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Rev. Jesse D. Scott
President
Las Vegas, NAACP

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NAACP Outlines Stand On Bork Nomination

TALKING POINTS ON THE BORK RECORD

I. The primary reason for opposing nominee Bork is that he has aligned himself against most of the landmark decisions protecting civil rights and individual liberties that the Supreme Court has rendered over the past four decades.

A. Race Discrimination

Bork finds insupportable the Court's 1948 decision in *Shelley v. Kraemer,* (334 U.S. 1) holding that judicial enforcement of *racially restrictive covenants* violates the 14th Amendment. Bork, Neutral Principles and some First Amendment problems, 47 Indiana Law Journal 1, 15-17. He opposed passage of the provisions of the 1964 Civil Rights Act barring dis crimination in public accommodations (though in his confirmation hearings in 1973 he said he had changed his mind), Bork, Civil Rights — A Challenge New Republic Aug. 31, 1963. He thought the Supreme Court was wrong in upholding provisions of the 1965 *Voting Rights Act* banning the use of literacy tests under certain circumstances. *Katzenbach v. Morgan,* 384 U.S. 641 (1966), Bork, Consitutionality of the President's Busing Proposals, 1, 9-10 (American Enterprise Institute 1972).

In 1972, he was one of only two law professors to testify in support of the constitutionality of legislation drastically curtailing school desegregation remedies that the Supreme Court had said were constitutionally necessary to cure violations of the 14th Amendment hearings of the Subcommittee on Education of the Senate Committee on Labor and Public Welfare on the Equal Educational Opportunity Act of 1972. 92d Congress, 2d Session (1972). Hundreds of law professors said the legislation was unconstituional. As Solicitor General, Bork continued to oppose school desegregation remedies, once being overruled by Attorney General Levi in his effort to bring the Boston school case to the Supreme Court to curtail remedy, See Orfield, Must We Bus? pp 352-353 (Brookings Institution 1978), Washington Post, May 30, 1976. Bork also unsuccessfully opposed in the Supreme Court fair housing remedies for low income black citizens even though the federal government had participated in the discrminiation. *Hills v. Geautreaux,* 425 U.S. 284 (1976). Since then he has made clear his opposition to affirmative action remedies for employment discrimination.

B. Other Insidious Forms of Discrimination

He has criticized as "improper and intellectually empty" a 1942 Supreme Court decision striking down an Oklahoma law that provided for the *sterilization* of some convicts. *Skinner v. Oklahoma,* 316 U.S. 535 (1942). He opposed on the same grounds the Court's decision in 1968 holding unconstitutional a state law barring *"illegitimate children"* from bringing wrongful death actions. *Levy v. Louisiana,* 391 U.S. 68 (1968). See Indiana Law Journal at p. 12.

So, too, Bork says that the equal protection clause of the 14th Amendment was an improper ground for the Supreme Court's invalidation of West Virginia's *poll tax* law. *Harper v. West Virginia Board of Elections,* 383 U.S. 663 (1966), Senate judiciary hearings on Confirmation of Robert Bork as Solicitor General, p. 17 (1973).

C. Restrictions on the Right to Vote

Apart from his opposition to the Court invalidating poll taxes and Congress barring literacy tests for voting, Bork has expressed vigorous opposition to the Supreme Court's decisions establishing the rule of "one man-one vote." *Baker v. Carr,* 369 U.S. 86 (1962); *Reynolds v. Sims,* 377 U.S. 533 (1964). He finds no basis for these decisions in the 14th Amendment, Indiana Law Journal at 18-19. While he posits another possible theory (the guarantee of a republican form of government) he makes it clear that many malapportionment schemes now prohibited would be allowed under his theory. Id.

D. Restriction on the Right to Privacy

Bork argues that the Constitution does not protect the right to privacy and that the entire line of Supreme Court decisions vindicating such rights is improper.

So he has inveighed on many occasions against the Supreme Court's decision invalidating a Connecticut law banning the use of contraceptives (even by married couples in the home) *Griswold v. Connecticut,* 381 U.S. 479 (1965), Indiana Law Journal It 9-11. And, as a judge, Bork wrote a major opinion supporting the authority of the military services to take action against homosexuals. *Dronenberg Zech, __F. 2d. __ (D.C. Cir. 1984).*

E. Restrictions on Free Speech

Bork argued in 1971 (and again in 1973) that "constitutional protection should be accorded only to speech that is *explicitly political*" (emphasis supplied), Indiana Law Journal at p.20, 1973 confirmation hearings at 20-21. He would exclude from judicial protection not only obscenity or pornography but scientific and literary expression. While he has recently indicated that he has modified some of these views, he has still not made it clear whether he believes that artistic expression is protected.

II The notion of Bork as apostle of judicial restraint is a myth.While Bork justifies his positions against individual rights and liberties as dictated by "judicial restraint" and "neutral principles," he becomes a judicial activist on behalf of corporate, property or governmental interests he favors.

Although nominee Bork says that he would give great deference as a judge to the acts of legislators, one very notable exception is his blistering attack on the Supreme Court's decision in *Katzenbach v. Morgan,* upholding the authority of Congress to curb the use of literacy tests in order to protect the right to vote. Bork says that Section 5 of the 14th Amendment gives Congress power only to "implement" or enforce rights already declared, not to give new content to rights. It seems clear that were Bork on the Court, he would have exercised very little judicial restraint in the *Morgan* case.

Similarly, Bork has made it plain in his writings that he would give very little deference to the legislative intent of Congress in enacting the anti-trust laws. He prefers instead to give scope to those legislative objectives (eg, economic efficiency) that he gives credence to and to disregard those (eg, breaking up concentrations of economic power) that he opposes. As a judge, Bork has played fast and loose with Congressional intent in reviewing regulatory decisions in such areas as the environment and occupational safety (see Nader and Glitzenstein, N.Y. Times 7/13/87 p. A 17).

In short, Bork is an advocate for judicial restraint in dealing with legislation he favors (mainly that restricting individual rights or liberties) but not in dealing with laws he opposes (mainly those impinging on property interests).

III. There is every reason to believe that nominee Bork would seek to reverse landmark decisions of the court if he became a justice. Where the court is closely divided, he may well succeed.

The lore is that once a nominee becomes a member of the Court he may pursue a course independent of the President who appointed him. If nothing else, it is agreed, the nominee is likely to respect settled law, even in cases where his views are opposed.

While that may be true of some nominees, it is hardly applicable to Bork. A member of the Supreme Court who simply disagreed with prior court rulings might nevertheless respect precedent. But Bork does not simply disagree — he thinks past decisions are disastrous.

To wit: *Baker v. Carr,* Jus-

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