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# ROBERT H BORK, "THE TEMPTING OF AMERICA"

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**Robert H Bork, "The Tempting of America: The Political Seduction of the Law", New York, Free Press, 1990, i-xiv, Text 1-355; Appendix (US Constitution) 357-378; Notes 379-407; Tables 409-420; Index 421-432.**

Not long after the United States Senate rejected the nomination of Judge Robert H Bork to the Supreme Court of the United States, I arrived at Los Angeles Airport on the way to a conference. After the long flight, and what seemed an almost equally long wait in the line for interview by a migration officer, I ultimately reached my interrogator. Wearily, I presented my passport to a large American official. He seemed puzzled by the green cover and the inscription "Official Passport". "What do you do?" he asked. "I'm a judge", I told him balefully. "A judge? I hope you're not like Robert Bork. We showed him a thing or two!" he said with obvious glee, stamping my passport with just a little passion and ushering me into the land of the free.

I pondered long upon the personal involvement which this lowly officer of the United States government felt in the process of the selection of one of the nine judges of his country's highest court. There is nothing similar to it in Australia. Nothing at all. From the highest court to the lowest, the announcements of appointments are made late in the afternoon following an Executive Council Meeting.

Generally, they rate scarcely a public mention. All too often, an ancient photograph of the new judge is dragged out of the media archives, with the frequent result that the wrong face appears above the name, otherwise clothed in the anonymity of wig and robe and twenty years service in the private legal profession.

These thoughts came back to me recently when an American academic sent me a full page advertisement in the Washington Post protesting the nomination of Judge David Souter to the Supreme Court. The advertisement asked a series of questions which, it was suggested, Americans were entitled to have publicly answered before Souter took his seat on what is arguably the most powerful judicial body in the world. Souter never answered those questions. Yet his nomination was overwhelmingly approved. An obscure judge thus sailed effortlessly through the confirmation process. Ringing in his ears, and those of the Senators, were President Bush's statement in nominating him: "What I'm certain of is that he will interpret the Constitution and not legislate from the Federal bench".

President Ronald Reagan whose benign photograph had welcomed me at LAX that sunny morning had had similar things to say about his nominee Judge Robert H Bork. Why then did Bork fail where Souter and others have so easily succeeded? And are there any lessons in the Bork confirmation process or the issues it engendered for lawyers and citizens in Australia? These are the puzzles which caused me to open Bork's book with curiosity. A clue to the answer to the

first question was provided by a well known columnist whose acid comment on the Bork rejection is collected on the fly-sheet of the cover, along with the laudatory remarks about Bork by former conservative politicians in the United States. "When a mind as keen as Robert Bork's encounters an adversary as formidable as the liberal legal establishment, the result is combustion". That is true to some extent. It is, however, not the full story.

Robert Bork took his undergraduate and law degrees from the University of Chicago where Milton Friedman (in economics) and Richard Posner (in law) became the gurus of a monetarist approach to society. Bork became a partner in a major law firm. He then secured appointment as the Alexander M Bickel Professor of Public Law at the Yale Law School where he taught constitutional law. He served as Solicitor General and Acting Attorney General of the United States until he was appointed with the same confirmation process that was later to bedevil him, a Circuit Judge on the United States Court of Appeals for the District of Columbia Circuit. This is a high profile position as the US Federal judiciary goes. Being based at the seat of government, it exposes the judges to decision-making in a wide range of important constitutional cases, usually of high national significance.

On the day President Reagan nominated Bork to replace Justice Lewis F Powell Jr on the Supreme Court, Senator Edward Kennedy, a member of the Senate Judiciary Committee made a nationally televised speech from the floor of the Senate. In it he said:

> *"Robert Bork's America is a land in which women would be forced into back alley abortions, blacks would sit at segregated lunch-counters, rogue police could break down citizen's doors in midnight raids. school children could not be taught about evolution, writers and artists would be censored at the whim of government, and the doors of the Federal courts would be shut on the fingers of millions of citizens for whom the judiciary is often the only protector of the individual rights that are the heart of our democracy."*[1]

Even by the robust standards of the United States, this was an extraordinary attack on a sitting judge who had but lately been endorsed by the self-same Senate for an important and highly influential Federal judicial office. Yet in the months that followed the nomination, until the vote was finally taken, attacks of this nature became quite common. A coalition of no fewer than three hundred interest groups, fearing that Bork was indeed the reactionary who would dismantle the liberal constitutional edifice erected by the Warren court, spent nearly $15 million on a campaign to defeat his nomination. The vote was eventually taken on 23 October 1987. Bork was defeated by 58 votes to 42. It was the largest margin by which the Senate had ever rejected a nomination to the Supreme Court. In January 1988, his reserved judgments completed, Bork resigned from the Court of Appeals. His stated objective was to vindicate his reputation as a judge and to voice in the public arena the concerns about judicial philosophy which had so fired up his antagonists.

*The Tempting of America* is not simply the story of

Bork's ordeal in the Senate. Part III of the book ("The Bloody Crossroads") recounts the candidate's experiences as a Supreme Court nominee. One would have liked a few photographs of the dramatis personae whose prose is left unadorned to enliven the pages of this part of the book. But illustrations are there none, consistent with Bork's serious-minded and conservative approach to his subject. This is not a popularized book, although it is written in anything but a scholarly prose. It is full of quotations, many of them in a racy style. But the book has a very serious purpose. It is written by a person who believes he has suffered a great wrong and who is keen that his fellow citizens (and others interested) should consider the lesson to be derived from his rejection for the institutions of this country.

It is interesting to reflect upon how wide of the mark were the questions the Reagan administration asked before putting Bork's name forward. In a nondescript coffee house, he met the emissary of the President:

> *"He had perhaps twenty questions that primarily concerned personal morality, questions about money, drugs, sex, wife or child abuse and the like. It seemed somehow characteristic of Washington that many of these transgressions had gained proper names as in, "Do you have the [name of a prominent person] problem?" After a number of questions, I said, "Look, I have led a very dull life". [The emissary] said, "Good. That's the way we like it"."*

Bork returned to his Federal court house, doubtless heart pounding, casting a glance at the great white building of the Supreme Court now seemingly within his grasp. His hopes must

have been dinted after Senator Kennedy's speech. Bork realized that, unlike many nominees, he would be forced to answer Kennedy's criticisms:

> *"A nominee who has not written on the relevant subjects can decline discussion. I could not."*

Bork was a prolific writer. Not only on the Bench but in law reviews he had become something of a proponent for a principle of judicial restraint which he saw as having been rejected by the Supreme Court. This was not only the Supreme Court under Warren - but also under Berger and even Rehnquist. What he went through Bork ascribes "to the increasing politicisation of our legal culture". Ironically the room in which the confirmation hearings were heard was the very room in which the Army-McCarthy hearings had taken place, leading to the downfall of the unlamented Senator from Wisconsin. It was the room in which Bork had taken the oath when confirmed as a judge of the Court of Appeals. He expounded his philosophy of judging and declared that it was "neither liberal nor conservative":

> *"It is simply a philosophy of judging which gives the Constitution a full and fair interpretation but, where the Constitution is silent, leaves the policy struggles to the Congress, the President, the legislatures and executives of the fifty States and to the American people."*

A major effort of the campaign against Bork was his suggested opinion that the limited United States Constitution, being silent on the right of privacy, gave no guarantee to it. Upon this opinion, the voices became strident, both inside

and outside the Senate Chamber. Television clips, with Gregory Peck no less, denounced Bork's vision of an "America without privacy". Bork despaired that anybody had bothered to read his writings or his testimony. He sat down to write a letter to the White House withdrawing from the battle. Family and supporters urged him to stay the course. He did so in a public statement declaring:

> *"Federal judges are not appointed to decide cases according to the latest opinion polls. They are appointed to decide cases impartially according to law."*

He urged a quieter debate in the name of the "cause of justice in America". But by the time the vote was taken its conclusion was foregone. He was having lunch at a Washington hotel when a reporter approached to ask him how he felt "about being rejected". He felt effectively barred from public life. It was not long after that he resigned from the Federal judiciary. President Reagan replied to his letter of resignation with a suitably graceful expression of admiration. As a human tragedy for a talented man it is a story well told. Nor is Bork without a sense of humour. As the sole reflective photograph of him on the front cover demonstrates he bears a striking facial similarity to the then Surgeon General of the United States, Dr Everett Koop. Once in a Chicago bookstall Bork was approached by a woman who told him very earnestly "Sir, we are heeding your warnings". She ultimately revealed that she thought he was the Surgeon General full of health warnings for his fellow citizens. Bork concludes his chapter on the confirmation

with the bitter-sweet note:

> *Dr Koop, I am told, is frequently stopped by strangers who tell him they are sorry he didn't make it."*

As we have no equivalent procedure for the confirmation of judicial officers in Australia, much of the book has little immediate relevance to our institutions. I imagine it would be relevant if ever we paused to consider a confirmation process. Until now, no such process has been thought necessary. Without a Bill of Rights and embracing the declaratory theory of the judicial function, Australia's judges were, until lately, thought to be immune from the pressures which were said to justify a popular voice at the entrance to the judicial monastery.

The termination of appeals to the Privy Council, the discrediting of the declaratory theory (which Lord Reid in 1972 called a "fairy tale") and the growing inventiveness of Australia's courts, led by the High Court may lead to new demands for some form of preappointment scrutiny. Certainly, such demands have been made in Canada following the introduction of the Canadian Charter of Rights and Freedoms. It is certainly something to be kept in mind if ever the Bill of Rights debate is raised again in this country. When it becomes plain to the community that judges do make law, it becomes less unreasonable for the democratic institutions to demand some part in their appointment, as well as in their removal. The democratic checks in Australia have occurred, until now, at the exit from the monastery. If the Bork tale

has any lessons for our institutions, it is more likely to be for the new institutions considering the removal of judicial officers. It may be hoped that they will not be politicized by the same stereotyping extremism as bedevilled Judge Bork.

If there is a lesson for us in the Bork case it is that in the United States and Australia, jurists who have opinions that they have expressed are less likely now to be appointed to high office than those who have kept their opinions entirely to themselves. Any opinion is bound to have upset somebody. Opinions forcefully and persuasively expressed (as Bork's gifts allowed him to do) inevitably upset many people. They make appointment seem difficult to cautious politicians and those who advise them. It is not without significance that the two judges appointed to the Supreme Court since the Bork fiasco have been quiet, formerly obscure jurists with no intellectual track record coming anywhere near that of the volubly, energetic eloquent Bork.

Bork's book is an eloquent statement of his judicial philosophy. Perhaps in the United States there is a need to summon the judiciary back to the basic function of giving meaning to laws made by those with greater legitimacy in law-making. In that sense, Bork and the conservative men who have followed may be redressing the adventures of the creative judges of the US Supreme Court, most notably William J Brennan Jr whose place Judge David Souter has lately taken. That is for United States citizens to judge. But it should never be forgotten that it was the "activist" Supreme Court which solved some of the acutest problems of that

democracy where Congress had failed adequately to cure great wrongs: including the catalogue of creativity hinted at by Senator Kennedy in his denunciation of Bork.

If there is a criticism of Bork's philosophy it is that it harkens back to the "fairy tale" which Lord Reid despatched twenty years ago for most of the rest of us in the common law. The call for a return to true declaratory theory has little attraction to realist Australian lawyers taught by Julius Stone and alert to the truths laid down by Roscoe Pound at Harvard University in the early decades of the century.

Laws are expressed in writing, whether in a constitution, legislation or the judgments of the common law. Writing reproduces language. Language (particularly the English language) is inescapably ambiguous. In such ambiguities there are, uncomfortable as it might be for a person like Bork, large opportunities for judicial choice. The recognition of that choice, and the possession of an intellectually valid framework for exercising that privilege, is the necessity for a modern lawyer, but particularly for a judge of the highest court. Bork, a highly intelligent lawyer, would recognise these fundamentals, stated so starkly. Essentially he was (and is) simply an articulate spokesman for reducing the field of choice and for returning judges to a much more circumscribed role than lately they have assumed in the United States. Kennedy and Souter since him and Rehnquist, O'Connor and Scalia before him, embrace the new mood. It is not particularly shocking to lawyers in

Australia. Here the problem has been to get judicial recognition of the leeways for choice. It has by no means been to rope in excessive judicial imagination and adventurism. So far.

The type of controversy which ultimately brought the nomination of Bork down is neatly illustrated in Australia by the recent decision of the High Court of Australia in New South Wales v The Commonwealth[2]. The majority in that case determined the validity of the new Federal Corporations Act with heavy emphasis upon the history of s 51(xx) of the Australian Constitution. The Act was held invalid, in large part because the Court concluded that the drafters of the Australian Constitution never intended that the Federal Parliament should have the power to incorporate trading and financial corporations. Such a view would have been entirely congenial to Robert Bork. It was the kind of judging that he called for in the United States. Justice Deane, alone, upheld the validity of the Federal statute. He saw the Constitution as a social compact, made between the people of this country in 1900. In his dissent, he reasoned that it was "simply not to the point that someone or other of the changing participants in the Convention Committees or debates or some parliamentarian, civil servant or draftsman on another side of the world intended or understood the words of the national compact would bear some different or narrower meaning".[3] This was the kind of reasoning that Bork rejected.

One emerges from a reading of his book with a respect

for Robert Bork's high intelligence and personal integrity, an appreciation of his legitimate and continuing intrusions into the public debate but a feeling that his views about the legitimacy of judicial choice are unduly narrow. What a sorry situation the Australian Commonwealth would now be in if all of the decisions of the High Court on constitutional cases had been determined by reference to the perceived intentions of the drafters in the conventions of the 1890s or the meaning of the words of that austere document, narrowly construed. Instead, succeeding generations of our judiciary, with the genius that is the great moving force of the common law system, have moulded constitutional law and other legal principles in a creative and entirely legitimate way.

It is the marriage of stability and creativity that is the reason for the success of the common law after the sunset on the Empire which originally nourished and sustained it. Bork is a man for stability. In the United States, as in Australia, there is also a legitimate place for creativity. Yet I put down this book with a sense of regret that he "didn't make it" to the Supreme Court of the United States. Those who have been confirmed are by no means less conservative. They were just more silent. Is this really the intellectual tradition of O W Holmes? Of Cardozo? Of Brandeis? Or of Frankfurter?

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1. The Cong Rec S 9188-S 9189 (July 1, 1987).

2. (1990) 64 ALJR 157.

3. Ibid, 161.