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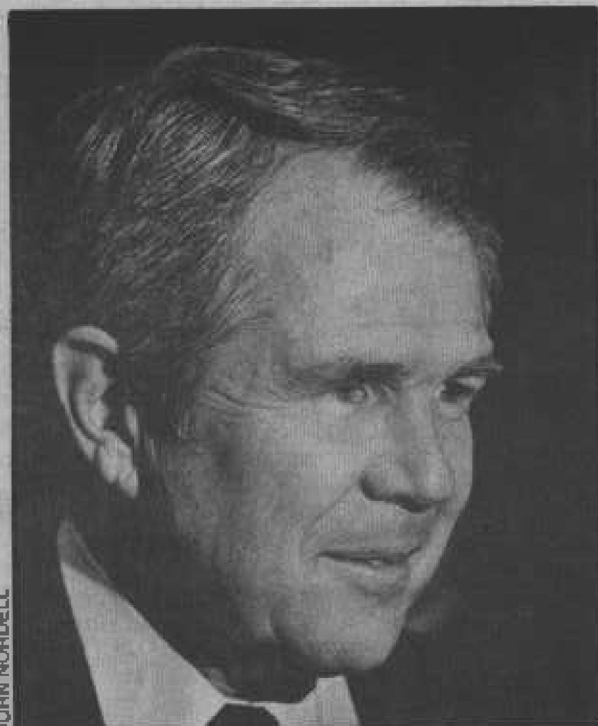

Is the Lord liable if Robertson's not viable?

IRREVEREND ROBERTSON

And you thought Joe Biden had problems. Pat Robertson may soon be wanted by the law in Massachusetts — that is, if state authorities follow the advice of the Reverend William F. Schulz, president of the Unitarian-Universalist Association, who wants to see the GOP presidential candidate tossed in the hoosegow for violating the commonwealth's 290-year-old statute banning blasphemy. With tongue firmly planted in cheek, Schulz says Robertson — the Virginia-based minister who has claimed his candidacy is "anointed by God" — runs the grave risk of breaking the state law that makes it a crime to "expose to contempt and ridicule the Holy Word of God." As Schulz sees it, "If Robertson's candidacy is, as he and many of his supporters claim, 'anointed by God,' then the Deity itself will be exposed to ridicule each time Robertson loses a primary or fails to finish first in the latest poll."

lesbians and teenagers." Only Councilors Scondras and Charles Yancey voted against firing the two men.

According to Scondras, several council members admitted privately that they wouldn't have voted to fire French and Dotterman if this hadn't been an election year. But it turns out that their concern about votes may have cost them some. The Boston Lesbian and Gay Political Alliance has voted to rescind its endorsements of councilors Hennigan Casey, Christopher Iannella, and Bruce Bolling, all of whom voted for the firings. The alliance plans to mail brochures with the word "rescinded" stamped across each of the three lawmakers' faces to 3000 people this week.

— **Maureen Dezell**

DOUBLE NEGATIVE

After every political disaster, there are countless opportunities for pundits to issue forth on the hows and whys. So it was last week, when Michael Dukakis's campaign manager, John Sasso, resigned after it was revealed that he had been responsible for the "attack video" that helped bring down Senator Joe Biden's presidential campaign. And so it was last November, when the Massachusetts GOP suffered one of the worst drubbings in recent memory. Back then, one of those issuing forth on the cause of the GOP gethsemane was Dukakis's chief of staff, John Sasso, who offered this postmortem during an election-eve interview with a television reporter. "I think that the negative campaigning came back to haunt them," he said.

— **Scot Lehigh**

DRAFT RITES

As things look increasingly murky and bleak in the current Democratic presidential field, there's growing interest in the idea of drafting a prominent politician to be the party's nominee at the convention next July. According to the Presidential Campaign Hotline, a computerized compilation of news on the 1988 race, Senator Daniel Patrick Moynihan (D-New York) suggested last weekend that Senator Bill Bradley (D-New Jersey) and New York Governor Mario Cuomo be available during next summer's Atlanta convention as

Bork's "confirmation conversion" smacked of shameless politicking.

BORK CHOPS

The flip-flop man

BY HARVEY SILVERGLATE

There is a widespread suspicion that Judge Robert H. Bork of the US Court of Appeals for the District of Columbia Circuit and former professor of law at the Yale Law School underwent a "confirmation conversion" during his appearance before the Senate Judiciary Committee. This felicitous phrase was coined by Senator Patrick Leahy (D-Vermont) to describe Bork's apparent attempt to wriggle out of or explain away positions that he has held for decades and reiterated as recently as a few years ago, all in an effort to attract enough votes to achieve confirmation to the Supreme Court.

Careful observers, however, would have noticed the first signs of such a conversion even before the Senate hearings began — indeed, as early as July 28, 1987, when the Court of Appeals on which Bork sits issued its long-awaited full-bench decision in the case of *Natural Resources Defense Council v. the US Environmental*

prosecute Robertson, to ensure that the televangelist will be safely in the clink throughout next year's primary season. If Attorney General Jim Shannon is lacking for evidence, we'd be happy to provide him with the results of a Marist poll of New York voters released Wednesday: Robertson's anemic 1.6 percent showing, we're told, has countless New Yorkers chortling at the Deity's inept handling of His candidate.

— **Francis J. Connolly**

MICHAEL ROMANOS

Iannella: cancel that endorsement.

VOTING BLOCK

"I will not have my name affixed to anyone who feels that molesting children is something that should be encouraged," Boston City Councilor Maura Hennigan Casey announced to her council colleagues at their September 30 meeting, summing up the sentiment behind the 9-2 vote to dismiss two of David Scondras's aides, J. French Wall and Gary Dotterman, from their council positions.

As the *Phoenix* reported last week, Dotterman and Wall were fired because of their involvement in the Committee for Civil Liberties and Sexual Freedom, an organization that claims "to aid both defendants and alleged victims in legal cases which allege nonviolent, nonexploitative sexual activity between gay men or

respective states in order to win control of the delegates pledged to them for the first ballot, Moynihan seemed to suggest that Bradley and Cuomo be prepared to use their state delegations as the basis of a second-ballot race for the party nomination.) Of course, the scenario lurking behind Moynihan's suggestion is that none of the six Democrats now in the field will win a majority of votes on the first ballot, when delegates are pledged to them. In that event, during the second ballot (when the delegates are released from their pledges) Bradley or Cuomo could make such a run.

Wednesday the *Washington Post* added its clout to the idea of a brokered convention by noting that it's a possibility worth considering; it also added Senator Sam Nunn (D-Georgia) to the list of potential favorite sons. For his part, Cuomo sounded ambivalent about the idea. According to the Hotline, Cuomo said there's no way he could run for president and serve as governor. Of course, he observed, New York Lieutenant Governor Stan Lundine could make do as governor in a pinch.

— **John Medearis**

TO HAVE AND HAVE NOT

What good organization giveth, the Democratic National Committee (DNC) taketh away. On Wednesday the Dukakis campaign announced that it had received the endorsement of 11 Democratic office-holders from South Dakota, including the state's House and Senate minority leaders. That's quite a coup, given that the bloc represents more than a third of the Democrats in the South Dakota legislature. What made it even more important was that South Dakota had scheduled its primary for February 23, a week after the Iowa caucuses and the same date as the New Hampshire primary, which made it quite a place to win a toehold. Now for the bad news. The same day the campaign was announcing the endorsements, the DNC succeeded in pressuring South Dakota to change the date of its delegate-selection process. According to Jim Carey, executive director of the DNC's Compliance Assistance Commission, under the terms of the new agreement, South Dakota's February 23 primary will be a nonbinding affair; the state's delegates will be selected by caucuses after Super Tuesday, on March 8. Similarly, Minnesota, another state where Dukakis hoped to do well early, has agreed that the first stage of its four-step caucus system, also scheduled for February 23, will be conducted by secret ballot, the results of which will not be announced until after March 8.

— **Scot Lehigh**

the 11 judges on that court unanimously overturned a November 1986 three-judge-panel opinion that had been authored by Bork.

What is fascinating is that the full-court opinion that overturned Judge Bork's panel opinion was authored by none other than Robert Bork himself.

This turn of events — in which Bork wrote an opinion invalidating the opinion he had written just eight months earlier — arose out of a Natural Resources Defense Council (NRDC) challenge to the EPA's view of the standards the government has to follow in deciding when to ban or limit the discharge of hazardous pollutants, including carcinogens, into the air. The EPA has taken the position that, in determining the acceptable levels of pollutant emission, the agency administrator can take into account the economics involved in the emission-control process. The NRDC stance, on the other hand, holds that the administrator must base his decision *exclusively* on health-related factors and that any uncertainty about the effects of carcinogenic agents on humans requires the administrator to prohibit emissions that fall within that range of doubt. The NRDC believes, in effect, that if a pollutant could cause cancer in one single person, it may not be emitted.

The argument turned on the interpretation of Section 112 of the Clean Air Act, passed by Congress 17 years ago. The Reagan administration, in purporting to carry out the congressional mandate to clean up the air, was trying to temper what it viewed as unnecessarily rigorous enforcement of that statute in prior years — enforcement it saw as overly protective of the public health and not sufficiently sympathetic to the economic costs to industry. This was part and parcel of the administration's overall view that government regulation should be more concerned about the economic costs of compliance with such administrative mandates as the Clean Air Act, even if there are some "minor" adverse public-health consequences as a result.

The NRDC challenge to the EPA view was first heard by a three-judge panel of the Court of Appeals, which included Bork. In November 1986 that panel issued a 17-page opinion siding with the Reagan administration, with a vigorous dissenting opinion written by Judge J. Skelly Wright, known for his hostility to the Reaganite judges' approach to the law. The NRDC then filed a petition asking that the entire membership of the court reconsider the case.

The significance of the decision to rehear the case was not lost on those who know how the court operates, including, of course, Bork. The Court of Appeals has for

Continued from page 16

The author wishes to acknowledge the assistance of Boston University law student Joseph Kelly in the preparation of this series.

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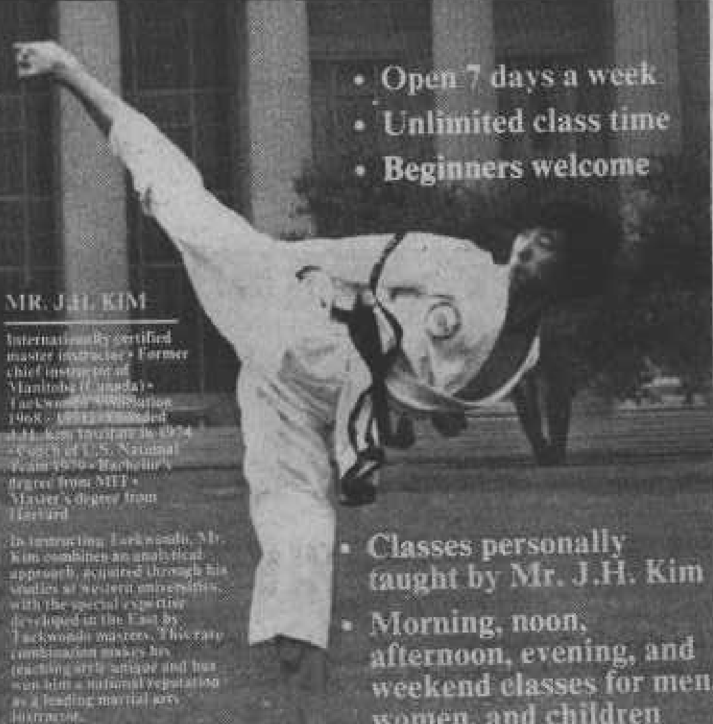

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Chops

Continued from page 2

some time been divided into two warring camps — one consisting of six judges appointed by Reagan, the other made up of the five judges appointed by prior presidents. Yet the decision by the court to rehear the case in front of its full membership meant that the NRDC had picked up at least one Reagan-appointee vote, and perhaps more, since a majority of the judges is required to grant a rehearing request. Bork, of course, was in a position to know precisely how many of his Reaganite colleagues were in favor of a rehearing. Presumably, he also realized that the chances were quite good that his panel opinion would be reversed.

This realization was surely confirmed at the oral argument. Bork's panel opinion had been predicated on the assumption that the EPA would never allow a level of carcinogenic emissions that was just barely below the level known to be dangerous to human health, since the statute requires that an ample "margin of safety" be allowed. The panel opinion had said that in deciding a proper "margin of safety," economic considerations could be taken into account.

At oral argument, according to David Doniger, the NRDC lawyer who represented the winning side of the case, Bork asked the EPA lawyer a hypothetical question: if a pollutant definitely harmed people at the 100-parts-per-million emissions level, would the administrator set the allowable emission standard at 99 parts per million? The government lawyer replied that of course the EPA would not set the limit so close to a known dangerous level, *unless*, of course, the administrator determined that

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trol were very, very high. This response undermined the assumption on which Bork's earlier opinion had been based, and it became fairly obvious at this point that the earlier opinion would not stand.

The big shock came, however, when the full court's opinion in the case turned out to be unanimous — and to be written by none other than Bork. Bork's second opinion never mentioned the first panel opinion. It set out a two-step process to be followed by the EPA in cases under Section 112 that adopted neither the position advanced by the EPA nor the position advanced by the NRDC. The first step, said the court, was to define a safe level of emissions, and here only health-related factors — not economic factors — could be considered. The second step was to define an acceptable margin of safety.

Part of the reason, one supposes, that the full-court opinion agreed with neither side was that the two court factions could not agree on a single clear opinion. Yet the position advanced by the EPA was so outrageous — particularly in light of the EPA lawyer's shocking response to Bork's hypothetical question at oral argument — that the Reaganite faction could not support the panel's initial position. The bottom line was that the NRDC won its main point: that economic factors could not play a role in determining whether a pollutant was dangerous to human health.

Students of the Court of Appeals have been buzzing over Bork's overturning his own panel opinion. Yet this is hardly surprising, given the context in which the full-court review took place.

By the time the full-court rehearing came up, Bork had already been nominated for the Supreme Court. Had he not switched sides after the oral

Continued on page 18

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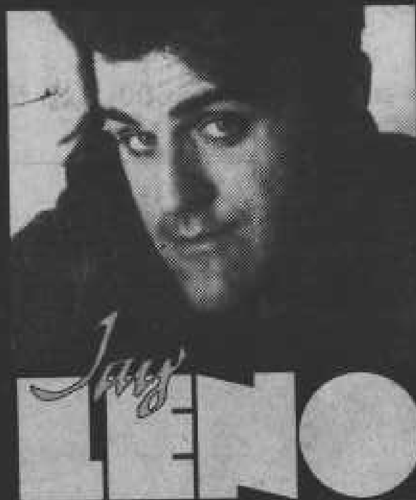

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Chops

Continued from page 16

argument, he would likely have been in a very small minority of dissenters and would consequently have looked like someone out of the mainstream. After all, in his infamous 1971 article in the *Indiana Law Review*, Bork had compared the asserted right of a married couple to use contraceptives in the privacy of their bedroom to the asserted right of a corporation to pollute the air, as pointed up in last week's "Bork Chops." To have authored the panel's opinion, which could easily have been interpreted to mean that it's okay to allow some cancer if it's going to cost money to clean up carcinogenic air emissions, and not to have reversed himself in the full-court review, would have made it appear to the Senate that the "new" Bork was the same as the old. It was bad enough that the 1971 law-review article would haunt him during the Senate hearings, but for a 1987 court opinion also to provide fodder for his opponents would have been deadly. After all, Bork was constructing a defense based on the rationale that his earlier views were the product of the inquiring mind and pedagogical tactics of a law-school professor but that his performance as a judge was more "mainstream." Moreover, for Bork to have hung out in lone dissent, opposed even by the five other Reagan appointees on the court, would have destroyed the myth that he was nothing more than a classic judicial conservative like the late John Marshall Harlan and Felix Frankfurter.

So Bork underwent his first confirmation conversion, it seems, even before the confirmation hearings started. He not only joined the other judges on the Court of Appeals, he also got

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opinion that announced, in effect, that one does not have the same right to pollute the air as one has to use contraceptives in the marital bedroom.

A close examination of Bork's second opinion indicates that he deviated substantially from his claimed "jurisprudence of original intent," in which he professes to follow the intentions of the framers of the Constitution rather than the personal predilections of modern-day judges. As NRDC attorney Doniger notes, both of Bork's opinions differ from what anyone else or any other court has written about or decided to be the meaning of this section of the Clean Air Act. "You can't have an original-intent meaning that remains undiscovered for 17 years, let alone two such meanings," says Doniger.

Robert Bork is woefully out of step, and his inability to pull off a credible conversion on numerous points cost him dearly before the Senate Judiciary Committee that rejected him by a 9-5 vote and, according to public-opinion polls, the American people. Contrary to the long-held views of cynics, it would appear that a substantial number of Americans worry about such things as civil liberties and civil rights, as well as clean air.

It has been inspiring to a lot of people that in this 200th year of our Constitution, an enemy of our national charter, and particularly of the Bill of Rights, has generated widespread opposition to his Supreme Court bid, not because he is a crook, not because he is immoral, but because he espouses a so-called judicial philosophy that, if adopted by the Supreme Court, would likely spell the end of the system of government that has kept us free for two centuries and brought us much closer to the ideal of equality under the law in recent decades. □