NOMINATIONS OF JOSEPH T. SNEED TO BE DEPUTY ATTORNEY GENERAL AND ROBERT H. BORK TO BE SOLICITOR GENERAL

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-THIRD CONGRESS

FIRST SESSION

ON

NOMINATIONS OF JOSEPH T. SNEED, OF NORTH CAROLINA, TO BE DEPUTY ATTORNEY GENERAL AND ROBERT H. BORK, OF CONNECTICUT, TO BE SOLICITOR GENERAL

JANUARY 17, 1973

Printed for the use of the Committee on the Judiciary

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NOMINATIONS OF JOSEPH T. SNEED TO BE DEPUTY ATTORNEY GENERAL AND ROBERT H. BORK TO BE SOLICITOR GENERAL

WEDNESDAY, JANUARY 17, 1973

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 10:35 a.m., in room 2228, Dirksen Senate Office Building, Senator James O. Eastland (chairman) presiding.

Present: Senators Eastland, McClellan, Hart, Burdick, Tunney, Hruska, Fong, Thurmond, and Mathias.

Also present: John H. Holloman, Francis C. Rosenberger, and Thomas D. Hart, of the committee staff.

The CHAIRMAN. This hearing is on the nomination of Joseph T. Sneed of North Carolina to be Deputy Attorney General.

Senator Helms, you may proceed.

STATEMENT OF JESSE HELMS, U.S. SENATOR FROM NORTH CAROLINA

Senator HELMS. Mr. Chairman and other distinguished Senators, I am Jesse Helms of North Carolina and I thank you for the privilege of appearing before this committee this morning for the purpose of presenting to you a highly respected resident of North Carolina who has been nominated by the President to be Deputy Attorney General.

I met Mr. Joseph T. Sneed III, for the first time last week. Subsequent to our meeting, Mr. Chairman, I made inquiry of several sources as to his background and competence. Without exception, he was given splendid recommendations by those who have known him and worked with him.

Briefly, Mr. Sneed has been professor of law and dean of the Duke University Law School since February 1971. Before coming to Duke University, he had built an outstanding academic career at a number of excellent law schools in Texas, New York, Massachusetts, and California.

Mr. Sneed was born in Calvert, Tex., on July 21, 1920. After undergraduate work at Southwestern University, he attended the law school at the University of Texas, which awarded him a law degree in 1947. His legal education, I should mention, was interrupted by service during the Second World War as a staff sergeant in the U.S. Army Air Force.

For 10 years after graduation, he remained at the University of Texas Law School, first as an instructor, then as assistant professor,

then as associate professor, and finally as a professor of law. In addition, during the years 1949–50, he served as assistant dean in 1952, he was a consultant to the Texas Legislative Council, and from 1954 to 1956 he was counsel to the firm of Graves, Daughtery and Greenhill in Austin, Tex.

In 1957, Mr. Sneed left the University of Texas to join the law faculty at Cornell University in Ithaca, N.Y., as a professor of law. Harvard University awarded him an S.J.D. degree in 1958. Thereafter, he remained at Cornell until 1962, when he moved to Stanford University Law School as a professor of law. While at Stanford, Mr. Sneed served as president of the American Association of Law Schools in 1968, and as a member of the California Law Revision Commission in 1970. He received an LL.D. degree from Southwestern University in 1968.

In addition to numerous articles, Mr. Sneed is the author of "Configurations of Gross Income" published in 1967. He is a member of the bar of Texas and of New York, Order of the Coif, the American Law Institute, the American Judicature Society and the American Bar Association. He is a widely recognized expert in the field of taxation.

He is married to the former Madelon Juergens and they have three children.

My inquiries have convinced me that Mr. Sneed comes to the job of Deputy Attorney General with an outstanding academic background. I commend him to this committee as unusually well qualified for the position.

Thank you, Mr. Chairman.

The CHAIRMAN. I want to place in the record a statement from Senator Ervin in support of the nomination of Mr. Sneed to be Deputy Attorney General.

[The statement referred to follows:]

STATEMENT OF SENATOR SAM J. ERVIN, JR. IN SUPPORT OF THE NOMINATION OF JOSEPH T. SNEED, III TO BE DEPUTY ATTORNEY GENERAL OF THE UNITED STATES

Mr. CHAIRMAN. I sincerely regret that a previous commitment prevents me from personally expressing to the Committee my support for the nomination of Joseph T. Sneed, III, as Deputy Attorney General of the United States.

Mr. Sneed is presently serving as Dean of the Duke University School of Law in Durham, North Carolina. North Carolinians take great pride in the outstanding national reputation of the Duke Law School and its tradition of academic excellence. Joseph Sneed has contributed to that tradition during his tenure on the Duke faculty and has won the respect and admiration of his colleagues there.

Mr. Sneed's academic and professional qualifications for Deputy Attorney General are impressive. He received his LL.B. degree from the University of Texas, an S.J.D. degree from Harvard University, and an LL.D. degree from Southwestern University. After receiving his LL.B. from the University of Texas in 1947, he served until 1957 as a member of its law school faculty. While in Austin, Texas, he was associated with the law firm of Graves, Daugherty, and Greenhill. From 1957 to 1962, Mr. Sneed was Professor of Law at the Cornell University Law School, in Ithaca, New York. Thereafter, he joined the law faculty at Stanford University where he served until coming to Duke University in 1971.

I am confident that, based upon Mr. Sneed's excellent professional background and reputation and his outstanding academic achievements, Joseph Sneed will render distinguished service to our country as the new Deputy Attorney General. Certainly, the country at this time has great need for a man of his abilities in this important position.

I urge the Committee to approve Mr. Sneed's nomination. Certain of his confirmation, may I add that I am personally looking forward to working with Mr. Sneed on matters of mutual interest in the years ahead.

The CHAIRMAN. Mr. Sneed, is your biography before you correct?

TESTIMONY OF JOSEPH T. SNEED, NOMINEE TO BE DEPUTY ATTORNEY GENERAL

Mr. SNEED. Yes, sir; Senator Eastland, it is substantially correct.

The CHAIRMAN. It will be placed in the record.

[The biographical sketch of Mr. Sneed follows:]

JOSEPH T. SNEED, III

Born: July 21, 1920, Calvert, Texas.

Marital status: Married (wife, Madelon), three children.

Legal residence: North Carolina.

Education: 1937–1941, Southwestern University, Texas, B.B.A. degree. 1941–47, University of Texas, Austin, Texas; LL.B. degree. 1958, Harvard University, S.J.D. degree. 1968, Southwestern University, LL.D. degree.

Bar: 1948–1958, Texas; New York.

Military service: November, 1942–February 1946, U.S. Army Air Force, S/Sgt.

Employment: 1947–57, University of Texas, Instructor. 1947–51, Assistant Professor of law. 1951–54, Associate Professor of law. 1954–57, Professor of law. 1949–50, Assistant Dean. 1954–56, Graves, Daugherty & Greenhill, Austin, Texas, Counsel. 1957–62, Cornell University, Ithaca, New York, Professor of law. 1962–71, Stanford University Law School, Stanford, California, Professor of law. February 1971–present, Duke University Law School, North Carolina, Dean and Professor of law.

Office: Duke University Law School, Durham, North Carolina.

Home: 2815 Chelsea Circle, Durham, North Carolina.

The CHAIRMAN. Senator McClellan?

Senator MCCLELLAN. I have no questions.

The CHAIRMAN. Senator Hart?

Senator HART. I had an opportunity to visit with Dean Sneed yesterday. I did not ask him then and I am going to ask him now if he had anything to do with the development of any school desegregation plans in North Carolina?

Mr. SNEED. No, sir; Senator Hart. I have been in the State only 2 years and I have not participated in any way. My duties as a dean have been all consuming

Senator HART. Thank you, Mr. Chairman.

The CHAIRMAN. Senator Burdick?

Senator BURDICK. I have no questions, Mr. Chairman.

The CHAIRMAN. Senator Tunney?

Senator TUNNEY. Thank you, Mr. Chairman.

I had the opportunity, because Dean Sneed has spent so much time in California teaching at Stanford University, to talk to many eminent attorney in California who know him and they all have praised the dean for his integrity and his brilliance. They are universal in their opinion that he would be a very fine Deputy Attorney General. I am pleased to join with my colleagues in saying I am most happy to support the nomination.

Mr. SNEED. Thank you, Senator Tunney.

The CHAIRMAN. Senator Hruska?

Senator HRUSKA. Mr. Chairman, it was with interest that I canvassed the records of both of these nominees. They have both compiled a very significant record in their field of the law.

I do know that one of the products of Mr. Sneed's teaching is on my staff and if Mr. Sneed will do as good a job and as fruitful a job in his new assignment as he did with Malcolm Hawks in teaching him the law, then I forecast a very, very fine future for him.

Mr. SNEED. Thank you, Senator. I had very good material.

Senator HRUSKA. Mr. Sneed, have you been in the office there these recent days being briefed and being oriented a little bit?

Mr. SNEED. To some necessary degree, yes, sir. I have been commuting between Durham and Washington.

Senator HRUSKA. Did you have occasion to inquire about the progress being made on the Department of Justice's proposal to revise the Federal Criminal Code?

Mr. SNEED. Only in a general sense, Senator Hruska. I do know that the Criminal Division is working on the project. The Office of Criminal Justice is also involved and there is every intention on the part of the Department to go forward with whatever suggestion it cares to make at the appropriate time.

Senator HRUSKA. It will be with interest that we will follow up on that. We have done a lot of work on it, and we expect to get it to a point of action sometime this calendar year.

Mr. SNEED. I am aware of that and will do everything in my power to assist.

Senator HRUSKA. I have no further questions, Mr. Chairman.

The CHAIRMAN. Senator Fong?

Senator FONG. Mr. Chairman, I have no questions. I should like to congratulate Mr. Sneed and Mr. Bork on their nominations. Although I am a Harvard man, I am never the less very happy to see a Yale man succeed a Harvard man as Solicitor General.

The CHAIRMAN. Senator Thurmond?

Senator THURMOND. Thank you, Mr. Chairman.

Dean Sneed, I want to congratulate you upon your appointment.

Mr. SNEED. Thank you, sir.

Senator THURMOND. I feel that you will be a great asset to the Justice Department in the performance of its work.

Looking over your record you appear well qualified. You have been a soldier, you have been a distinguished teacher of law, you have practiced law, you seem to meet all of the qualifications. If I did not know you, however, and had any questions, from the high esteem in which I hold the able and distinguished Senator from North Carolina, Senator Helm, I would cast my vote for you on his recommendation. It will be a pleasure for me to support you.

Mr. SNEED. Thank you, Senator Thurmond.

The CHAIRMAN. Senator Mathias?

Senator MATHIAS. Thank you, Mr. Chairman. I would just like to welcome Mr. Sneed to the committee, and to express my admiration for his record, and to wish him well in the performance of his duties.

Mr. SNEED. Thank you, Senator Mathias.

The CHAIRMAN. Does anybody else have any questions?

Senator HART. Mr. Chairman, I am advised that the Senator from

Massachusetts, Mr. Kennedy, does have questions he would like to address to Dean Sneed and will be here very shortly. I am sure that before we have finished with Professor Bork, Senator Kennedy will be here.

The CHAIRMAN. We will now take up the nomination of Robert H. Bork of Connecticut to be Solicitor General of the United States, vice Erwin N. Griswold.

Senator Weicker of Connecticut is recognized.

STATEMENT OF LOWELL P. WEICKER, U.S. SENATOR FROM CONNECTICUT

Senator WEICKER. Thank you very much, Mr. Chairman. I appreciate your courtesy and the privilege of appearing before your committee.

Mr. Chairman, it gives me a great deal of pleasure to present to your committee Prof. Robert Bork, who has been nominated by the President for the position of Solicitor General of the United States. Professor Bork has a very rich background both in the practice of law and in the academic field relating to the law and is at present professor at the Yale Law School in New Haven.

Very briefly, he served with distinction in our Armed Forces, in the U.S. Marine Corps, and then went into private practice of law in Chicago, which practice involved some 7 to 8 years of his life, and then on to the Yale Law School where he is at present an associate professor.

I think it is a mark of the esteem in which he is held by members of the judiciary that three Federal judges selected Professor Bork to devise a reapportionment plan for the State of Connecticut. I have had occasion to sit down and chat at length with the nominee. I find him to be a man of great integrity, certainly of academic brilliance, and of a deep commitment to the high principles that guide this Nation, and I think he will make a superb Solicitor General, and indeed am very proud that he comes from my State of Connecticut.

The CHAIRMAN. Thank you, sir.

Professor, is your biography before you correct?

TESTIMONY OF ROBERT H. BORK, NOMINEE TO BE SOLICITOR GENERAL OF THE UNITED STATES

Mr. BORK. Yes, it is, Senator.

The CHAIRMAN. It will be placed in the record.

[The biographical sketch of Mr. Bork follows:]

ROBERT H. BORK

Born: March 1, 1927, Pittsburgh, Pa.

Marital status: Married (wife, Claire), three children.

Legal residence: Connecticut.

Education: 1944–45, University of Pittsburgh, Pa. 1947–53, University of Chicago. 1948, B.A. Degree. 1953, J.D. Degree.

Bar: 1953, Illnois.

Military service: 1945–46 and 1950–52, active duty, U.S. Marine Corps Reserve, 1st Lt., inactive status until December, 1958 when discharged as captain.

Employment: 1953–54, University of Chicago, Research Associate, Law and

Economics Project. 1954–55, Private practice, Willkie, Owen, Farr, Gallagher & Walton, New York, New York. 1955–62, Kirkland, Ellis, Hodson, Chaffetz and Masters, (now Kirkland & Ellis) Chicago, Illinois, Associate and Member. 1962–present, Yale University Law School, New Haven, Conn., Associate Professor of law, 1965, Professor of law.

Office: Yale University, New Haven, Conn.

Home: 142 Huntington St., New Haven, Conn.

Senator HART. Professor Bork, as with the dean, we had a visit yesterday afternoon. I certainly want to compliment you on the impressive academic career which has been yours and, as I indicated yesterday, there are some questions I would like to ask you.

The first bears on something I was not aware of, although I should have been, when you were visiting yesterday. As I now understand it, we are being asked to confirm you now when there is no vacancy for the position.

It is my understanding that Dean Griswold, the present Solicitor General, has announced no plans to resign and indeed indicates that he will be on the job through the end of the court term in June.

I remember Senator Thurmond several years ago expressing some concern about the practice of confirming people before there was a vacancy. At that time there was a possibility that we might be changing administration but there is not that possibility in this case. Now, what would be your status between now and the end of June if we advise and consent to this nomination?

Mr. BORK. What I had intended to do and what I have worked out, Senator, with Dean Griswold is that I will come down very frequently, because there are large problems of transition in that office. During the spring Dean Griswold will be handling cases, of course, which he has helped develop and prepare but, in addition to that, cases will be coming in that are really cases that will affect the next term of the court, Dean Griswold has very kindly offered to educate me in the operations of that office and to talk with me about the problems in cases coming up for the next term. So there is a transition period, and a period of education of me by the Dean.

Senator HART. I certainly can understand why it would be desirable to familiarize yourself, with the work, but could not that be done on a consultative basis? Why should we advise and consent to your nomination as the Solicitor General when there is the Solicitor General named Griswold? How do you work with two Solicitors General?

Mr. BORK. Senator, I would not be the Solicitor General because that would not become effective until I were actually sworn in. I would not expect to be sworn in until such time as the dean's resignation became effective. But there are, I think, a number of good practical reasons why it would be very desirable if I could be confirmed previously to that. One of them has to do with working on the cases if I were known to be confirmed and therefore certain to take office.

Senator HART. Would you participate in the decisions then?

Mr. BORK. I would participate in discussions about the cases.

Senator HART. But you do not have to be confirmed as the Solicitor to do that.

Mr. BORK. No, no; I do not. The other thing, of course, is——

Senator HART. What is the practical advantage?

Mr. BORK. Well, I think if it were certain that I would be the Solicitor General it would make much more sense for me to put my contri-

bution into that discussion and, in addition to that, Senator, there is the problem of staffing. That is an office that has a regular turnover, a lot of young people come to that office and work for a year or 2 or 3 and then leave, and there is some recruiting to be done, and if the staff is to be chosen to fill those vacancies, then I think it would be well that the man who does the recruiting and chooses the personnel know that in fact he is going to be the Solicitor General when they come on the job.

Senator HART. Well, Secretary of Defense Laird indicated last summer that he was going to retire beginning with the new term, but we were not asked to advise and consent to Secretary Richardson's nomination until about the time of the chance. Defense is a pretty complicated department, too. Do you think it is a good precedent if we begin this as a pattern of practice to act on a nomination 6 months ahead of time?

Mr. BORK. Senator, I think that the worth of the precedent might vary a good deal from office to office. I cannot speak as to other offices. I do not, candidly, see any problem with this office. I think what is to be known about me is already known. I think it would have considerable practical advantage if I were confirmed at this time so I could begin to phase in and do the things that have to be done.

Senator HART. How does Dean Griswold feel about this?

Mr. BORK. Dean Griswold and I have discussed this procedure and he is thoroughly in accord with my phasing in in this fashion.

I would say the dean has been extremely cooperative and extremely kind and I look forward—one of the benefits of this office is the opportunity to observe him on the job and to learn from him.

Senator HART. I think we would kid ourselves to pretend that an opportunity to observe, to come to know personnel, and, if it is desirable, even to have an input into decisions, requires the confirmation of the indicated successor. There may be additional leverage as the result of the confirmation although succession is 6 months ahead but given the temperament of Dean Griswold I am sure you would be as welcome as a consultant as a confirmed successor. Is that not true?

Mr. BORK. I am sure I would be welcome with Dean Griswold. There is no problem there, Senator.

Absent confirmation, which implies the possibility that confirmation will not be forthcoming, I would think it would be unfortunate if I went ahead and put my input into these various decisions of staffing, of cases, and so forth, and then it turned out for some reason or other that there was a different Solicitor General in that office in the fall, having to live with things that I had influenced, a staff perhaps I had chosen, that he had not chosen.

Senator HART. We must be careful that we do not do too much by this precedent. So much of what you say could equally be said with respect to most other posts.

On the matter that we did talk about—and if I had known about this 6-month thing I would certainly have raised it——

Mr. BORK. Yes, sir.

Senator HART. You have expressed yourself freely, and always with tight reasoning, on a number of subjects, antitrust matters, civil rights. You will now for 6 months be a kind of Solicitor General, and

then presumably the Solicitor General after that, and in that role you will be the Government's appeal lawyer. Is that not a shorthand way of describing what you will be doing?

Mr. BORK. That is quite accurate, Senator, yes.

Senator HART. It is a policy post?

Mr. BORK. Not particularly, Senator. I view it as a post of being the attorney for the Government.

Senator HART. What if the Government takes a position in the field of antitrust or civil rights that you think is wrong, and have said in the past is wrong, what do you do?

Mr. BORK. What will I do? I will enforce the policy of the Government in antitrust as the Government defines it. I do not define it, Senator.

I might say that in practice both for defendants in antitrust cases and for plaintiffs in antitrust cases I frequently urged positions that as an academic I would criticize.

Senator HART. If the Assistant Attorney General in charge of civil rights has recommended action be taken against a school district or several school districts, or if the Assistant Attorney General in charge of antitrust wants to go after a conglomerate, and you believe on the law that you would take a different view in both cases if you were the Assistant Attorney General, as Solicitor General what do you do?

Mr. BORK. Well, of course, Senator, the initial determination to file a lawsuit against a conglomerate or against a school district would not come within my office at all.

Senator HART. That is right.

Mr. BORK. Those cases would be filed and then come to me, if at all, upon appeal. At that stage, I am sure that I would continue the policy of the Justice Department, even if I disagreed as an academic with that policy. But that, I take it, is not relevant to my performance of these duties: that is, my personal academic disagreement would not be relevant to the performance of these duties.

Senator HART. Really your answer disarms me. I was going to read you some of the things you have written in both areas. Am I to understand that your concept of your duties as the Solicitor General is to appeal, as aggressively and as effectively as you can, those Government positions taken by the Justice Department notwithstanding the fact that those positions may run squarely counter to strong opinions you have voiced and written earlier?

Mr. BORK. That is correct, Senator. I have had that experience, I may say, in practicing law. Lawyers on the other side have pointed out thta I had written something in support of their position, and I have had occasion to say in court "I am trying to enforce the law and not my own opinions."

Senator HART. I do not want to take more than my share of time and will yield very shortly in order that others may proceed.

You participated, Professor Bork, in a symposium on the Cambodian incursion which was printed in the American Journal of International Law. Your remarks—they were very brief really—included comment on the President's authority for that invasion. At the conclusion of your remarks, you said:

The Cambodian incursion and its aftermath do raise important constitutional questions but they do not seem to me to be the questions posed by some of the

other panelists. I think there is no reasons to doubt that President Nixon had ample constitutional authority to order the attack on the sanctuaries in Cambodia seized by the Vietnamese-Vietcong forces. That authority arises from the inherent powers of the Presidency and from congressional authorization.

The real question in the situation is whether Congress has the constitutional authority to limit the President's discretion with respect to this attack. Any detailed intervention by Congress in the conduct of the Vietnamese conflict constitutes a tresspass upon the power the Constitution reposes exclusively in the President.

You suggest, if I read your article correctly, that Congress can end our involvement in Vietnam. While all of us hope we are approaching a resolution of that, could you explain how, in your view, the Congress does have the constitutional power and could end that war if our hopes are dashed again?

Mr. BORK. Senator, referring to the article, or the brief comment, you are reading from, my position there was that Congress certainly has broad power over war or peace. It should be able to make that decision. I was discussing the Cambodian incursion as more of a tactical problem because the enemy had seized bases in Cambodia and were attacking into South Vietnam from there, and because the Government of Cambodia welcomed the American incursion and under those circumstances, and all of these cases depend heavily on circumstances, under those circumstances that seemed to me to resemble a tactical field decision, not an invasion, and not a starting of a new war and, therefore, to be within the President's powers. And it seemed to me that Congress, under those circumstances, ought not to assert constitutional power over tactical decisions and I thought that was one.

It certainly seems to me that the major question of war or peace is always for Congress.

I might add, Senator, that this is a kind of question that will almost certainly never come into the Solicitor General's office or to the courts.

Senator HART. Maybe I am asking for your advice as a constitutional lawyer whether or not it comes to you as the Solicitor General. In that same article, you say:

I arrive, therefore, at the conclusion that President Nixon had both constitutional power to order the invasion and that Congress cannot with constitutional propriety undertake to control the details of that incursion.

You have developed that point in your answer.

But you continue:

This conclusion in no way detracts from Congress war powers, for that body retains control of the issue of war or peace. It [Congress] can end our armed involvement in Southeast Asia.

How?

Mr. BORK. Well, Senator, I confess that I have not studied the question of the particular form your efforts take, whether it would be—if that were the decision of Congress—whether it should be by cutoff of funds or some other mechanism. I am sorry to say I have not studied it. I was at that point, in that brief comment, merely trying to point out there was a spectrum of war powers running from Congress major powers to the President's more detailed powers.

Senator HART. Is it fair to say that clearly you believe we have the power to end our involvement, and inescapably it follows that the President would be obliged to respect that ending, if we can end it, and that it means the President cannot ignore us?

Mr. BORK. As I read the Constitution, Senator, the ultimate power of war and peace resides in the Congress.

Senator HART. You have not thought through how we end it?

Mr. BORK. No, sir; I have never addressed myself——

Senator HART. We have the power, you feel certain of that?

Mr. BORK. It seems to me the Constitution requires that conclusion.

Senator HART. The Constitution operates equally on the legislative and the executive branches?

Mr. BORK. Indeed, Senator.

Senator HART. I pass for the moment.

The CHAIRMAN. Senator Burdick?

Senator BURDICK. I have no questions, Mr. Chairman.

The CHAIRMAN. Senator Tunney?

Senator TUNNEY. Thank you, Mr. Chairman.

I share with my distinguished colleague from Michigan a concern about the confirmation process taking place 6 months in advance. I do not, however, feel that this in and of itself should be a reason for denying confirmation.

But I wonder if you could, Mr. Bork, say if there would be any reason why, to your knowledge, 6 months from now you could not just as readily be confirmed as you would be today?

Mr. BORK. No, Senator. I think, as I understood the time element, I think it would be a little over 4 months when I planned to assume that office rather than 6. But I do not know of any reason why the confirmation could not occur then.

It would be a considerable practical advantage if it occurred now for the reasons I have detailed with Senator Hart, and the President has nominated me at this time and my name is before the Senate.

Senator TUNNEY. As I understand the role of the Solicitor General in all cases involving the executive branch, including the regulatory agencies, with the exception of the ICC, the Solicitor General grants or denies requests of petitions for certiorari or to appeal adverse decisions; and if the Government is the respondent, the Solicitor General decides whether to contest the appeal. And the Solicitor General also participates as amicus curiae on his own initiative or upon the court's requests; and the Solicitor General is often involved in interagency disputes before the court and may take one side or the other.

This would indicate that the Solicitor General does have considerable power in determining what cases will be heard before the Supreme Court and what cases will be appealed or not. In a statistical study it was found that the Solicitor General approved less than 20 percent of the requests for certiorari petitions sought by executive departments, and less than 60 percent of those requested by the appellate sections of the Justice Department, and less than 65 percent of those requested by regulatory agencies.

What this means is simply that the Solicitor General imposes to a very considerable extent his philosophy or his view of legal matters upon the process of appellate review to the Supreme Court.

I must say I, as was Senator Hart, am disarmed by your statement that even though an appeal related to a matter that you personally, legally, and philosophically disagreed with, that you would express the will of the Government in the appeal.

However, before we get to the appeal, before the appeal action takes place, would not you have wide room for imposing your own personal view of the law upon that appellate process even where you disagreed with the Attorney General or with the appellate division of the Justice Department?

Mr. BORK. That is an important question, Senator Tunney. I would like to point out that the Solicitor General has the degree of freedom that he does have by custom and tradition really on condition that he not abuse it. By law he is under the Attorney General's direction so that there is the fact that the discretion that the Solicitor General has, I think, is reposed only because it is understood that he will not abuse it.

Secondly, the Solicitor General must view himself, I think, as an officer of the Court, and he must, to the degree possible, obtain the confidence of the Supreme Court. I do not see how a Solicitor General who imposed his own views upon the appeal process and kept cases from the Court that the Court thinks it ought to have, could conceivably retain the trust of that Court. I think he would, in effect, destroy his own value as Solicitor General if he did that.

Senator TUNNEY. Well, in light of that, I would like to ask you about a statement that you wrote in the September 1969 issue of Fortune magazine in which you criticized the antitrust policy of the Nixon administration. You said:

> The Nixon administration's announced determination to wage war on conglomerate mergers—with special but by no means exclusive attention to the acquisitions of the top 200 manufacturing companies—must rank as one of the bleakest, most disappointing developments in antitrust history.

Do you continue to hold this true of the Nixon administration's antitrust policy?

Mr. BORK. Senator, in my opinion, which is my opinoin as an academic in this field, the conglomerate merger campaign was an antitrust mistake. However, it should be said that this administration, and this Justice Department, continues to enforce the antitrust laws vigorously. They have guidelines about conglomerate mergers. Those will be enforced, and should such a case come up to me that case will be dealt with in line with that policy and not in line with my academic opinion I expressed in that article.

Senator TUNNEY. You just answered my next question.

Let us go to another area of antitrust enforcement where the Solicitor General may have an impact and that is the Federal Trade Commission. The FTC was responsible for bringing the organizational case against Proctor and Gamble in its acquisition of Clorox which went a long way to establish the principle that one large company could not acquire another company having a large share of a market where the first company is a potential entrant into that market.

In your 1967 Fortune magazine article you strongly disagreed with the Supreme Court's opinion affirming the FTC's position, and near the end of your discussion, you observe that "defendants are simply not winning cases they should win in the Supreme Court." Earlier in that article you noted that the then Solicitor General Thurgood Marshall had to decide whether to seek Supreme Court review of the Court of Appeals decision adverse to the FTC.

If this case had come to you as Solicitor General—with the FTC requesting Supreme Court review—what would have been your position? Would you have approved the Commission seeking review?

Mr. BORK. Well, it is a little hard to answer that now, Senator. I think I probably would have. Of course, I would have to put myself back at that time as to what the policy of the administration was with respect to that kind of merger. If the policy of the administration was to go after it, yes, I would have approved the appeal.

Senator TUNNEY. You would have approved the appeal, and that is in line with your answer to a previous question that you would enforce the policy of the Justice Department and the other agencies as they relate to these and antitrust matters?

Mr. BORK. Yes, sir.

Senator TUNNEY. Let us move from antitrust policy to the first amendment. In a recent article you wrote that the "first amendment must be cut off when it reaches the outer limits of political speech." You argued that only explicitly political speech should be protected by a first amendment:

> The category of protected speech should consist of speech concerned with governmental behavior, policy or personnel,whether the governmental unit involved is executive, legislative, judicial or administrative. Explicitly political speech is speech about how we are governed and the category therefore includes a wide range of evaluation, criticism, electioneering and propaganda. It does not cover scientific, educational, commercial or literary expressions as such. A novel may have impact upon attitudes that affect politics, but it would not for that reason receive judicial protection.

Now would you care to relate that comment to how you feel about recent Supreme Court decisions relating to the freedom of speech?

Mr. BORK. Senator, the article you have there, I think I should point out, is explicitly a tentative and rather theoretical attempt to deal with the problem, and it starts off with an attempt to pick up Professor Wechsler's concept of neutral principles and see what can be done with that concept. At the end of the article I point out that I think these are the conclusions that are required by that idea of neutral principles, but that I am not sure about the whole subject. It seems to me, to move closer to your question, Senator, that—let me say that article is a theoretical exercise. As a professor, I am paid to speculate, and I do speculate; sometimes I wish I had confined myself to writing about spendthrift trusts, but I speculated in that area, and I think the concept of neutral principles suggests those results.

If you move, then, away from the concept of neutral principles and adopt some other concept those results are not required. I do think that the speech about politics, speech about government, speech about candidates, legislatures, judges and so forth, are the core of the first amendment. That is the most important part of the first amendment, because the first amendment is essentially about the political processes by which we govern ourselves in a representative democracy.

It seems to me as you move out from there the first amendment's claims may still exist but certainly by the time, in my own view, by the time they reach the area of pornography, and so forth, the claim of first amendment protection becomes rather tenuous.

Senator TUNNEY. In other words, you feel that the Supreme Court in some recent cases in relation to pornography did not interpret the law correctly?

Mr. BORK. I think some of the guidelines they have laid down are unfortunate, Senator, because they are going to have a terrible time applying them, and as I recall, the Supreme Court has taken up a lot of those cases again this term in an effort to review the whole problem. I think when you get cases that appear to be much the same on the facts going different ways, as has happened in this field, you have perhaps a suggestion, an indication, that the law could use some further refinement.

Senator TUNNEY. Would you feel it to be appropriate where you disagree with a Supreme Court decision of the past to appeal the case to the Supreme Court in the hope that you can get a reversal of a previous opinion?

Mr. BORK. I am sorry. I think that would be appropriate if there was reason to believe that the Supreme Court wished to reconsider the subject. I do not think I ought to take appeals up just because I would like to reconsider the subject.

Senator TUNNEY. But where you felt that the Supreme Court, as it is presently constituted, might reverse itself. I take it that you believe that it would be appropriate to appeal even where there had been a decision that was contrary to what your own personal views were and are and where you had a feeling that the Supreme Court might make a decision which would be more in line with your views?

Mr. BORK. Senator, I think that whether I think the Supreme Court is likely to do it, whether to come down more in line with my views, or perhaps less in line with my views, if I have reason to believe the Supreme Court wants to consider the subject, it seems to me, as an officer of the court, I ought to bring that case up and explain the varying positions that are available.

Senator TUNNEY. You have challenged the correctness of the "one man, one vote" formula established by the Supreme Court in *Reynolds* v. *Sims* and companion cases. In a December 1968 Fortune magazine article you state that "on no reputable theory of constitutional adjudication was there an excuse" for the "one man, one vote" doctrine. Do you continue to believe that the Supreme Court erred in establishing the "one man, one vote" principle?

Mr. BORK. I do, Senator. I think the Supreme Court was quite right in Baker against Carr in going into the reapportionment field and I think Justice Stewart had what I would consider the correct approach, which would be to say "Show me a rational apportionment plan, show me that the majority of the people in that State can change that apportionment plan when they wish to and I will approve it."

I think "one man, one vote" was too much of a straight jacket. I do not think there is a theoretical basis for it.

I may add my own experience as a special master in Connecticut applying the "one man, one vote" rule in the State confirms me in that belief.

Senator TUNNEY. In *Reynolds* v. *Sims*, the Solicitor General argued the case for the United States, as amicus curiae, at the request of the Supreme Court. The Solicitor General argued for "one man, one vote." If you had been Solicitor General, would you have been able to argue for "one man, one vote?"

Mr. BORK. Would I have been able to? Yes, sir; I would have been able to. I would have advised against it.

Senator TUNNEY. You would have advised the court against it or——

Mr. BORK. I would have—it is a little hard to speak without putting it in an institutional context. If it were that kind of an important case I am sure the Solicitor General would confer with other members of the Justice Department about it. In that kind of conference I would have advised against urging a "one man, one vote" position. I would also have wished, whether my advice were accepted or not, to explain to the court that there were the following options, kinds of roads the court might take, and try to explain to the best of my ability what I considered to be the benefits or costs or detriments to each such option.

Senator TUNNEY. And that despite the fact that the Attorney General requested you to argue in favor of "one man, one vote?"

Mr. BORK. I think I would say to the Attorney General at that time, "I will do so." I also would advise that we explain to the court, since we have an obligation to the court that a private litigant does not always have, that we explain to the court what some of the problems with that approach may be and what alternative approaches there might be.

Senator TUNNEY. Well, if a "one man, one vote" case should arise while you are the Solicitor General, would you file an amicus brief attempting to limit the doctrine of "one man, one vote" as enunciated by the court?

Mr. BORK. I have not made any decision about it, Senator, in fact had not even thought about it. I do not think it is likely to come up because the court has on its docket this term reapportionment cases from all over the country, and I think it is a good guess that they intend to review that entire field. Whether they will confirm "one man, one vote" or move to some other position, I do not know.

Senator TUNNEY. Do you think that you could sign a brief that was inconsistent with your personal views?

Mr. BORK. I think I can, Senator, and I know that I have.

Senator TUNNEY. I have other questions but I do not want to take the time if there are others who have questions.

Senator HRUSKA. Go ahead.

Senator TUNNEY. In an August 1963 New Republic article you opposed the enactment of the then proposed Interstate Public Accommodations Act. In a subsequent letter, you stated:

> The proposed legislation, which would coerce one man to associate with another on the ground that his personal preferences are not respectable, represents such an extraordinary incursion into individual freedom, and opens up so many possibilities of governmental coercion on similar principles, that it ought to fall within the area where law is regarded as improper.

In light of this statement of your beliefs, I would like to ask you a few questions about enforcement of the Civil Rights Act.

Mr. BORK. Senator, may I——

Senator TUNNEY. Yes.

Mr. BORK. I should say that I no longer agree with that article and I have some other articles that I no longer agree with. That happens to be one of them. The reason I do not agree with that article, it seems to me I was on the wrong tack altogether. It was my first attempt to write in that field. It seems to me the statute has worked very well and

I do not see any problem with the statute, and were that to be proposed today I would support it.

Senator MATHIAS. Would the Senator from California yield for just a minute in the light of his previous generous offer.

Senator TUNNEY. Yes.

Senator MATHIAS. I, unfortunately, have to leave the committee in a few minutes and I have just two or three very brief questions.

Let me say, first of all, that I was considerably encouraged and pleased by the colloquy between you and Senator Hart in which you stated your conviction, which is a conviction I share, that the Congress is still the repository of the power to decide the issue of war and peace. It is an important statement on your part and one that I welcome and applaud.

You said that this was just a general constitutional conviction on your part, not one that you had thought out in its tactical aspects and how it would be implemented. I would like to offer one possible means of implementing it, one that I certainly hope we will never resort to, one that I hope that the lubricant of goodwill that has kept the Government working for so long will prevent us from ever resorting to, but it is the simple act of one Chamber of the Congress, either the House or the Senate, failing to concur in an appropriation bill to supply the funds to continue hostilities.

It would seem to me, and I would like to ask you what your attitude would be, that this would simply be the end of it, if either the House or Senate did not approve an appropriation bill or did not act on it one way or the other.

Mr. BORK. Senator, I must say I really have not studied this aspect of the question at all. What we have, what the Senator had there, is that I was a discussant on a panel, and the panel was about the Cambodian incursion, and I was merely suggesting the range of powers that I thought the Constitution suggested were appropriate to the President, on the one hand, and the Congress, on the other, and I am afraid that is about as far into that field I have gone. Ultimately, I think, war or peace is for the Congress. I have not really thought about how, in varying situations, the Congress makes its will known if it wishes to.

Senator MATHIAS. I feel that as you enter the field you are on the right path and I walk with you.

I have only one other question to ask and it is are you currently of counsel in any active litigation?

Mr. BORK. I am currently an attorney for two plaintiffs in antitrust cases in New Haven. I intend, if confirmed, to wind up my participation in those cases altogether very shortly.

Senator MATHIAS. Either to resign as counselor or——

Mr. BORK. In fact, I have filed a motion in one case to withdraw as counsel. The judge asked that I stay in for a while longer, and I thought it was proper to do so until confirmation or something of that sort occurred, because it is a case I started and had been the prime mover in it.

Senator MATHIAS. It would seem to me that it might be helpful to you for your protection as well as being of help to the committee to give us some official notice of the title of those cases, not at this point, but to supply it for the committee at some point.

Mr. Bork. All right.

[The following letter was subsequently received by the committee.]

Associate Deputy Attorney General,
Washington, D.C.

Hon. James O. Eastland,
Chairman, Judiciary Committee, U.S. Senate, Washington, D.C.

Dear Senator Eastland: At his confirmation hearing on January 17, 1973, Professor Robert H. Bork was asked to supply the names of those cases in which he was involved at present. Accompanying this letter you will find names of two cases pending in the Federal District Court for the District of Connecticut which Mr. Bork informs me are the only two cases he is associated with.

Sincerely,

Charles D. Ablard,
Associate Deputy Attorney General.

Enclosure.

(1) *Landmarks Holding Corporation, et al, plaintiffs* v. *Hamden Mart, Inc., et al, defendants*, Civ. Act. No. 14,572 (D. Conn.) (counsel for plaintiffs).

(2) *George P. Aker, Richard C. Bond, Jervis Langdon, Jr., and Willard Wirtz, Trustees of the property of Penn Central Transportation Company, successors in interest, Richard Joyce Smith, Trustee of the property of The New York, New Haven & Hartford Railroad Company, plaintiffs*, v. *United States Steel Corporation, Bethlehem Steel Corporation, Armco Steel Corporation, Edgewater Steel Company, Baldwin-Lima-Hamilton Corporation, and Abex Corporation, defendants*, Civ. Act. No. 12,156 (D. Conn.) (counsel for plaintiffs).

Senator Mathias. Thank you very much. I appreciate the kindness of the Senator from California in yielding.

Senator Tunney. Thank you.

I was interested in your statement that you no longer agree with the position that you held in 1963. Does that mean that you would vigorously enforce the Interstate Public Accommodations Act?

Mr. Bork. Certainly, Senator. If it comes to me on appeal, I will take the Government's position.

Senator Tunney. Have you taken a position with respect to the correctness of the Supreme Court's decisions in *South Carolina* v. *Katzenbach* and *Katzenbach* v. *Morgan*, which upheld the constitutionality of the 1965 Voting Rights Act?

Mr. Bork. I have, Senator. My position was that I thought South Carolina against Katzenbach was correct, and I thought Katzenback against Morgan was incorrect.

Senator Tunney. You thought it was incorrect?

Mr. Bork. Yes.

Senator Tunney. Do you still feel that way today?

Mr. Bork. Well, insofar as Katzenbach against Morgan says, as I read it to say, that Congress controls the content of constitutional protection, I think that is incorrect because I think that is ultimately under the tradition of judicial review we have had in this country. I think that is ultimately a question for the Supreme Court.

Senator Tunney. Do you feel that you are prepared to make that appeal if the Attorney General had wanted you to, despite your personal feelings?

Mr. Bork. If the Attorney General wanted me to take that appeal I would take that appeal.

Senator Tunney. If further questions should arise about the constitutionality of the Voting Rights Act, could you as Solicitor General take a position consistent with *Katzenbach* v. *Morgan*?

Mr. Bork. Could I take one consistent with it? I think so, Senator if that is indicated.

Senator Tunney. Have you a position with respect to the correctness of the Supreme Court's decision in *Harper* v. *Virginia Board of Elections*, which held that the imposition of the poll tax was unconstitutional?

Mr. Bork. I think I have, Senator. I am trying to cast my mind back on things I have written. I think I have previously indicated that that case, as an equal protection case, seemed to me wrongly decided. It might have been decided the same way, and now we are getting into areas of speculation and theory more appropriate to my role as a professor.

It seems to me a lot of those cases are really essentially republican form of government clause cases and maybe you can uphold that decision on a theory like that rather than on an equal protection theory.

May I add, Senator, that was a case in which there was no evidence or claim of racial discrimination in the use of the poll tax. If there had been, of course, it would be properly an equal protection case and the result would have come out just the way it did.

Senator Tunney. How do you feel now about the decision. Do you think that as far as the welfare of the Nation is concerned, the *Harper* case was correctly decided?

Mr. Bork. I do not really know about that, Senator. As I recall, it was a very small poll tax, it was not discriminatory and I doubt that it had much impact on the welfare of the Nation one way or the other.

Senator Tunney. How about the welfare of those people who had to pay it and might not have been able to afford to pay it, for those people who perhaps would have been inhibited from registering to vote and voting because of the poll tax?

Mr. Bork. Well, I would hope that a State would take some measures to enable those whose means do not permit them to pay a tax like that to pay it or to be relieved of it.

Senator Tunney. What about the constitutional issue?

Mr. Bork. Well, I think that is a question of degree. It depends upon the size of the poll tax, but I think we are discussing something, Senator, that is past us down the road.

Senator Tunney. You do not think it is any longer an issue?

Mr. Bork. No, I do not think it is an issue of any sort today and I certainly am not interested in reviving it as an issue.

Senator Tunney. And you would have no difficulty arguing the law as the Supreme Court announced it in that case?

Mr. Bork. None whatsoever.

Senator Tunney. You state in a June 1968 article in New Republic that:

> The virtue of minimum-wage legislation is an article of faith with collectivist liberals, but its effects and the sources of its real political appeal are far different than they imagine. The popular myth is that minimum wages redistribute wealth from wealthy employers to poor workers. The plain truth, recognized by economists of widely different political persuasions, is that the effect of such laws is to protect well-paid, highly skilled workers from the competition of the less skilled.

In light of this statement, what are your views on the wisdom of the Federal laws regulating minimum wages and maximum hours for workers?

Mr. Bork. Those are two different cases. There may be a case for regulating maximum hours which is for the health of the workers, and it is a different question and I must say that the issue I am about to discuss with you is not one I would discuss as Solicitor General. It is not my question at all, it is not even a question for the judge, the wisdom of those laws, it is only a question for Congress. But if you nevertheless wish me to go on, I think that economists of very different persuasions, in fact I do not know an economist, regardless of his politics, who will not say that raising minimum wages is detrimental to the less skilled members of the work force, and particularly to, it is particularly harmful to the efforts of blacks to obtain employment. I have seen that demonstrated theoretically and I have seen it demonstrated empirically.

Senator Tunney. Empirically how?

Mr. Bork. Well, for example, in the article you cite, Senator, there is a statement taken from an economist that the first time black teenage unemployment deviated, became larger than white teenage unemployment was when a minimum wage law, an effective minimum wage law, went into effect.

Senator Tunney. I recognize that others of more liberal persuasion perhaps than you have made the same argument. I do not think this is an appropriate forum for us to fight it out.

Mr. Bork. If I may say, Senator, in that article you are quoting from, I do claim to be a liberal. I suppose we may argue about the claim, but I do claim to be a liberal.

Senator Tunney. You may be.

[Laughter.]

Senator Tunney. But does your opposition to minimum wage laws extend to other labor laws, such as those providing for collective bargaining and for job safety?

Mr. Bork. No, it certainly does not apply to job safety. When you say opposition, Senator, this is not one of the causes of my lifetime. It was a remark made in a piece about politics, and I do not spend my time running around opposing minimum wage laws. I do not oppose effective job safety laws or minimum hours.

Senator Tunney. Thank you very much, Mr. Bork.

Senator Hart (presiding). Senator Hruska?

Senator Hruska. Mr. Bork, how many professional members has the staff of the Solicitor General's office?

Mr. Bork. At present 14, Senator.

Senator Hruska. Is that considered an adequate number for the volume of work that crosses the desks?

Mf. Bork. Well, it is not so considered by Dean Griswold. He thinks he can use three, four, or five additional members. But he also has no place to house them if he had them.

Senator Hruska. That would indicate that the volume is quite substantial, would not it?

Mr. Bork. It is indeed.

Senator Huruska. And, of course, it is only the difficult decisions that reach the Solicitor General's office. If they are not difficult they are disposed of long before they get to the attention of the Solicitor General, is that not correct?

Mr. Bork. Well the dean, as I understand it, Senator, makes a practice of looking at every decision about a case that goes through his office, and it seems to me that is a salutary practice, and I would try to do that. Of course, many of them are quite easy decisions. They come with recommendations from the division of the Government involved, plus a recommendation from a member of the Solicitor General's staff, but I think it is salutary for the Solicitor General to know as much as possible about the flow of work through the office.

Senator Hruska. Would you have any idea how many cases are now pending in the Supreme Court that will require argument by the Solicitor General?

Mr. Bork. I think the Solicitor General's office is likely to have about 60 major cases, 60 cases which will be decided on the merits.

Senator Hruska. How many?

Mr. Bork. Sixty, approximately 60 a term. But all of those are not argued by the Solicitor General. Members of his staff argue them as well, and often the lawyers from the various divisions of the Government who are primarily concerned with the matter may argue cases.

However, the Solicitor General does shape the case with those people, and work on the brief. It is not a question of just turning over the case to the other people, but in terms of argument the Solicitor General himself does not argue all of those cases.

Senator Hruska. There is certainly reason to seek an orderly transition from one Solicitor General to another, and I presume that would involve getting familiar with the cases that are pending, is that not true?

Mr. Bork. That is correct. The dean has provided a desk for me and the thought was that when confirmed I would come down there and begin working on the flow of matters through the office, being educated by him.

Senator Hruska. Some thought has been given to the matter of your confirmation at the present time rather than waiting until a later time. Some of the considerations are that you would be able to phase out your present occupation, and make an orderly entry into the very complex and very important duties of the Solicitor General. Have you any comments along that line? I know you have participated in discussion along that line?

Mr. Bork. I think it would be terribly helpful, Senator, if I were confirmed so that people to whom I offered staff positions would know in fact the offer was going to last, and they would be able to make their plans, and I could contribute my discussion in the cases coming up next therm with everybody secure in the knowledge that at least I would have some responsibility in those cases.

I had not mentioned that as to my personal life, of course, it would materially smooth my way if I could arrange schooling for my children and find a place to live, and so forth, secure in the knowledge that I would indeed be here.

Senator Hruska. I have no further questions, Mr. Chairman.

Senator Hart. The exchange you had with Senator Tunney on your article in the Indiana Law Journal was a rather complex analysis and I think in fairness we ought to have the entire article.

Mr. BORK. Yes.

[The article "Neutral Principles and Some First Amendment Problems" in the Indiana Law Journal, Fall 1971, was filed with the committee.]

Senator HART. Also, I read you an excerpt from a symposium printed in the American Journal of International Law and I think the whole article ought to be included in the record.

[The article referred to was filed with the committee.]

Senator TUNNEY. Perhaps, Mr. Chairman, we ought also to include the New Republic article and the Fortune articles.

Senator HART. Yes, all of them.

[The articles referred to were filed with the committee.]

Senator HART. I have some questions on that first amendment point of free speech: how far does it go, what is involved? When you were talking to Senator Tunney, you suggested two extremes, political comment and in quotes "pornography." There is a very hot area at the moment that lies some place in between, and that is the business of the press freedom, and the power of the Government to compel a newsman to divulge confidential sources. How do you handle this. What is your feeling?

Mr. BORK. Well my feeling is, Senator, it is not a topic, again, that I have looked into and can express a position. My feeling is that it would be well to have some careful legislation about the subject because obviously there are cases, I am sure, in which a reporter ought to protect his sources and there are cases where he obviously ought not to.

Senator HART. Do the cases where he should be permitted to protect his sources, in your judgment, relate to explicitly political stories, as you use that phrase?

Mr. BORK. I would suppose so. Senator, I really should not hazard opinions on this because I have not thought this through and, furthermore, I hate to hazard opinions on it because, if confirmed, I may find myself taking a position in a case and I would hate to have a lawyer on the other side read to be a statement I made today which is to the contrary.

Senator HART. We have already described a number of statements that are going to be read to you if, in fact, you appear in court, as you told us you will—

Mr. BORK. I know, I know.

Senator HART. —in opposition to already stated positions.

Mr. BORK. But those are positions I have thought through. Those are subjects which I have thought through. This is certainly one I have not thought through. It would seem to me that the area in which the Government's power to get information about a source is greatest would be in the area where a violent crime had been observed or national security, espionage, something of that sort, is involved.

It seems to me the Government's power would be least in the area or maybe nonexistent in an area where something properly called political speech was involved.

Senator HART. I am not pushing you now for an answer on an aspect of this that you have not thought through. But I think the key to it is whether you believe and understand the first amendment is available only with respect to political speech, disclosure, protest?

Mr. BORK. I have to insist, I am afraid that when I wrote that article I was entering into a field for the first time, and I was trying out a theoretical concept, if you will. I do not know what I will ultimately conclude in the field. I have changed my mind on large issues in the past. I do not think that theoretical concept is anything I would ever urge on the court. It was speculative writing which professors are expected to engage in, without meaning that that is what they believed for all time or that is what they think would be appropriate for some other organ of Government to pick up at that time and it is explicitly stated to be speculative in that sense.

Senator HART. I told you that your answer with respect to your willingness to move as some Assistant Attorney General might want on an appeal even though it was to advocate a position that you had earlier written against, disarmed me. But I have to reach for the arms, at least mildly now, because as I understood you when you were talking to Senator Tunney on the "one man, one vote" issue you said that you would be able to defend the "one man, one vote" proposition as it has evolved but that you would advise against it.

Mr. BORK. I meant if the administration were——

Senator HART. Whom are you going to advise?

Mr. BORK. Well, the question Senator Tunney asked me essentially was, I think, if I had been Mr. Cox at the time that camp up, when you had no firm law on the subject, and the question was what should the court do in this area, that is a subject so important that I am sure the Solicitor General confers with other persons in Justice and, perhaps, elsewhere, I do not know. In that kind of conference, in deciding what should Justice's position be on this matter, I would have advised internally against pushing for "one man, one vote" as the resolution of the problem and would have urged that the position taken by Justice Stewart be taken as the solution to the problem.

Senator HART. You also said, I believe, that you would sign a brief although the brief represented a view that you, as an individual and as a lawyer, felt to be wrong. I have read in the press that Dean Griswold has taken an opposite view and will not sign briefs?

Mr. BORK. I think there is a distinction there, Senator. What I meant was that when I thought the law was wrong but it was the law I would sign the brief. If I think it is not the law, I certainly won't sign the brief.

Senator HART. Very specifically, you wrote some very harsh criticism of the Justice Department's action against IBM in an antitrust case.

Now, the resolution of that case on appeal, I suppose, is a long way off, but let's assume it comes when you are the Solicitor General. What do you do about it?

Mr. BORK. At that time, if it comes, if you mean if the Government loses below, Senator, I think it would depend on a variety of factors, and one would be the recommendation of the Assistant Attorney General, one would be the recommendation of the Attorney General, one would be the grounds upon which the court below went, one would be the state of the law as it had developed in the interim. There would be a wide variety of factors to be considered.

Senator HART. Have we the cart before the horse? You say one element would be the position of the Attorney General. But won't you be advising the Attorney General?

Mr. Bork. Yes. So would the Assistant Attorney General in charge of antitrust.

Senator Hart. Well, in that setting is it possible to say that you would inescapably, would you not—and I am not using this critically—be using the Office of Solicitor General inescapably as an opportunity of advancing your own views on policies with respect to that case?

Mr. Bork. I trust not, Senator. When you say advancing my own views, how do you mean, Senator, you mean by not allowing an appeal?

Senator Hart. Arguments against the appeal, counseling against the appeal, because in your judgment it would be an imprudent interpretation or economically undesirable result?

Mr. Bork. Well, you know, I find it a little hard to place myself in that position in the future, and one thing I hope to learn is how the office operates. Certainly if I got into a discussion—my position about the wisdom of this kind of case is well-known, so, well, let's discuss what the policy is aside from my position about the wisdom of bringing that kind of a case.

Senator Hart. If you shared all my sound views on antitrust this would not bother me a bit. I think you should.

Mr. Bork. I will make the attempt, Senator.

[Laughter.]

Senator Hart. No specific issue bears more directly on the domestic scene than Federal courts seeking to deliver 14th amendment guarantees to children who are found to be in segregated schools and as a tool, with all its unhappy limitations, is bussing and in some situations it is found to be the only, although limited, means available to give some relief.

Now, you played a substantial role, if the press reports are correct, in drafting the President's so-called Equal Educational Opportunities Act of 1972, at least you had a role in shaping its basic structure, and you have several times said that you feel that the bill is good policy and constitutionally sound.

I was referred to and found very interesting one aspect of your testimony before the House committee, which is at page 1509 of the printed hearings. Your testimony is as follows:

> I would be clear about this: Congress certainly may not deny all remedies for segregation. I do not think Congress could even completely ban bussing as a single remedy. As the court noted in the strong opinion involving the North Carolina bussing statute, there are cases in which bussing is essential to the vindication of a constitutional right, and I would think it highly doubtful that Congress could ban bussing and have that statute stand up in the courts.

Do I take it from that passage that if the constitutional right cannot be vindicated without a particular remedy, there is only one remedy available to vindicate the right, that Congress cannot deny the court the availability of that remedy?

Mr. Bork. I believe that to be the case, Senator, because it seems to me that in such a case Congress would be denying the right and I previously just suggested that is not within the power of Congress.

May I make one comment, Senator. I think the press reports are not entirely accurate. I was called in as a consultant to the Cabinet Committee on Education. The breadth of my consultation was entirely within the area of law and the constitutionality of that bill. I was not

the only consultant, and I have confined my statements about the bill entirely to the constitutional issue, because it seems to me that is the only place such expertise as I may have obtains.

Senator HART. All right.

I appreciate that clarification of your role, and I asked the question because much of your defense of the bill has been based on the distinction between rights, which you deem absolute, and the remedies available for violation of those rights which, as you say, may involve balance and compromise of peoples' claims.

But I take it from the passage I have quoted that if the right cannot be fixed any other way then Congress cannot legislate out of the hands of the court that one tool?

Mr. BORK. Right. I entirely agree with that, Senator. If it were any other way, Marbury against Madison would not mean anything.

Senator HART. I wish the full committee were here to hear that.

Lastly, how do you feel about a constitutional amendment? How does that start: no citizen shall be denied the equal protection of the law? What about an amendment that says in substance that no citizen except a black child shall be denied the equal protection of the law? That is the way I have interpreted many of the amendments that have come to my attention. Could we do that?

Mr. BORK. I beg your pardon, Senator, what was the nature of that constitutional amendment?

Senator HART. Well, it was partly a speech rather than a question.

Mr. BORK. All right.

Senator HART. The need for busing is the result of a finding that a 14th amendment right is being denied to somebody's children. While legislative proposals have been made to attempt to outlaw busing as a remedy, increasingly there is developing an understanding, and I think you would help us in making this clear, that really there is no way to escape the mandate of the 14th amendment. You would have to amend the 14th amendment to, as they say, outlaw busing. How do you feel about such a matter?

Mr. BORK. You mean a constitutional amendment? Senator, I testified in that same hearing to which you referred that I did not think a constitutional amendment was appropriate in this field.

Maybe I should clarify one thing about the particular busing bill that I said was probably constitutional. It is legislation that enters into an area where the constitutional guidelines are quite few, and I think that a reasonable or a rational lawyer can only make estimates of probability. But with that in mind, it ought to be noted that the bill I testified about did not ban busing for students in the 7th grade and up, it merely said to the court: Look at other remedies and see if they will do the job. If they won't, then you may order busing.

For the students in 6th grade and below, the bill said: Busing may be ordered but only within certain quantative limits, which I cannot now recall exactly. That distinction rested in part upon the Supreme Court's opinion in the *Swann* case in which the court suggested that the ages of students might make a difference in the appropriateness of busing. It is a careful bill, it is a qualified bill, Senator Hart.

Senator HART. Which was amended, and that you are talking about got lost.

Mr. BORK. I was not involved in it after the initial drafting.

Senator HART. I understand.

Getting back to the constitutional amendment, I assume that the Constitution can be amended to do anything the amendment says which then by definition becomes constitutional. But what I am asking is what is your opinion as to the wisdom of amending the 14th amendment so as to prevent the use, the mandatory use, of buses?

Mr. BORK. I would oppose that, Senator, and I have opposed that in the testimony to which you refer.

Senator TUNNEY. I have one last question that is stimulated by your line of questioning, Mr. Chairman. I am curious to know with respect to antitrust what your attitude is to the guidelines that Donald Turner issued in 1968 with respect to horizontal mergers. He said that in these kinds of mergers between firms for market shares of 4 or 5 percent each that this conceivably would violate the antitrust laws. Do I understand your thinking correctly that the merger would have to involve somewhere around 30 percent of the market share in order to be violative of the antitrust laws?

Mr. BORK. Senator, let me clarify that. I think it will have to be somewhere around 30 percent before a realistic economic danger appears. That may not be the same thing as violative of the antitrust laws. The antitrust laws may deny an amount below where the economic danger appears. The law is shaped by the *Brown Shoe* decision and by the *Pabst* decision. Brown Shoe said a 5 percent market share is illegal and Pabst suggests 4.49 percent is illegal.

Senator TUNNEY. And Mr. Kauper, who has of course now taken over as head of that division, has indicated that he is going to enforce the guidelines. As a matter of policy you would have no difficulty arguing these cases on appeal to the Supreme Court if Mr. Kauper asks you to argue them even though in your own personal view it was a poor policy?

Mr. BORK. I would have no difficulty pointing out to the court that this is what the law that is established says. If the court asks me the questions you have asked me about my personal opinion about the economics of the situation, I would answer precisely the same way I have answered you.

Senator TUNNEY. Right.

The one thing that I must say from these hearings is that I have gained the impression that you are prepared to put aside your own personal philosophy and to argue cases on appeal and to bring cases up for appeal on the basis of the policy as enunciated by the agencies and the Attorney General and on the basis of the law as it presently stands.

Mr. BORK. That is correct, Senator.

Senator TUNNEY. Thank you very much.

Senator HART. This may be repetitious and if it is please advise me. I was late in arriving. A question has been developed in the Democratic caucus of the Senate which each committee chairman is asked to direct to nominees in their confirmation hearing. I do not know whether Chairman Eastland asked it or not before he left but let me ask both Professor Bork and Dean Sneed: Are you able to commit to the committee your willingness to appear and testify under conditions of reasonable notice and adjustments of schedules and so on

in matters that bear on the subject matter of your department and responsibilities? Dean Sneed?

Mr. SNEED. Senator, the answer is clearly affirmative, of course, subject to the conditions that are stated in your question. I personally am a firm believer in as much exchange as there can be between the two branches of government, the executive and the legislative, and I shall do everything that I can to accommodate the interests of the two branches.

Senator HART. Professor Bork?

Mr. BORK. Senator, I find myself unable to improve upon the dean's statement, sir.

Senator HART. I am not sure we are directed to narrow that question but—and not just out of curiosity—let me narrow it a little. President Nixon, and this goes back to the confirmation of Attorney General Kleindeenst as it related to ITT and executive privilege, President Nixon had issued an Executive order that described rather narrowly the circumstances under which an executive agency official should decline to disclose to Congress information that Congress sought. As I recall it included as a requirement that he designate someone on his behalf to designate the material that was subject to the claim of confidentiality. The Attorney General, as some of us understood it, went beyond that and asserted a seemingly inherent right in a department, specifically the Justice Department itself, to make that kind of judgment, that it had the right to plead silence, so to speak, without the President's indication that he wanted it treated as confidential.

Would you agree that the only basis for withholding information is the protection of the confidentiality of communications involving the President and that it can be asserted only at the direction of the President?

Mr. SNEED. Senator Hart, my understanding of this somewhat murky area of executive privilege leads me to believe that it is somewhat broader than you have stated. I know that is not a wholly satisfactory answer nor am I able to give you an answer which has a very sharp edge to it. But my reading of the *Reynolds* case, for example, leads me to assume that it is somewhat broader. A somewhat broader view also may be inherent in the Freedom of Information Act.

Senator HART. Professor Bork?

Mr. BORK. It is a field, it is an area, I have not studied, Senator, but it would seem to me that there may be occasions when a case in progress would be something that an attorney ought not to talk about quite aside from the President's involvement.

Senator HART. The answers which both of you have made to the basic question which the Democratic caucus has directed to be asked, your willingness to appear and testify, satisfies me.

The Senator from Massachusetts has sent a memorandum which indicates that he is presiding at a Health, Education, and Welfare hearing and that if he is not able to get here before we adjourn he asks that he be given an opportunity to address questions in writing to you, to the two nominees, which will be communicated before the end of business today. Is there objection to the issuance of those questions and the receipt of the answers?

Senator HRUSKA. No objections.

Mr. BORK. Do I understand the questions will be received today? Is that correct?

Senator HRUSKA. That is right.

Senator HART. May I ask that a communication addressed to me from Clarence Mitchell, Director, Washington Bureau of the National Association for the Advancement of Colored People, be included in the record.

[The document referred to follows:]

WASHINGTON, D.C., JANUARY 15, 1973.

Hon. PHILIP HART,
U.S. Senate, Washington, D.C.:

The NAACP notes that hearings will be held on the nomination of Mr. Robert H. Bork on Wednesday, January 17. We urge that Mr. Bork be questioned on whether he supports the transportation of children to public schools when such transportation is necessary to meet constitutional requirements in school desegregation cases. Increasingly the Department of Justice appears to be seeking to slow down and even nullify court orders supporting the historic decision of *Brown* v. *Board of Education*. The latest example, of course, is the Department's attempt to postpone the application of a decision requiring desegregation of the public schools in Prince Georges County, Maryland. We urge that Mr. Bork be questioned on whether he will continue the present policy of using the power of the Federal Government to slow down school desegregation. We are aware of the fact that a person serving in the Department of Justice may later be considered for a judicial post either in the Supreme Court or at some other level. On the basis of Mr. Bork's record to date, we would think that any attempt to place him in the judicial branch of government should be a subject for extensive hearings. We will appreciate it if this telegram is incorporated in the hearing record.

CLARENCE MITCHELL,
Director, Washington Bureau, NAACP.

Senator HART. If there are no further questions we will adjourn at the call of the Chair.

Thank you very much.

[Whereupon at 12:05 p.m., the committee adjourned subject to the call of the Chair.]

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