was a lawsuit about whether the charter should have been revoked on Saturday night before he was fired, and whether therefore the firing was illegal under the charter until it was revoked. I regard that as an argument about a 36-hour period. The reason the charter was not revoked before he was fired was that there was no staff around to do the necessary work. Monday morning the charter was revoked."

"I do not think that issue of which order it should have come in and whether the thing was illegal for 36 hours is important."

"[T]here was never any possibility that that discharge of the Special Prosecutor would in any way hamper the investigation or the prosecutions of the Special Prosecutor's office."

"The next day after the discharge there was a meeting in my office on Sunday. I brought in Henry Peterson, who was then the head of the Criminal Division of the Department of Justice, and I brought in Mr. Cox's two deputies, Henry Ruth and Philip Lacovara. At that meeting I told them that I wanted them to continue as before with their investigations and with their prosecutions, that they would have complete independence, and that I would guard that independence, including their right to go to court to get the White House tapes or any other evidence they wanted. Therefore, I authorized them to do precisely what they had been doing under Mr. Cox." (Senate Judiciary Committee 1982.)

On court-appointed special prosecutors:

"The question is whether congressional legislation appointing a Special Prosecutor outside the executive branch or empowering courts to do so would be constitutionally valid and whether it would provide significant advantages that make it worth taking a constitutionally risky course. I am persuaded that such a course would almost certainly not be valid and would, in any event, pose more problems than it would solve." (House Judiciary Committee 1973.)

On campaign financing reform:

"We have, as atonement for illegalities in fund raising in the 1972 campaign, the Federal Election Campaign Act, which limits political expression and deforms the political process. The Supreme Court held that parts of this act violate the First Amendment and probably should have held that all of it does." (Wall Street Journal 1978.)