Point of View

To Be Equal

RIGHTS AT RISK

by John E. Jacob

The resignation of Justice Lewis Powell from the Supreme Court and the nomination of Appeals Court Judge Robert Bork are ringing alarm bells of concern. If the Senate confirms Judge Bork's nomination, many important civil rights gains of the past will be endangered.

John E. Jacob

Justice Powell is a conservative, but far from an ideological right-winger of the kind favored by this Administration. His tenure on the Court was marked by his key role in many cases that extended and protected civil rights.

Perhaps his greatest contribution on the Court was to help stop the Administration's anti-affirmative action steamroller. While Reagan appointees and the Administration fought affirmative action, Justice Powell voted for it in key cases, including some that involved court-mandated quotas to counteract proven past discrimination.

He also voted to extend privacy rights, and constitutional guarantees of freedom of speech and of religion.

The important thing about his votes was that they were often "swing" votes — the deciding ballots. Now, some key decisions that were won by 5-4 votes, thanks to Justice Powell's support, may be brought back to the Court again. And if they are, the outlook for preserving affirmative action or women's rights will be dim if Judge Bork is confirmed.

That's why the Senate should vote against his nomination.

That will be a tough fight. But there's no reason why the Senate shouldn't reject a nominee whose views would tilt the balance of the Court against the most vulnerable in our society.

Administration spokesmen complain that the opposition to Judge Bork is "political," but so was his nomination. The Reagan Administration has always set its sights on controlling the Court through appointments of hard-line right-wingers.

The Constitution gives the Senate the right to approve or reject the President's nominations to the Court. Historically, it has often rejected nominees on political grounds — and I'm not citing ancient history either.

In 1968 a filibuster supported by the Republican Senate leadership forced President Johnson to withdraw the nomination of Abe Fortas as Chief Justice. His opponents fought the nomination because they said Fortas was "too liberal" and because the presidential election was coming up and they wanted Nixon to fill the vacancy.

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The argument that the President has the right to appoint people who share his own philosophy is correct. But the other side of that is that the Senate has the right to reject appointees who don't share *its* philosophy.

If a president can make an appointment on ideological grounds, the Senate can and should reject it on those same grounds.

From all accounts, Judge Bork is a sound legal scholar, a conscientious judge, and a nice fellow. But if his nomination is confirmed we can expect those narrow 5-4 decisions in favor of minorities to become 5-4 decisions against them. Our rights are too fragile to allow that to happen.

No one expects this Administration to appoint a defender of civil rights on the order of Justices Brennan and Marshall. But we do have a right to expect even this Administration to come up with a nominee who is moderate, fair, and flexible enough to judge the issues without ideological blinkers. And that's what is likely to happen if the Senate rejects Judge Bork's nomination.

From Capitol Hill

By Alfreda L. Madison

Administration Ignores Historical Facts On Intent of Founding Fathers

This year with the Bicentennial celebration of the Constitutional Conventional, the Reagan Administration has made a concerted attack on some of the most important constitutional precedents of the last half century. Attorney General Edwin Meese has become the Constitution's interpreter. He has a formula known as the jurisprudence of original intention. He is guided by what he contends are the intentions of the framers of the Constitution.

Professor Suzanne Sherry of the University of Minnesota, in an article entitled "Original Intent and The Bill of Rights," examines the jurisprudence of original intent, often called "intentionalism or interpretivism." Sherry says this intentionalism has five basic problems in applying them to an analysis of the Bill of Rights.

She states that it is impossible to determine the intent of the Constitution's framers because of the small amount of legislative history. What little history that does exist strongly suggests that the framers of the first ten Amendments hoped for an expansive interpretation of individual rights, rather than the restrictive interpretation that the Meese intentionalists invoke.

One problem is the question of whom we identify as the framers: was it the delegates to the Federal Convention in Philadelphia, the Congress, the state ratifying conventions, or popular sentiment of the time, as represented in newspapers and pamphlets, that drafted the amendments?

Second, the record shows, says Prof. Sherry in her article, that "there was too little consensus and too much unresolved debate to conclude that James Madison or James Wilson or Edmund Randolph or Elbridge Gerry — to name a few seminal participants with radically divergent views — represented the sense of the entire Convention."

Third, advocates of original intent have not explained the relationship between intentionalism and the doctrine of democracy. So why should any present Americans be held to have consented more to the views of a few White men of two centuries ago than to the views of federal judges appointed by the President and Senate, whom the people elected?

Fourth, in two hundred years, the American society has undergone some drastic changes. So it is highly probable that if delegates to the 1787 Convention were around today they would reach very different conclusions about the meaning of various textual provisions.

Fifth, reconstruction of the understanding of the framers suggests that they would have considered their own intent irrelevant to later interpretation. Intentionalists in the Reagan Administration direct their greatest wrath at a particular set of issues, those involving the Supreme Court's pronouncements on the meaning of the Bill of Rights. These involve the establishment clause of the First Amendment, the protection clause against unreasonable searches and seizures in the Fourth Amendment, the self-incrimination clause of the Fifth Amendment and the division of sovereignty between federal and state governments of the Tenth Amendment.

Professor Sherry establishes the impossibility of really determining the intent of the founding fathers because of the very sparse historical record. She shows that intentionalists' conservative agenda have drawn incorrect conclusions about the framers' intent, both generally and specifically.

On the general level, intentionalists advocate very narrow interpretations of the Bill of Rights and protection of individual freedom against government encroachment. Under this view, the establishment clause permits states to mandate non-voluntary prayer in public schools and funding of parochial education. Also this view provides only minimal protection against police coercion or intrusions, which is a narrow interpretation of the Fourth and Fifth Amendments. Sherry states that, contrary to the intentionalists' views, the Bill of Rights was intended to declare only some of the more important limitations on governmental infringement of individual liberty, but was not intended to be an exhaustive list of rights.

When the Constitution was adopted in the eighteenth century together with the Bill of Rights, most Americans believed the Declaration of Independence. They were "endowed by their Creator with certain unalienable rights." To protect these inherent rights, the Ninth Amendment was added — "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

In Professor Sherry's article, issue is taken with the present interpretation that the Senate has only a minimal role in overseeing presidential nominations to the judiciary. Debates at the federal convention suggest that the framers intended the Senate to play a very significant role.

The religious rights advocate that original intent of the establishment clause was intended only as a narrow prohibition or government discrimination between religions and not a ban against governmental aid to religion. This view is contrary to legislative history.

This article is proof that the Reagan Administration is seeking to change the course of America to fit its narrow conservative views, by a narrow interpretation of the intent of Constitutional Framers. This is done without any historical records to support their views.

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