

Faculty Forum

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articles that are regarded as extremely important, influential things, a former associate general of the United States — and a very excellent one — and who has been a judge for over five years for the Court of Appeals. That's an extraordinary background for anybody. I think he is exceptionally well qualified.

As far as his ideology, his concerns... That term is used by people who don't agree with what someone else thinks. I believe his judicial philosophy, his approach to judging his exception of the nature of judicial review and the Constitution are all well thought out and are within the range of mainstream and respectable opinion.

There's no question that there are many people in this country, and in law schools and elsewhere, that strongly disagree with that approach and that philosophy. But that doesn't mean that there is anything wrong with it; it's reputable.

I think it's an open question what he would do with respect to voting on Roe and Wade type of issues. He was very critical of Roe and Wade, but so were many law professors, who in fact are generally regarded as liberal and who approve of the result. But if he becomes a justice of the Supreme Court, he will, of course, be disciplined by and controlled to some extent by precedent and historic decisions. He well understands that. By which is meant that normally courts follow paths of precedents and only in fairly unusual circumstances will they reconsider and possibly overrule past precedence.

He spent a lot of time during his testimony last week trying to explain under what circumstances he thinks it might be legitimate for a Supreme Court to reconsider Constitutional precedence. So I think there is no one, no one can predict, and I would guess that Judge Bork himself could not predict and, of course, quite

properly has refused to commit himself on that issue. Despite the insistence, apparently, of Senator Packwood.

I would guess that even in his in own mind he will not know how he would vote on a Roe/Wade issue if it were to come up, until he has heard the arguments, and read the briefs, and participated in the dialogue and discussion within the court that takes place in the conference.

What do you see as Bork's chances of being confirmed? Do you see your testimony, and the testimony of other law school deans having an impact on his confirmation?

I think his chances are good but certainly it's not in the bag. There is tremendous opposition to him. Just looking closely at the senate committee, the judiciary committee, this week in the televised hearings, I think there are five senators on the committee who are virtually, publicly said they will vote against him almost regardless of what is said. I believe there are also five — I'm not absolutely sure about these numbers — but I think five who will clearly vote for him. The decision will turn on how the uncommitted, undecided centerist senators vote on the committee in the full senate... And I can't guess on that.

But I think that the testimony of the legal scholars and the law school deans in favor of Judge Bork might persuade the undecided senators that the image that has been cultivated and projected on Judge Bork as some sort of a wild man, or extremist or a radical of the right is simply preposterous. That doesn't mean that anyone who opposes him is ignorant or acting in bad faith. But I think that he cannot be legitimately opposed as a radical right-wing ideologue or anything of that kind. And I would hope my testimony, if we ever get to it, and the testimony of the other law school scholars and deans would help to make that case.

But the primary thing that the senators I think will be deciding on will be the impression they formed of him during the five days that they had him there and grilled him and questioned him — more thoroughly than any Supreme Court nominee in the history of the country. There's no question. I think that's much more important to the senators than anything we say in his favor or anything that the opposing witnesses say against him.

Is there anything that you have to add?

Well one final, very general comment, that isn't either pro or con Bork. I think it's both an interesting and fortunate coincidence that in this bicentennial year — very close to the 200th anniversary to the signing of the Constitution — because of this nomination, there has been so much tremendous attention and interest drawn to the role of the Supreme Court and Constitutional law. And probably that's a good thing because it will cause large numbers of people who are not lawyers, as well as some lawyers, to be thinking about the Constitution and the Court and various issues of law much more intensively and, I hope, informatively than is normally the case.

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