

credit card fraud conspiracy in *United States v. Jacobowitz* in 1988.

Judge Azrack has received numerous honors throughout her legal career, including the prestigious Eastern District Association Award in 2006.

Following Judge Azrack's confirmation by the Senate, Senator Gillibrand stated that she "is well-suited to serve.... Ms. Azrack is a woman with impeccable credentials, incredible intellect, and exactly the kind of fair-minded judgment we need on the federal bench. I am confident she will serve the Eastern District of New York well, as a federal judge." Senator Gillibrand concluded that Judge Azrack's appointment will add "yet another superb female jurist to the federal bench." President Obama expressed similar confidence when he nominated Judge Azrack in September 2014, stating that she would be a "distinguished public servant[] and valuable addition[]" to the United States District Court." Likewise, the American Bar Association Standing Committee on the Federal Judiciary unanimously rated Judge Azrack as well-qualified to serve in the Eastern District of New York.

Legal History

Robert Bork at Justice

By C. Evan Stewart



Robert Bork is a litmus test for most folks over 50 years old. Either he was a brilliant law professor and jurist who was unfairly denied a seat on the U.S. Supreme Court or he was a rabid, right-wing ideologue who, if put on the Court, would have created an America "in which women would be forced into back-alley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens' doors in midnight raids..." (Senator Edward M. Kennedy, June 23, 1987). Less well known is his service to his country as Solicitor General and his role in the Saturday Night Massacre.

Getting Hired By Nixon

At a 1972 meeting in the White House to discuss possible legislation relating to busing children to school, Bork first met President Nixon. Being a bearded law professor from Yale, Bork could see Nixon "visibly recoil a

step or two" when Nixon was introduced to him (Nixon professed to loathe Ivy League professors). But when Bork was allowed to weigh in on the proposed bill — stating that the Supreme Court authority upon which it was premised was "corrupt constitutional law" — Nixon immediately reacted: "I believe the same thing, but I didn't know there was a law professor anywhere in the United States who agreed with me."

The month after Nixon's landslide reelection, Bork was called at his New Haven home by U.S. Attorney General Richard Kleindienst: Would Bork accept the job of Solicitor General if it were to be offered? Bork quickly replied "most certainly." The next day, John Dean, the White House Counsel, followed up, requesting that Bork come to Camp David for an interview with Nixon. Without any irony, Dean also asked Bork whether he had any skeletons in his closet.

Bork's interview with Nixon was a pleasant session, with Nixon holding forth on a wide range of subjects. At one point the President said it was too bad Bork had gone to Yale; Bork responded that in fact he was a Chicago graduate. Nixon replied: "That's almost as bad." When the interview ended, the two men had not talked about the Solicitor General position, and Bork left clueless as to why he had been selected by the President.

On June 26, 1973, after non-contentious confirmation hearings (and having allowed for his predecessor to stay until the end of the Supreme Court's term), Bork

was sworn in as Solicitor General. “On top of the world,” with what he deemed a “real plum” of a job, Bork had no idea of the tsunami into which he had walked.

On the Job

No sooner had Bork settled into his office at the Justice Department than Spiro Agnew, Nixon’s Vice President, scheduled a meeting with the new Solicitor General. Bork, intellectually acute but politically naïve, had no idea what to expect. After a 20 minute conversation that was “desultory, leading nowhere,” the meeting ended and Bork returned

to the Department of Justice “rather confused about the whole episode.”

The fog began to clear a bit when Nixon’s chief of staff, Alexander Haig, asked Bork to the White House a few weeks later. The primary purpose of the meeting was to entreat Bork to leave his new post and take charge over Nixon’s legal defense team dealing with the Watergate mess. At the same time, Haig told Bork that Agnew was under investigation by the U.S. Attorney in Baltimore for taking bribes when he had been governor of Maryland.

Bork ultimately talked his way out of accepting Haig’s offer

(Bork: “I’ll have to hear the tapes.”

Haig: “You can’t hear the tapes.”).

As for Agnew, the evidence against him convinced *everyone* at the Justice Department that Agnew was a common criminal (he also had taken bribes while Vice President). Nixon’s new Attorney General, Elliot Richardson, brought Bork to a high level pow wow at the White House with Haig and the entire Nixon defense team (now led by Texas law professor Charles Alan Wright) to see how Agnew’s “situa-

tion” could or should be resolved. The team wanted (at least) a delay in any indictment. When that did not get anywhere, Haig bumped up the pressure: “Let’s go see the President.”

In route to the Oval Office, Richardson and Bork ducked into a men’s room. Fearing it was bugged, Richardson turned on all the water faucets; both men agreed that this was a “resignation issue” (*i.e.*, neither could stay at the Justice Department if Agnew was not indicted). In the Oval Office, Nixon was “totally relaxed” as he heard the pros and cons debated before him. After 45 minutes of back and forth, Nixon spoke up: “I guess you have to indict him.”

As the Agnew indictment became imminent, the Vice President played what he thought was a trump card: Vice Presidential immunity — no one in that post could be indicted and tried *before* Congress had impeached and removed him from office. Agnew’s lawyers moved on that basis to close down the Baltimore grand jury, adding as an additional ground the prejudice that flowed from alleged Justice Department press leaks. Bork was assigned by the Attorney General to respond. The latter ground was easy to address; the immunity issue, however, was much trickier: not only was there no definitive law on point, any position taken could have an impact on Nixon’s increasing legal difficulties (*e.g.*, Was there Presidential immunity? If so, what was the nature and scope of said immunity?).

While finalizing the Jus-



Robert Bork in 1979. Photograph courtesy of Yale Law School.

tice Department's brief (which, among other things, differentiated between the Presidency and the Vice Presidency — the latter essentially a non-functional post that only becomes important if the President leaves office, dies, or is impeached), Bork had to prepare for and then make his first oral argument before the Supreme Court. Back at the Department of Justice after the argument "went smoothly enough," Bork learned he would not have to travel to Baltimore to argue Agnew's motions — the Vice President had that day taken a plea deal and resigned. Richardson reported to Bork that his brief was one of the reasons Agnew had thrown in the towel.

Bork and the Saturday Night Massacre

Initially, the Solicitor General had nothing to do with the work Special Prosecutor Archibald Cox was doing *vis-à-vis* Watergate. Soon, however, Attorney General Richardson began to task Bork with discrete assignments in that area: meet with Cox and his staff regarding how to deal with national security matters; rewrite Cox's open-ended charter to make clear it covered only Watergate-related subjects; and negotiate with Cox and his staff regarding the "proper" role of executive privilege.

Then came Nixon's plan to deal with the tapes: the venerated John Stennis (the *very* senior Senator from Mississippi) would review Nixon's recordings and present authenticated versions to Cox. Stennis was not only *very*

old, however, he was also in poor health and had bad hearing. Recognizing his limitations (but bowing to the President's patriotic implorings), Stennis told the White House he would take on the job but would need help to actually do it. No problem, said the White House, Fred Buzhardt — Nixon's Special Counsel (and political fixer) — would be happy to pitch in! Would Cox agree to Nixon's "take it or get fired" deal?

Bork went to work Saturday morning (October 20, 1973) with "no inkling that the dispute would in any way involve [him]." In a televised press conference that day (which Bork watched at the Justice Department), Cox announced that he could not in good conscience agree to the President's "compromise." Directly thereafter, Richardson summoned Bork to his office.

Bork arrived to find the Attorney General, the Deputy Attorney General, William Ruckelshaus, and a number of Richardson's staff. Richardson and Ruckelshaus — both of whom had assured the Senate Judiciary Committee that they would only fire Cox for "extraordinary improprieties" — quickly affirmed they could not axe Cox. Richardson then asked Bork: "Can you fire him, Bob? The gun is in your hand — pull the trigger!"

Bork would later write that, at that moment, he "was in a welter of contradictory impulses, unable to see clearly what the results would be of a firing or a refusal to fire." Clearly, Nixon had the legal authority to fire Cox, and the

public defiance of the President by a constitutionally inferior officer of the executive branch (on television yet) was grounds in and of itself. Bork also worried that if he took the same tack as Richardson and Ruckelshaus, the Justice Department might be reduced to chaos, with mass resignations and a White House operative like Buzhardt put in place as acting Attorney General. After trying to sort out his "contradictory impulses," Bork announced: "I can fire him, but then I will resign." Both Richardson and Ruckelshaus urged him not to take the latter step (fearing the same chaos at Justice), assuring him that they would publicly make clear they had urged Bork to stay.

Ultimately Richardson resigned and Ruckelshaus tried to (Nixon refused his resignation and fired him instead). Bork was driven to the White House, and with Professor Wright as the principal draftsman, produced this letter to Cox:

October 20, 1973

Dear Mr. Cox:

As provided by Title 28, Section 508(b) of the United States Code and Title 28, Section 0.132(a) of the Code of Federal Regulations, I have today assumed the duties of Acting Attorney General.

In that capacity I am, as instructed by the President, discharging you, effective at once, from your position as Special Prosecutor, Watergate Special Prosecution Force.

Very Truly Yours,
Robert H. Bork
Acting Attorney General

Bork then was ushered in to meet with Nixon in the Oval Office. Bork thought the President was “distraught,” having not anticipated the consequences of his “compromise.” In a disjointed conversation about what might happen next, Nixon suddenly blurted out: “You’re next when a vacancy occurs on the Supreme Court.” As Bork would later write: “I hadn’t the courage to tell him that I didn’t think he could get anyone confirmed to the Supreme Court, and particularly not the person who fired Cox.”

That night, Bork and his wife hosted a dinner party for Ralph Winter (a colleague from Yale Law School) and his wife. All over the rest of Washington (and throughout the nation), the political world was in an upheaval and the impetus for Nixon’s impeachment took on a whole new momentum.

Bork was now a national figure; on Monday a crowd stood outside a local diner, pressed against a window, staring at him having breakfast. One of the first things he did when he returned to the Justice Department was to meet with Cox’s deputies and assure them that their work could (and would) continue without interference. What about the tapes, they asked. Bork replied: “I’ll back you up. Go to court for any tapes and documents you need.”

With the political firestorm

ignited throughout the country, and with a warning from a White House official that a cornered Nixon “might take desperate actions of which I might not approve,” Bork did his best to ensure that the Justice Department continued to function. One way he accomplished that was to select a successor to Cox. All roads quickly led to Leon Jaworski, a former president of the American Bar Association, prosecutor at the war crime trials after World War II, and head of a prominent Texas law firm (Fulbright & Jaworski). With Jaworski in place, and once the President nominated Ohio Senator William Saxbe to be the Attorney General in December 1973, Bork was able to transition back to his old job.

That did not end Bork’s interplay with Watergate, however. With the tapes dispute going up to the Supreme Court, Bork was called into a White House meeting where he was told by Haig that Nixon wanted Bork to argue on *his* behalf before the Court. Bork replied that that was an impossibility, given that the special prosecutor was a branch within the Justice Department. Haig was incredulous, calling Bork’s position a “technicality.” Bork replied: “They hang people on technicalities!” (James St. Clair, Nixon’s latest lawyer, whispered to Bork: “I think you’re right.” Bork: “Tell him that!” St. Clair: “Maybe I will ... someday.”)

After the Court ruled against the President, Haig called Bork to report that the White House was debating whether to obey the

Court. Bork’s advice: “If you don’t, it is instant impeachment.” Shortly thereafter the tapes were produced to Jaworski.

Postscripts

- Before he died in December 2012, Robert Bork wrote a memoir of his experiences as Solicitor General. Published in 2013 as a result of his wife’s efforts, “Saving Justice: Watergate, the Saturday Night Massacre, and Other Adventures of a Solicitor General” (Encounter Books) is a great book for lawyers and non-lawyers interested in the Watergate era.
- Bork’s principal academic work was in antitrust, and in 1978 he published what many believe to be the seminal work in that field: “The Antitrust Paradox: A Policy at War With Itself” (Simon & Schuster). Oddly, he created a paradox of a different sort two decades later when, as a hired expert on behalf of Netscape in the litigation wars with Microsoft, he took positions 180 degrees different from those he advocated in “Antitrust Paradox” (*e.g.*, profits are not evidence of a monopoly; bundling and restrictive contracts are okay; vertical integration is okay; dominant market share achieved by internal growth is okay). One might suppose, as Ralph Waldo Emerson once opined, that “[a] foolish consistency is the hobgoblin of little minds.”