Testimony of Robert H. Bork

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on S.158

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My name is Robert H. Bork. I am the Alexander M. Bickel Professor of Public Law at Yale University. I am pleased to testify on the constitutionality of S. 158 at the Subcommittee's invitation.

S. 158 would provide that human life shall be deemed to exist from conception. The intended result of the law is to bring fourteenth amendment protections of human life to bear upon unborn fetuses. The object, as I understand it, is to return to the states the power to regulate abortions that was denied by the Supreme Court in Roe v. Wade, 410 U.S. 113 (1973). The bill further attempts to remove jurisdiction over abortion cases from the lower federal courts but not the Supreme Court, thus ensuring that litigation concerning abortion laws would reach the Supreme Court through the state courts.

At the outset I want to say that discussions of constitutionality are often embarrassed by the failure to note the differences, which are sometimes significant, between a prediction of what the Supreme Court will do in fact, what it would do if it followed its own precedents, and what it would do if it followed the Constitution. I will evaluate the bill primarily

from the third viewpoint, discussing its validity if the Constitution itself were followed.

From that perspective, it seems to me that the bill is constitutional insofar as it deprives the lower federal courts of jurisdiction but unconsitutional insofar as it attempts to prescribe a rule of decision for the courts under the fourteenth amendment.

Before coming to that, it should be said that if S. 158 were enacted and held constitutional it is not at all clear what the results would be. States might choose to allow many types of abortions simply by not banning them. Under the premises of S. 158 that would be the equivalent of not having a law against some kinds of homicides. There is at least one, perhaps aberrational, Supreme Court decision that suggests the possibility of an equal protection attack on such an arrangement (Skinner v. Oklahoma, 316 U.S. 535 (1942), thus requiring the states to outlaw abortions or abandon laws punishing homicide. It is highly uncertain whether or not such an attack would succed today in this context.

It has been said that passage of S. 158 would not interfere with private abortions, which seems correct since there is in such cases no state action. But it has also been said that passage of the law would preclude federal or state funding of abortions. That seems less clear. The state courts, and ultimately the Supreme Court, would have before them a case involving the clash of two constitutional rights -- that of the woman and that of the fetus. The fact that the constitutional right of the woman to an abortion is the result of judicial legislation, is, in this context, irrelevant. Given the clash of two

constitutional rights, it is impossible to say how the Supreme Court would adjust them. It is entirely possible that the adjustment would produce a constitutional law of abortions very much like the law of Roe v. Wade, 410 U.S. 113 (1973).

I mention these matters merely to suggest that S. 158 may not be a cure-all. We do not know what it would become in the hands of the courts, even if they accepted it, at least nominally, as constitutional.

I turn next to my own doubts that S. 158 is constitutional. Here I am forced to defend the Supreme Court's ultimate authority to say what the Constitution means against recent decisions of the Court. The supporters of S. 158 argue for its constitutionality from a line of Supreme Court decisions that cede to Congress a major role in defining the substantive content of the Constitution. There is no doubt those decisions exist. Since you have heard about them before, I will mention them only briefly.

In Lassiter v. Northampton Election Board, 360 U.S. 45 (1959), a unanimous Supreme Court held that states were constitutionally empowered to use a non-discriminatory literacy test for voting. Yet in Katzenbach v. Morgan, 384 U.S. 641 (1966), the Court held that Congress could eliminate literacy in English as a condition for voting by exercising the power granted in Section 5 of the Fourteenth Amendment. In Oregon v. Mitchell, 400 U.S. 112 (1970), a unanimous Court upheld Congress' elimination of all literacy tests. There are other decisions that declare a congressional power to define substantive rights guaranteed by the thirteenth, fourteenth and fifteenth amendments by employing the granted power to "enforce" the provisions of those

amendments. These precedents all uphold the constitutionality of S. 158. I would conclude that S. 158 is constitutional but for my conviction that each of these decisions represents very bad, indeed pernicious, constitutional law.

The power lodged in Congress to "enforce" constitutional guarantees is the power to provide criminal penalties, redress in civil damage suits, and the like, for violations of those constitutional guarantees as they are defined by the courts. It is not a power to define the substantive content of the guarantees themselves. I know of no indication that Congress was given any such power in the legislative history of these amendments, and no precedent of the Supreme Court that would uphold any such power -- until the era of the modern, activist, liberal Supreme Court. In testimony here, you have heard cited the 1879 case of Ex parte Virginia, 100 U.S. 339 (1879), but that decision does not contemplate any such congressional power to define substance. It held that Congress could make it a federal crime to disqualify persons from jury service on account of race because the fourteenth amendment, as interpreted by the Supreme Court, prohibited such action.

In these respects, I agree entirely with the dissent of Justice Harlan, joined by Justice Stewart, in Katzenbach v. Morgan, which stated:

> When recognized state violations of federal constitutional standards have occurred, Congress is of course empowered by S5 to take appropriate remedial measures to redress and prevent the wrongs. (citation omitted) But it is a judicial question whether the condition with which Congress has thus sought to deal is in truth an infringement of the Constitution, something that is the necessary prerequisite to bringing the S5 power into play at all. (384 U.S. at 666)

The majority position in Katzenbach v. Morgan works two constitutional revolutions at once. It replaces the Supreme Court with Congress as the ultimate authority concerning the meaning of crucial provisions of the Constitution. The majority position also replaces state legislatures with Congress for all matters now committed to state legislation. A national legislature empowered to define the meaning of involuntary servitude, privileges and immunities, due process, equal protection, and the right to vote, which includes all qualification of electors, can void any state legislation on any subject and replace it with a federal statute.

It is because I think S. 158 rests upon the principle of Katzenbach v. Morgan that I think it unconstitutional.

This places me in a somewhat uncomfortable position. I am convinced, as I think almost all constitutional scholars are, that Roe v. Wade is an unconstitutional decision, a serious and wholly unjustifiable judicial usurpation of state legislative authority. I also think that Roe v. Wade is by no means the only example of such unconstitutional behavior by the Supreme Court.

The fact is that S. 158 proposes a change in our constitutional arrangements no more drastic than that which the judiciary has accomplished over twenty-five years. Without any warrant in the Constitution, the courts have required so many basic and unsettling changes in American life and government that a political response was inevitable. Though I do not think it desirable that the political response should succeed in the form this bill takes, the fact of expressed political outrage at such judicial usurpation is in many ways a healthy

development in our constitutional democracy.

The judiciary have a right, indeed a duty, to require basic and unsettling changes, and to do so, despite any political clamor, when the Constitution, fairly interpreted, demands it. The trouble is that nobody believes the Constitution allows, much less demands, the decision in Roe v. Wade or in dozens of other cases of recent years. Not even those most in sympathy with the results believe that, as demonstrated by a growing body of literature attempting to justify the courts' performance on grounds of moral philosophy rather than of legal interpretation. Such justifications will not wash. The judiciary's legitimate power to set aside the decisions and actions of elected representatives and politically responsible officials comes from the Constitution alone and is limited to a fair interpretation of the Constitution.

The question to be answered in assessing S. 158 is whether it is proper to adopt unconstitutional countermeasures to redress unconstitutional action by the Court. I think it is not proper. The deformation of the Constitution is not properly cured by further deformations. Only if we are prepared to say that the Court has become intolerable in a fundamentally democratic [illegible] and that there is no prospect whatever for getting it to behave properly, should we adopt a principle which contains within it the seeds of the destruction of the Court's entire constitutional role. I do not think we are at that stage. But if others think we are, then we should be debating not the techinicalities of S. 158 and cases such as Katzenbach v. Morgan, but the question of whether we should retain, abandon, or modify the constitutional function of the courts as we have known it since Marbury v.

Madison, 1 Cranch 137 (1803). That is a legitimate subject for inquiry, but we ought not arrive at the answer in the narrow context of S. 158 without fully realizing what we are really discussing.