

THE BORK NOMINATION

IN THE LATE SUMMER OF 1985 Hurricane Gloria was billed as the storm of the century, and by the time it arrived, there was hardly a hatch not battered down on the nation's East coast. Providentially, it came on shore when tides were friendly, so Gloria never lived up to its media hype. Even when you see a storm coming, you can never tell quite how big it will be or just what course it will take. In the late summer of 1987, the nomination of Judge Robert H. Bork to the Supreme Court is being billed as one of the political storms of the century, or at least of this 100th Congress. It is too early to predict how Judge Bork's nomination will fare in the Senate, or even in the Judiciary Committee, through which it must first pass, but the political winds are up, and timely advisories are in order.

Judge Bork's qualifications. Let it be said at the outset that there is nothing in Robert H. Bork's scholarship or writings that can be construed as disqualifying him for the Supreme Court nomination. Naturally, there are some who disagree with this or that decision, but no one disputes the carefulness of his opinions or the caliber of his learning. Recent essays by alarmed commentators have pointed to specific opinions he has held over the past 25 years—for example, with respect to the "right to privacy." Such historical investigation is fair enough, even if the objective reader of such critical essays wants to ask if the Judge's opinion might not now be somewhat different from what it was in 1963 or 1971. Still, taken as a whole, the body of the Judge's scholarship is solidly within what might be called a traditional reading of the Constitution, and labels such as "rigid," "conservative" and "authoritarian" are ill-advised when compared with the breadth and depth of the Judge's writings, as well as the nuancing and modifications to which he has submitted his views over the years. Justice John Paul Stevens and retired Chief Justice Warren E. Burger have both taken the unusual step of endorsing Mr. Bork's nomination.

Legitimacy of the coming political struggle. "Historical" arguments, supposedly based on the intentions of the Constitution's framers, are already being made in the Senate to prove that no one should impose an ideological test on the Bork nomination. Even granted the Judge's impeccable legal and academic qualifications for the Su-

preme Court, it would be silly to maintain that politics or ideology should have nothing to do with whether his nomination is easily confirmed, or confirmed at all. The Senate's consent cannot be forced by a show of academic probity or impressive legal credentials, even if, all other things being equal, such qualifications should count the most. Inevitably, there will be a political struggle, so let there be a minimum of crocodile tears on that score. Those now friendly to the Bork nomination might well be questioning the nomination of some other candidate hereafter, and legitimately so.

The need for perspective. Granted the legitimacy of political debate on this issue, it would be wise for both sides to abstain from "do-or-die, now-or-never" rhetoric, always a temptation in circumstances like these. First, it can be shown that previous Justices whose advent was either feared or longed for often did not fulfill either their detractors' predictions or their promoters' hopes. After all, by the time judges make it to the Supreme Court, they tend both by inclination and by confirmation to be independent in their judgments. This is not to say they are infallibly right, but neither are they absolutely predictable. Second, the nation may have to go through this nomination and confirmation procedure again in the near future. Justices Thurgood Marshall, William Brennan and Harry Blackmun are elderly and variously ailing. Since these Justices are usually considered "liberal," the prospect of their departure from the Court might prompt the opponents of Mr. Bork to use exaggerated arguments against him. That would be unfortunate, since precisely the likelihood of having to replace other members of the Court should be a reminder that, under such circumstances, anything less than objective and measured debate will not serve the nation well.

The abortion question. There can be little doubt that Mr. Bork's reservations about *Roe v. Wade*, the 1973 Supreme Court decision that removed the regulation of abortion from the states and legalized it nationwide, will be a decisive factor in determining the outcome of the confirmation debate. For though his nomination would have raised questions in any case—most Supreme Court nominations do—it does not seem that ideological differences with Mr. Bork would otherwise have been such as

to overcome credentials so unexceptionable. It is the implacable opposition of pro-abortion lobbyists that has given this debate its fierceness so far and promises to be its most characteristic feature. The air is thick with claims that Mr. Bork would deny a woman her "constitutional right" to an abortion and that the result for society would be "setting the clock back." Pro-abortionists might well be anxious, for both the present-day rhetoric about a putative constitutional right to take human life and the present-day reality of abortions in this country

(1.6 million annually) ultimately rest, not upon the will of the people as expressed by Congress or the State legislatures, but upon a 1973 decision by the Supreme Court. And one of the Justices voting with that 1973 majority, Mr. Burger, has since expressed official dismay (in a later, 5-4 decision) that that apparently limited 1973 decision has had such unlimited and unforeseen effects in our society. Mr. Bork is not the only one who doubts the wisdom of *Roe v. Wade*. If Mr. Bork's opinion of *Roe v. Wade* is to be the litmus test of his suitability, then he passes.

IN SIGHT

El Gran Comunicador

On the evening of Aug. 24, Radio Liberación, the clandestine voice of the contras in Nicaragua, beamed a three-minute address to Nicaraguans by none other than the Great Communicator, Ronald Reagan. It was in English, of course (translation provided afterward). This suggests that it was directed as much to Mr. Reagan's right-wing critics here at home as it was to the Nicaraguans. For the basic message—one that would please Jack Kemp and Richard Viguerie—was that the United States would continue to support the contras unless "sweeping political and social change take place in Nicaragua." This converts the Central American agreement, recently signed as a regional plan, into unilateral concessions to be made by Nicaragua, and it does not bode well for the peace the president is on record as supporting. Referring to that plan in his address to the Nicaraguan people, for instance, Mr. Reagan spoke of its having been signed by four presidents and "the leader of the Sandinistas," as if Daniel Ortega had not been legitimately elected president by a substantial Nicaraguan majority—a fact that serious and independent commentators, including the other Central American Presidents, do not dispute. Referring to the contras' activities, Mr. Reagan spoke of "the war that has befallen your country"—the same sort of grammatical usage (perhaps it could be called the "irresponsible impersonal") that he employed in saying the sale of arms to Iran was a good policy that "went astray."

Christian Magazine and the Limits of Glasnost

The survival of *The Bulletin of the Christian Community*, a 200-page, unofficial Christian magazine, may provide a significant test for the limits of "glasnost" in the Soviet Union. What is at stake in Mikhail S. Gorbachev's liberalization program, say some Soviet watchers in the United States, is the shape of the entire Soviet manner of government. If unofficial magazines like *The Bulletin of the Christian Community*, which prints signed accounts of religious activists still in prison, are permitted to keep operating, then the system may be stretched

beyond its endurance. For this reason, most Soviet watchers expect a waning of this kind of "openness" sometime after 1988. "I don't think they want to cause any sensations by cracking down too soon," said the Rev. Victor Potapov, a Russian Orthodox priest who broadcasts over *The Voice of America*. "It's not going to last very long." Even so, the system will probably never again be quite the same.

Merit and Badges

The Boy Scouts of America, realizing that young people face challenges never known before, has identified several of the major issues facing youth. They include child abuse, illiteracy, unemployment, hunger and drug abuse. The Chief Scout Executive, Richard M. Ruffino, has committed the Scouts to programs to combat these concerns. For example, "Drugs: A Deadly Game" was launched earlier this year. Over six million booklets have already been distributed to local scout councils, schools, police departments and community groups across the nation.

Textbook Challenge Reversed on Appeal

The 6th U.S. Circuit Court of Appeals overturned a judge's ruling that the Hawkins County, Tenn., public schools had violated the constitutional rights of fundamentalist Christian children by requiring textbooks that offended their beliefs. The Federal Appeals court—in a 3-0 decision—stated that the previous decision, the result of a controversial fundamentalist suit brought against "secular humanist" doctrines, should be remanded to U.S. District Court Judge Thomas G. Hull for dismissal.

In its decision, the Appeals Court noted that "the requirement that public school students study a basal reader series chosen by the school authorities does not create an unconstitutional burden under the free exercise clause when the students are not required to affirm or deny a belief or engage or refrain from engaging in a practice prohibited or required by their religion."

