National Press Club Luncheon With Robert Bork

Distinguished Fellow, Hudson Institute and Former Supreme Court Nominee

SUBJECT: Nomination of John Roberts To U.S. Supreme Court
MODERATOR: Rick Dunham, White House Correspondent, BusinessWeek Magazine
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MR. DUNHAM: Today's speaker, Judge Robert H. Bork, is a former federal appeals court judge, noted legal scholar and a rare American to have a verb named after him.

To Bork or to be Borked has become part of the American political lexicon, meaning to have your political enemies to attempt to destroy you personally simply to score political points.

With the Supreme Court confirmation hearings for Judge John Roberts originally scheduled to open today, we at the National Press Club thought that Judge Bork could offer some important perspectives on the court and the confirmation process.

As you all know the Roberts hearing have been delayed because of the death of Chief Justice William Rehnquist and President Bush's nomination of Judge Roberts to become chief justice. But we eagerly await Judge Bork's remarks.

A prolific author and constitutional anti-trust law expert, Judge Bork is currently a distinguished fellow at the Hudson Institute, and more recently he authored a book entitled, "A Country I Do Not Recognize: The Legal Assault on American Values," published by the Hoover Institution Press.

Whether legal commentators agree with him or disagree, then they tend to concur that he is one of the most prominent and controversial American legal intellectuals of modern times.

Born in Pittsburgh in 1927, Judge Bork earned by his B.A. and J.D. from the University of Chicago. Originally, reportedly, a New Dealer, he became a convert to free market conservatism while at Chicago.

His immersion in laissez-faire economics under the tutelage of Professor Aaron Director (ph) helped spur his keen interest in anti-trust research.

In 1962 Judge Bork joined the faculty of the law school at Yale University and in 1978 published the influential book, "The Antitrust Paradox, a Policy at War with Itself." In this book Judge Bork argued that the antitrust judicial rulings of the time went against the original intent of the law.

This premise led to Judge Bork's deep interest in the premise of judicial restraint and strict constitutional interpretation as a judge's primary responsibility.

His scholarly work brought Professor Bork to the attention of Barry Goldwater and Richard Nixon. He worked for them in 1964, '68, and '72 presidential elections. Judge Bork was appointed by President Nixon to be solicitor general in 1973 and became part of the Watergate story because of his role in what became known as the Saturday night massacre.

Later, in the 1970s, he returned to academia and writing at Yale. He was brought back to Washington in 1981 by President Reagan and was confirmed for a seat on the federal court of appeals for the D.C. Circuit, a well known steppingstone to the Supreme Court. When Justice Lewis Powell retired in the summer of 1987, President Reagan nominated Judge Bork to the Supreme Court. After an aggressive public campaign by liberal groups that probably is unprecedented in modern times, Judge Bork's nomination to the Supreme Court was defeated in October, 1987, by a Senate vote of 58 to 42, with the current Senate Judiciary Committee chairman, Arlen Specter, voting with Democrats in opposition.

What a surprise when Judge Bork supported Senator Specter's 2004 primary election opponent. Judge Bork returned to writing, and in 1989 published the best-seller, "The Tempting of America, the Political Seduction of the Law," which outlines his thoughts on the politicization of the judiciary and the downside of judicial activism.

In the 1990s Judge Bork turned his attention to American culture when he penned two books on the subject, "War in the Culture," and "Slouching Toward Gomorrah: Modern Liberalism and American Decline." With the long-awaited Senate hearings for Judge Roberts soon to begin, we look forward to hearing from Judge Bork about his own experiences and opinions on the Supreme Court nominating process. We also believe Judge Bork will have some valuable insights into Judge Roberts' previous judicial history and his work in the Reagan administration, along with Justice Rehnquist's legacy. Please join me in welcoming Judge Robert H. Bork.

(Applause.)

MR. BORK: Thank you, Mr. Dunham.

As far as the verb is concerned, I don't mind the fact that my name has become a verb. It's one form of immortality. You all recall Captain Boycott and Captain Lynch and Hobson of Hobson's choice. Hobson ran a stable in London a couple of centuries ago, and when you went to get -- to rent a horse you got the one nearest the door and that was it. So that became known as Hobson's choice. Well, if I'm about to join that company of men, that's all right. I'm a little disappointed you described me as a New Dealer. I was a socialist. You don't do these -- (inaudible) -- things by half -- by halves.

Well, it would appear we have a lot to talk about today, and I'll try to only outline the topics that are before us and rely on you in the question-and-answer period to develop them more fully. The death of William Rehnquist, though long foreseen, is a very sad event. He's been a friend as well as a judge before whom I argued. I'm known him for over 40 years.
He was on the Supreme Court when I argued my first case there in 1973, and he was there when I argued my last case in 2003. He was the only one left from that initial bench.

He was admirable as a man, as a justice and as a chief justice. His colleagues on the court, however much they disagreed with his opinions, found him not only fair and agreeable

personally, but also efficient in moving the court's business. He was a strict time keeper at oral argument, as I can testify because he was the kind of chief justice who when your time was up and the red light came on, would cut you off in the middle of the word "if." (Laughter.)

This is not an occasion for a eulogy, but I tend to talk about the confirmation process which John Roberts and some as yet-unknown nominee will endure. All of this will take place while the president -- he must be having fun -- will deal simultaneously with the war in Iraq and the disasters on the Gulf Coast. He's being attacked on all three subjects, and this delay would give additional time for the groups in opposition to build a larger campaign.
Given all this going on in the world, it may seem academic -- I don't use the word, academic, as a pejorative, by the way -- it may seem academic to discuss the nature of the confirmation process, but I think it's not. The Supreme Court has made itself perhaps the most important branch of government in domestic polity, certainly the most important and powerful branch of government when it comes to culture and how culture develops. It's therefore worth asking how changes in the confirmation process in recent years will affect the future of the court. The coming battle over Roberts' confirmation is as good a way as any to get into that subject.

Well, what do we know about Judge Roberts? I know him somewhat, but only on a casual basis. I would say we are friendly acquaintances and that's about it. I've never heard him say anything about judicial philosophy, and about any of the hot issues that come before the court, and I know of no one who has heard him say anything on those subjects.

We do know he has a brilliant mind -- legal mind -- and an equable and a judicious temperament. Those qualities would put him among the very top ranks of all justices who served on the court, and they should be more than enough to ensure his confirmation. But on a substantive level, he will be opposed nonetheless. I don't think, by the way, that it's true the fact that he's been nominated for chief justice raises the stakes, as Senator Schumer and some others have said. The chief justice is primarily -- in addition to being a justice, he's primarily an administrative officer. He has a lot of administrative duties, and the only power he has is that when he's in the majority or on the dissent, either way, he gets to appoint the justice who will write the opinion for the majority or the dissent, but that's about it.

On a substantive level I would guess that Roberts did not participate in the creation of new constitutional rights. And I would, for example, be very surprised if he voted to invent a constitutional right for homosexual marriage, which some of his colleagues -- future colleagues -- on the Supreme Court, are clearly bent on doing.

On the other hand, I have no basis even for a conjecture whether he would be willing, as the former chief justice, as Justices Scalia and Thomas were, to vote to overturn some of the constitutional outrages of the past. I hope he would, but I simply do not know. The ultra liberals, however, manage to discern from what it might be said are extremely meager materials, enough to demand his rejection by the Senate. It's amazing that they know so much about a man who has said so little.
(Laughter.)

It's like drawing a complete picture of a dinosaur from one tiny and ambiguous bone chip. On the basis of one remark about the Southwest Arroyo Toad, not being in interstate commerce, Senator Kennedy says Roberts endangers Social Security, Medicare, civil rights and anything else that Americans value. Groups like the People for the American Way, NARAL, NOW and MoveOn.org, inform us that Judge Roberts hates women, hates

minorities, homosexuals, religious freedom and civil liberties for anyone. If you believe these folks there's hardly any American that Judge Roberts does not hate. The poor man must live on Alka-Seltzer to keep his acid level down.

We may confidently expect that any day now the People for the American Way will demand that the Senate probe the serious allegation that Roberts was once seen chatting with a man whose second cousin once removed knew a man who was suspected of being a member of the Federalist Society.

That society was formed by three or four law students at Yale and Chicago in order to bring some semblance of much-needed balance into the discussions of legal and policy issues in the law school. And the fact that it is out of balance is not -- is beyond dispute. A recent study of the political complexion of the most prestigious schools shows the faculties to be overwhelmingly liberal. The faculty contributions to political parties, for example at Harvard and Yale, are over 90 percent to Democrats. The Federalist Society, unlike the ACLU, for example, take no public positions and engages in no litigations. It holds conferences and discussions and is careful to include liberals and libertarians, as well as conservatives.
The ultra liberals' description of the Federalist Society as some form of a right-wing conspiracy is about on the veracity level of the Protocols of the Elders of Zion. Both are forgeries and frauds.

But the process that we see today is a sharp break with the not- so- distant past. Prior to Harlan Fiske Stone, or perhaps Felix Frankfurter, if memory serves -- sometimes it does and sometimes it doesn't -- a nominee did not even appear before the Senate Judiciary Committee. Almost all our history, the nominee never appeared. It was considered beneath the dignity of the office.

Byron White was asked only about a dozen innocuous questions. William O. Douglas sat outside the hearing room until at last he sent a note in asking if the committee intended to call him. They sent word out no, they didn't, so he went home. Now we're unlikely to see that sort of process or, indeed, any dignified process again. Today's confirmations are political struggles, political circuses, and there may be no going back. The most significant change, the most obvious change, is the participation -- one would almost say the domination -- of highly charged, well-financed and vociferous interest groups. Those on the Left began the politicization of the confirmation process, and most of them are at it again. It took conservatives some time to wake up to the new reality that confirmations are now conducted as nationwide political campaigns.

Now pro-Roberts groups are matching the liberals in television and newspaper advertising, press releases and blogs -- all of the resources of public relations. Millions, perhaps tens of millions, in money, in time and effort will be spent. I suppose we ought to extend the McCain-Feingold campaign finance law to confirmation proceedings. The parties in the Senate are polarized, as are Americans more generally. A television talk show host told me that callers are more angry and divided than ever in his experience. The atmosphere in Washington is more poisonous even than it was when Richard Nixon was being driven from office, and that saying a great deal. And at the moment, there is no end in sight to this rancor.

The acrimony of the confirmation circus is increased by televising the hearings. Though they distort the progress -- the process, those cameras are not going to go away. They present the senators with a magnificent photo opportunity extending over a number of days, and an opportunity to play to their most partisan constituents.

One senator who was dismayed that televising in the Oliver North hearings had resulted in a mistrial asked me how they could avoid that in the future, and I said hold the hearings without television. He smiled and said what's your second-best option?
(Laughter.)

The warlike conduct of confirmations, which includes distorting what the nominee has said, has consequences, I think, in the choice of nominees. I predicted in a book I wrote 15 years ago that the temptation for a president is likely to be to nominate men and women who have written and said little, or ideally nothing, on issues of constitutional law.

It's possible to suspect that that was part of David Souter's appeal to the first George Bush. Souter was quite circumspect about his views. I was told he was asked if he had read my book, "The Tempting of America: Political Seduction of the Law." He said, well, he had bought it. Of the two, that's the one I prefer.

(Laughter.)

The absence of a paper trail may have been one the White House has found attractive about John Roberts. I should have known, as the Bible has it in the book of Job, "Oh that mine adversary had written the book". And the last thing you want to do is write a book. I can think of several eminently qualified persons who are unlikely ever to be nominated precisely because they have expressed opinions in public. Finally, the process has changed because senators now demand that nominees state their positions on dozen of issues. That's an effort to require the nominee to make campaign promises, as he would in any other political campaign. A number of things wrong with that, but the most obvious is the senators come to control the meaning of the Constitution by controlling what the nominee -- how he will vote if he's on the court. And that's a task for which the senators are ill-equipped, and for which the advise and consent function cannot have been intended. Well, who's responsible for turning confirmations into political circuses? The proximate cause, of course, are the senators, but right behind them are the activist groups. But I think neither the senators nor the activist groups are the ultimate cause, and that ultimate cause I think is none other than the Supreme Court of the United States.

Despite assertions from interested parties that this is a conservative court, the obtrusive fact is that on cultural issues, it is a very liberal court. This court has been liberal -- the court has been liberal for 50 years or more, but during that time, the content of liberalism has changed, and the court has shifted with it. The Warren court politicized every branch of law -- statutes, Constitution, everything. It's drive was for equality of outcomes in the economic sphere, as well as in others. Thus the taxpayer, the patent owner, the employer in a dispute with the labor union all routinely lost. During the Warren years, no antitrust defendant ever won in the Supreme Court, regardless of the law or the record and the findings made in the court below. Chief Justice Warren said at one point that these government attorneys worked hard and were underpaid, so the defendant had to prove the government was wrong beyond a reasonable doubt to win the case. When William O. Douglas visited the Yale Law School where he once taught, a student of mine asked him why no antitrust defendant had ever won in the Supreme Court. Douglas' entire reply was he was ashamed that a Yale Law student should have to ask such a question. And at Yale, this was known as the time as the value jurisprudence, which freely translated means, "Which side are you on, Jack?" That was the outlook that dominated the Supreme Court in those years.

Today's court is different. If you go up there with an antitrust case or a tax case, you get a straightforward lawyer-like response and result. You may not like it, but it will be an honest bit of lawyering.

But when a major cultural issue comes before the justices, the majority moves left. That is true of its decisions on abortion, homosexual behavior, pornography, prior restraints on political speech, driving religion from the public square and affirmative action. Its philosophy appears to be one of encouraging radical individualism, radical personal autonomy, when the liberation of the individual from laws that cabin free choice. This was the outlook of the '60's generation, and I think it is not too unkind to say that the court's decisions in these area resemble, remarkably, political correctness.

That is why Justice Scalia can say in a passage that provided the title for the book just mentioned -- he dissented and he said, quite accurately I think, day by day, case by case, the Supreme Court is "busy designing a Constitution for a country I do not recognize." And that's the title of the book, and I think it's quite accurate. There's too much to expect that a liberationist philosophy can produce coherent law. Instead, sometimes it produces comedy.

The court has held, for example, that it's an illegal establishment of religion for high school students to pray before a football game that nobody be hurt. On the other hand, the court has said that nude dancing is entitled to considerable First Amendment protection because it's expressive. But they don't ask what it is that's being expressed.

(Laughter.)

But anyway, this led Ted Olson to suggest that since nude dancing is preferred to prayer as a form of communication, perhaps the students should dance naked before games. (Laughter.) I reminded him, however, that nudity must not be achieved by performing the dance of the seven veils because that has Biblical connotations -- (laughter) -- and would therefore be a forbidden establishment of religion. The ACLU would be on the case in a minute.

(Laughter.)

In a word, the court has made itself into a political institution by deciding major cultural issues that have no relation to anything in the Constitution. Originally, our idea was a separation of powers, which was supposed to keep the court out of legislating. It has not now kept the court out of legislating. And by showing that it will decide such issues, the court invites for additional litigation by ideological groups and individuals. It is inevitable that partisans will struggle politically to control what is a political institution, and the Supreme Court is the supreme political institution because its decisions are final. When it speaks in the name of the Constitution, whether it speaks truthfully or not, as to that issue, the democratic process is at an end. That is why the court has become a political prize and a political weapon. And that's why confirmation processes have become the fiasco that they have become.

But why do a majority of the justices behave in this fashion? Why do they take anti-constitutional positions which they then call constitutional law? I think the answer's not far to seek. The justices are part of and respond to the intellectual class, loosely defined; that is, universities, faculties -- law school faculties -- journalists, entertainers and so on. Now that class is not composed of people who are necessarily more intelligent or possessed of greater degree of common sense than the rest of the public; it is rather composed of people

who make their livings or gratify their egos dealing with ideas either at wholesale or retail. To illustrate the point of the breadth of this class, both Jane Fonda and Ward Churchill qualify as members of the intelligentsia. Now, there are reasons why the intellectual class or intelligentsia is to the left of the public on moral issues. I won't prolong this talk by going into them, but I will if the subject comes up in a question period. Well, why are some of our justices influenced by the opinions of that class? In the first place, they are members of the intellectual class, and they take their assumptions as given. We all tend to do that. It takes a conscious effort to read words and history without succumbing to your own biases. And no judge can entirely escape from the way he sees the world. But there's a great deal of difference between the judge who does his utmost to recognize and correct for his biases and the judge who takes his predispositions as what the Constitution must mean.

Then there's the related factor of unconscious conditioning. People can be unconsciously conditioned to behave in a certain way, and my favorite example is that there was a professor of psychology at a university who was a pacer; he used to pace as he lectured from the outside wall with the windows to the inside wall against the hallway. And he lectured his class -- too much, apparently, they thought -- on unconscious conditioning. So they decided to try it on him. And the next class day, as he paced towards the wall, the outside wall with the windows, they paid rapt attention, took notes and hung on every word. As he paced in the other direction, they began to push their papers aside and look at the newspaper and whisper to each other. And within 20 minutes, they had him pinned to the outside wall; and he didn't know why, but he was just there.

(Laughter.)

The intellectual -- the justices learned -- not consciously playing to it, but they learned if they move a certain direction, they get the adulation of The New York Times, The Washington Post, and the major networks and so forth. If they move in the other direction, like Scalia, who The New York Times said is out of the mainstream -- that metaphor ought to be retired permanently -- they get less good press, and they get -- just about everybody they meet socially is of this intellectual class disposition.

Now, every poll shows that the intelligentsias differ markedly from the attitudes of the general public, and that's what we call the culture war. And the court has aligned itself with the intellectual class and against the opinions of the general public in that war. The court is the ideal legislature for the intelligentsia. The contest today is about judicial philosophies; that is to say between originalism and judicial activism. Now this may strike you as an intensely dull subject, but those terms are being thrown around so freely and misused so freely, I think it's worth just spending 30 seconds straightening it out.

Originalism merely means that the Constitution, like other legal documents -- wills, contracts, statues -- should be interpreted according to the principles the ratifiers who made it law understood themselves to be enacting. Originalism does not go out of date because you apply the principles to unforeseen circumstances. For example, the Fourth Amendment's prohibition on unreasonable searches and seizures, they were thinking about a constable and heavy boots clomping into your home. But the principle would seem to be the same when the government began to tap your phone and place electronic surveillance in your home or your office. And so they came to require a warrant thereto, judges.
So the Constitution doesn't go out of date. The principles are permanent and valuable.
Activism is not, contrary to much ill-informed opinion, a question of how many times a judge has struck down statutes. Activism occurs when a judge announces principles and reaches results that cannot plausibly be related to the actual Constitution. The

opposition to Judge Roberts comes largely from those who want to retain an activist court, to give themselves still more political victories.

Well, there's no mechanical solutions to fix this broken process. Impossible to devise a process so perfect that no one needs to be good. The only solution is that the court be removed from its political role by nominating and confirming justices who will abide by the principles of the Constitution as they are originally understood. With that in mind, if I want Roberts to be confirmed, I would advise him or any other nominee of three points.

The first bit of advice is, don't write or say anything about the Constitution. (Laughter.) Judge Roberts has already satisfied that requirement.

The second is, don't commit your vote at the hearings on any issue. If you are drawn into commitments about how you will vote, you'll only be ratifying the corruption of the confirmation process.

And third and finally, don't make it obvious that you think some of the senators' questions reveal that they haven't a clue about the Constitution or its interpretation.

(Laughter.)

George Bush has specified the criteria for the justices he wants. He said the ones he most admires are Scalia and Thomas. And we may assume he'll follow those standards in the next nomination. The temptation may be to get somebody who's known as a moderate, which means you don't know where they will go. But that shouldn't -- that will never pacify the left. So he should go ahead and nominate people in the mold of Scalia and Thomas. The road back to a nonpolitical court and hence to a rational and nonpartisan confirmation process will be a long and hard one. But with two vacancies to be filled, the president has a chance to make a start.

Thank you.

(Applause.)

MR. DUNHAM: Thanks very much, Judge Bork. You talked about the poisonous atmosphere on Capitol Hill. I was wondering when you thought the partisan arms race began? And do you have any thoughts on how it can be changed? Can we put the genie back into the bottle?

MR. BORK: I thought I just suggested there wasn't any particular way to change. If you look at the center of the cultural war and the antagonism, it is, whether you like it or not, Roe against Wade. In European countries, abortion is decided by legislatures, as it was in this country up until Roe against Wade in 1973. And in those European countries and here, it was not an explosive issue. It did not polarize people completely. But when the Supreme Court took it away from the democratic process, that's when this country began to polarize.

Now in Europe, the parties go in; they battle it out; they reach a compromise of some sort about abortion. Each side knows it will be back next year and then will try again. As a result, a lot of the hatred and venom that is now in our politics because of that decision does not occur on that issue there. But I don't foresee a time, even with the overruling of Roe against Wade -- which is not certainly imminent, if it ever occurs -- I don't foresee a time in which social peace or political peace will return to us.

MR. DUNHAM: You may have just answered my follow-up in there. But I was wondering if you think -- what you think the chances are that Roe versus Wade will be overturned in the next 10 years?

MR. BORK: I think the chances that Roe against Wade will be overturned in the next 10 years are virtually nil unless Roberts is willing to go back and overturn it. And I don't know if he is or not. And unless originalist judges replace Justice Stephens when he retires and so forth. One of the reasons that my hearings erupted was that they knew I would be the fifth vote to overturn Roe against Wade. And that's what brought the thing to a fit of hysteria. I think that's going to happen again and again until Roe against Wade becomes accepted law, which I don't think it will be, not by the general public -- not by a large part of the general public. Or unless it's overturned.

MR. DUNHAM: Okay. One person in the audience takes up your challenge and says I'll bite. Why are intellectuals more likely to be liberal than the general population?

MR. BORK: Well, there are a couple of explanations. But the one I prefer is from Max Weber, and he said that there are certain people -- and he listed the categories of occupations they have, and he fit the categories with the intelligentsia, who require some transcendent meaning in life. And religion once provided that in Europe. But when religion declined, the next -- the only available religious alternative was socialism -- left-wing politics because socialists have an overall principle of -- that gives meaning to their lives. Conservatives don't. Conservatives don't have any overarching principle. So the intelligentsia moved to socialism. And that was -- that's very true if you look at the intellectual class. They'll say the end of the last century -- and of the century before that through the 20th century. But when socialism collapsed, the -- that movement fragmented. And now you've got individual causes like animal rights, environmentalism and forth and that, which is all right, except on extreme manifestations of that, including violence because the anger now that socialism has collapsed -- what they have left is anger. And I don't know -- I don't know how -- if people insist upon a transcendental meaning to life and they can't accept religion, I think we're in for social division for a long time to come.

MR. DUNHAM: Your third piece of advice for Judge Roberts had to do with not letting members of the Senate know what he necessarily thought of their intellect and other things. Some observers in the media have noted that one reason for our Senates decision not to confirm your nomination was that you debated members of the Judiciary Committee on the legal points, that you put up a fight and argued when they were explaining everything they knew about the law. Do you think if you'd answered with single sentences or not answered at all it would have made any difference? MR. BORK: That's -- I don't know. I have no idea. But it was difficult -- and for me as it wasn't for others because I had written a great deal about the relevant issues, including about the emptiness of Roe against Wade and Griswald against Connecticut and there being no right of privacy and so and so on. And that began to be immediately distorted. You may recall Senator Kennedy going on the floor about 45 minutes after I was nominated. He was on the floor announcing that my America -- well, to sum it up -- would be a fascistic hell. Now, under those circumstances, I didn't see how I couldn't refuse to discuss what my views actually were in the Senate. But maybe I could have. I don't know? I would have been touch and go. But somebody who hasn't written those views doesn't have that burden to carry.

MR. DUNHAM: As a result of the 1986 elections, the Democrats had a pretty strong majority in the Senate at the time of your nomination. Do you think your confirmation would have turned out any differently with the Senate the way it is right now, with Republicans having a rather substantial majority or at least a decent majority?

MR. BORK: Yes, I think it would have, particularly if there were groups in support as well as in opposition, which there weren't in 1987 because nobody organized in time.

MR. DUNHAM: Some conservatives have been worried about self nominees -- that the entire process that was driven by your confirmation fights. And some have even questioned the Roberts nomination in that respect because he is not clearly out there on issues that they care about deeply. What are your thoughts on that? Should -- you're saying -- your advice is not to have written or not have say public positions on the issues. But what should conservatives do or what should they feel about nominees coming forward on faith from the president?

MR. BORK: Well, I don't really know what the conservatives can do because if they insist upon a nominee who makes campaign promises to them, probably he'll be fiercely opposed and probably maybe ought not to be confirmed if he's going around telling groups he's going to satisfy their desires. I'm afraid you have to take your chances. Now, John Roberts is a highly qualified man, both intellectually and in terms of personality. And if some conservatives are going to insist that he also pledges that he will vote to overturn Roe against Wade and so on and so forth, I think they're out of their minds. They ought to -- they ought to take him and see what happens. They're not going to get any better nominees through. They're not going to get any right-wing partisans through.

It puzzles me as to why they would demand perfection -- which is that every view of Roberts be known and that it be agreeable to them. That's not going to happen.

MR. DUNHAM: Do you have any thoughts about a new replacement for Justice O'Connor, either -- the names out there -- do you know the long lists and the short lists from the two Ediths to Luttig, Wilkinson, Gonzales, et cetera, et cetera. And one person in the audience asks do you think the president is bound to replace Sandra Day O'Connor with a woman?
MR. BORK: I don't think he's bound to replace Sandra Day O'Connor with a woman. But I suspect that he will find it politically attractive to do so. He may even decide to replace her with a woman from a minority group.

Now the people who have been mentioned for the Supreme Court to replace Sandra Day O'Connor -- I'm somewhat embarrassed about that because some of them are my friends. And some of my friends ought to be on the court. And some of my friends ought not to be on the court. And I don't want to stand here and tell you which is which.

(Laughter.)

I do wish, for example, that Judge Raymond Randolph from the D.C. circuit were on the list. But I haven't heard his name. And I do think that the moral statute of limitations having run upon smoking marijuana with your students, Douglas Ginsburg, who's a chief judge in the D.C. circuit now, and has had to withdraw because of the marijuana issue, would be a splendid Supreme Court nominee. But I don't suppose that's politically very likely.

MR. DUNHAM: Should the administration ask Justice O'Connor to stay on past the first Monday in October so that the court can operate with eight or the full complement of nine justices if Judge Roberts is confirmed? And do you expect that she'll be sitting there the first Monday of October?

MR. BORK: Well, she has promised to stay on until her successor is qualified. I mean, it's a funny position because if Roberts is confirmed and she leaves, that the court would then be four to four. You would get some decisions that would be four to four, which means

no law is being made. So I think she should hold on until her -- as she said she would -- until her successor is qualified so we can have a full nine judges.

MR. DUNHAM: You spoke highly of Justice Rehnquist. What do you think his legacy is going to be in the history of the Supreme Court? And where would you rate him alongside some of the great chief justices of the past?

MR. BORK: Well, I think as a chief justice, he was extremely good. By that, I mean he was very fair and very agreeable to his colleagues. They all respected him. They respected his positions, though he didn't share them much. And he ran the court and its associated institutions with great efficiency. So I think he will leave a legacy as a very good chief justice. Now, of course, the other question is what about his legacy on substantive issues? Well, we've overplayed this business about federalism or states rights or whatever you want to call it. There is no possibility that we're ever going to revive federalism in the way that it used to be before the New Deal. That was over and it's over for good. And when I say this to conservative groups they sometimes hiss me.

But the court cannot -- can you imagine a judge saying that Social Security is unconstitutional, which it is -- (laughter) -- according to the original understanding. But, you know, the fact is, the idea of enumerating -- of confining -- Congress to the enumerated powers, which do not include Social Security, that idea has been dead since the beginning of the republic.

People -- George Washington began to violate it as soon as he got into office. So that to say that Social Security is, in an academic sense, a speculative sense, unconstitutional may be true. It's also utterly irrelevant. Nobody's going to roll back -- no judge is going to -- no group of judges are going to roll back the situation to where it was before the New Deal.

MR. DUNHAM: One of the reporters in the audience is curious if you have any particular anecdotes about Chief Justice Rehnquist, particularly outside of the courtroom or off the bench?

MR. BORK: Well, no. Rehnquist -- while a very agreeable man, a very estimable man, was not the kind of man who was very colorful. He didn't get off many remarks or witticisms that resonate in your memory.

I do remember when his back was bad he came to New Haven. And he and his wife and my wife and I sat in the living room and talked while he lay on his back on the floor because of his back. It was kind of odd to have the conversation with his voice coming up from the floor all the time.

(Laughter.)

But no, he -- I remember once I argued a case involving federalism and won it nine to nothing. And I had lunch with Rehnquist later, and he said you didn't convince me. I said why didn't you raise dissent. He said it wasn't a constitutional case and there was no point -- there wasn't any point, I guess.

MR. DUNHAM: Do you think there's an advantage for a chief justice to have served as an associate justice before becoming chief justice? And Judge Roberts will become one of the younger chief justices if confirmed. Do you think it's a good thing that a chief justice could be serving for three decades or longer?

MR. BORK: Yeah. I don't think that prior experience as a justice is in any way important to -- after all, the great chief justice, John Marshall, who did most of the -- laid most of the groundwork for the republic, hadn't served as a justice. And William Howard Taft, who was a good chief justice, did not. I won't get into more recent years. But after all, the chief justice job, aside from what he does as a justice, which everybody else on the court does, as I say, is largely an administrative task. And I don't think it takes a great deal of judicial experience to engage in an administrative task. Nor do I think it's a bad idea that he might serve for three decades because from what I just said, it's not that crucial who is chief justice.

MR. DUNHAM: There's been some debate on whether there should be a mandatory retirement age for justices, I guess going back to Franklin Roosevelt and before. Do you have any thoughts about either term limits or a mandatory retirement age?

MR. BORK: Well, of course, to get either term limits or a mandatory retirement age, you'd have to amend the Constitution. I think the chances of doing that are just about nil. Nor do I think it would improve matters much. You would get rid of the occasional senile judge, which happens from time to time, a judge who doesn't know what's going on in the courtroom. And I've sat on the bench with such a judge. But you'd get an occasional senile judge, but as a cure for judicial activism, I don't think it would do a thing. In fact, maybe if you told a justice he had 10 years and no more, he might decide to do as many spectacular things as he could right away in order to leave a mark on history. A lot of judges worry about their legacies without realizing they're not going to have much of one anyway. (Laughter.) But they worry about it. And give them 10 years to establish it, they'll likely be even more activist than they would have otherwise.

MR. DUNHAM: People here actually want to hear your opinions on a number of cases. I've picked out two to ask about. One person wants to know about your reaction to the recent court decision on government taking of private property. And then several people asked about the Supreme Court decision on the 2000 election.

MR. BORK: Well, the court decision about government taking of private property I think was wrong, but I don't think it was the disaster that it has been portrayed as. What the court said was that a local government could condemn your property, take it away, for in effect whatever use it found for it, including giving it to somebody who paid more taxes. And that strikes me as wrong under the takings clause. On the other hand, it's easily cured. All the state governments have to do is either amend their own constitutions or pass their own statutes saying you may not do that. The Supreme Court didn't say that you had to have the power to do that; they said if you took the power and exercised it, you could. But you can confine -- the states can confine themselves so that that's a(n) easily remedied decision.

The Supreme Court decision in 2000? Well, there are two aspects of that. One is this crazy idea that the Supreme Court selected the president. The fact is that every poll by the media, every recount by the media -- and the media is not pulling for George Bush in Florida -- every recount shows that George Bush won -- very narrowly, but he won. So it didn't affect who was president, although a lot of Democrats like to pretend that it did.

The majority decision -- after all, you know, seven justices, including some liberals, said that what Florida had done violated the Constitution. The -- it only became -- when it got down to whether you could send it back for another try in a very short time period or

cut it off now, that was the only time it was only a five-justice majority. But I think the concurring opinion -- the majority opinion I'm not too wild about. I think it opens up all kinds of mischief. But the concurring opinion by Rehnquist, Scalia and Thomas -- by the trio -- I think was very sound, and confined the principle, as it should be have been confined, to presidential elections. The majority really opened up the possibility of litigating every close election for everything from dogcatcher on up, which I think was a bad mistake.

MR. DUNHAM: A lot of conservatives had hoped that Justice Scalia would have been elevated to chief justice. Why do you think the president chose Judge Roberts over Justice Scalia?

MR. BORK: I suppose the ease of confirmation. Scalia has raised a lot of hackles. I tend to agree with Scalia, but the fact is he has raised a lot of hackles. And I think the campaign against him would have been much more hysterical, and they would have much more material to cite, than is the case with Roberts. I suppose that's why Roberts was chosen.

MR. DUNHAM: Reportedly, Senator Kennedy stated that the nomination of Judge Roberts should not be acted on until the president nominates the replacement for Justice O'Connor. Do you have any thoughts on that?

MR. BORK: I can't imagine what he's talking about. I don't know why. Unless he's thinking we're entitled to a liberal nominee if we confirm Roberts, and therefore we should have both of them in front of us at once. That doesn't make a lot of sense, except politically for Senator Kennedy.

(Laughter.)

MR. DUNHAM: You talked about television and televising the confirmation hearings. What are your thoughts about televising Supreme Court proceedings? And do you think it's going to happen in the next 10, 20 years, or at all?

MR. BORK: Well, Western civilization is clearly on a down path, so I suppose it may happen.

(Laughter.)

I think it's a terrible idea. You know, the -- if Court Television, for example, goes in and televises every argument in the Supreme Court, whatever you think of that, the fact is that the networks are going to pull out two-minute or one-minute segments that they want to highlight, and that will give a wholly distorted view of the process. It's going to change the way justices ask questions, it's going to change the way lawyers answer questions, and it's going to give a false impression of what is actually taking place in the Supreme Court. So it's a very bad idea.

MR. DUNHAM: I want to sneak in one detailed antitrust question. The writer asks a few sentences -- I hope the answer is shorter than the question -- in your opinion, what are the practical legal effects of the Supreme Court's opinion in the Trinko versus Verizon case last year? And would the AT&T phone monopoly been broken up had the decision last year been law in the early 1980s?

MR. BORK: To tell you the truth, I haven't worried about this Verizon case. And I wrote a book about the antitrust sometime ago, and when I finished it, I said, well, that settles that. Nobody is going to have to write any more about antitrust.

(Laughter.)

Oddly enough, some of them keep trying. But I haven't -- the only time I've turned my attention to antitrust since then really is when I had a case involving this thing.
If I had an occasion involving this Verizon case, I would have studied it.
The reason AT&T was broken up was that it operated partly in a free-market context and partly in a regulatory context. And when that happens, it's possible to shift costs back and forth in ways that harm consumers and damage rivals. They wanted -- Bill Baxter was head of the Antitrust Division then -- wanted to get the regulated aspect of the business separated from the free-market aspect, and I think it was a pretty good idea.

MR. DUNHAM: I want to thank you for being here, Judge Bork. And before I ask the final question, I have a presentation.

MR. BORK: This final question must be a humdinger.

(Laughter.)

MR. DUNHAM: Yep. The National Press Club mug, and a framed certificate of appreciation from the National Press Club, which you may give back after the last question.

(Laughter, applause.)

MR. BORK: (Laughs.)

MR. DUNHAM: Anyway, you said early on that you were a socialist in your youth. Are you now, or have you ever been, a member of the Federalist Society?

MR. BORK: I am national co-chairman of the Federalist Society.

(Laughter.)

Is that supposed to condemn me? Thank you very much.

(Applause.)

MR. DUNHAM: I'd like to thank all of you for coming today. I'd also like to thank National Press Club staff members Melinda Cooke, Pat Nelson, Jo Ann Booz, and Howard Rothman for organizing today's luncheon. Thanks to the Press Club Library for its research.

And we're adjourned. (Sounds gavel.) (Applause.)