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 battened 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 Supreme 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 im-
placable 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 "constitu-
tional 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 legis-
latures, 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 la-
ter, 5-4 decision) that that apparently limited 1973 deci-
sion has had such unlimited and unforeseen effects in our
society. Mr. Bork is not the only one who doubts the wis-
don 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 clan-
destine voice of the contras in Nicaragua, beamèd a
three-minute address to Nicaraguans by none other than
the Great Communicator, Ronald Reagan. It was in Eng-
lish, 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 Nicaragu-
s. 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 agree-
ment, 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 sup-
porting. 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 Nicara-
guan majority—a fact that serious and independent
commentators, including the other Central American
Presidents, do not dispute. Referring to the contras' ac-
tivities, Mr. Reagan spoke of "the war that has befallen
your country"—the same sort of grammatical usage
(perhaps it could be called the "irresponsible imper-
sonal") 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 Communi-
ty, a 200-page, unofficial Christian magazine, may pro-
vide 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 Bulle-
tin of the Christian Community, which prints signed
accounts of religious activists still in prison, are permit-
ted 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" some-
time 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 sev-
eral 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 fund-
damentalist 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 re-
manded 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."