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Associate Justice Bork?

By Marvin M. Karpatkin

The public knows of Robert H. Bork as the bearded Yale Law School professor whom President Nixon appointed as Solicitor General, and who moved up to the post of Acting Attorney General when Attorney General Elliot L. Richardson resigned, and Deputy Attorney General William D. Ruckelshaus refused to obey the order of his commander in chief to fire Archibald Cox.

Mr. Bork was supposed to have caught the President's attention when he was one of the few academics who came to the defense of the President's antibusing bill. A lawyer of dazzling abilities, he was the author of the Justice Department memorandum that helped to seal the fate of Spiro T. Agnew as Vice President by arguing that only the President—and not the Vice President—is immune from criminal prosecution.

Mr. Bork served his commander in chief well as Acting Attorney General and as the outstanding legal brain-truster of the Nixon inner circle. But now that William B. Saxbe has been sworn in as the President's fourth Attorney General, Mr. Bork can give his full attention to the post of Solicitor General, the third-ranking officer in the Justice Department.

The office of Solicitor General has traditionally been one of special distinction, generally characterized by a certain measure of independence from the political side of the Justice Department. Past Solicitors General, Republican as well as Democratic, have occasionally demonstrated this independence by advocating positions before the Supreme Court at variance with the views of the Administration.

Solicitor General Simon E. Sobeloff, during the Eisenhower Administration, refused to sign his name to a Government brief defending the security-risk program. President Johnson's Solicitor General, Thurgood Marshall, "confessed error" in a large number of cases in which illegal wiretapping was discovered. And Mr. Nixon's first Solicitor General, Erwin N. Griswold, publicly clashed with Gen. Lewis B. Hershey by filing a brief that opposed the Selective Service System's practice of punitively reclassifying young men who protested against the Vietnam war and the draft.

President Nixon has little reason to

fear any such kicking up of heels by his new Solicitor General. He has found in Mr. Bork someone who may be expected to encourage the four Nixon-appointed justices on the United States Supreme Court to continue to revise downward the civil-liberties accomplishments of earlier decisions.

In an article in *The Indiana Law Journal*, Mr. Bork expresses the view that the First Amendment protects only what he calls "explicitly political speech."

He wrote: "There is no basis for judicial intervention to protect any other form of expression, be it scientific, literary or that variety of expression we call obscene or pornographic."

And regarding political speech, he rejects the classical Holmes-Brandeis "clear and present danger test" as mere rhetoric.

He would allow legislatures to penalize any advocacy of violation of the law—not acts, but advocacy—regardless of the constitutionality of the law or the remoteness of any danger. Presumably this would have included the Rev. Dr. Martin Luther King Jr.'s advocacy of peaceful violation of segregation laws.

In an article written for *Fortune* magazine, Mr. Bork admonishes President William J. McGill of Columbia for having proposed rules to effect orderly change on college campuses. According to Mr. Bork, student distrust of university administrations reflects "paranoid feelings" and is "usually without objective justification." One wonders how he feels about Kent State and Jackson State. Moreover, he opposes bringing to the courts such issues as "abortion statutes, the death penalty, environmental issues, the rights of women, the Vietnam war," since in his view these are questions for the political process, and going to court means seeking an "authoritarian" solution.

It is hard to imagine a worse nightmare than a vacancy occurring on the non-Nixon side of the Supreme Court and Mr. Bork's being selected as the fifth Nixon justice. The Court would then remain as a legacy of the Age of Nixon for many years after Mr. Nixon himself had been repudiated by the American people.

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In Thursday's Op-Ed article, Mr. Justice Bork?, a typographical error changed the meaning of a word. The *Indiana Law Journal* quotation should have read: "There is no basis for judicial intervention to protect any other form of expression, be it scientific, literary or that variety of expression we call obscene or pornographic."

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