The Joseph Story Awards Banquet
3/24/88

Tonight we commemorate the great tradition of American constitutional law by honoring two of its foremost scholars and practitioners: Professor Raoul Berger and Judge Robert Bork.

I scarcely know which of these stellar individuals to talk about first, so I'll just take our honorees in alphabetical order. True, they're pretty close even by that standard, but unless there's been an activist judicial decision saying that the alphabet is a living document that changes to suit the needs of the times, and the order of vowels is hereby reversed — unless that has happened, then Professor Berger should come first.

Raoul Berger — where does one begin? How does one even keep up with this 88 year old master — an accomplished violinist at an early age, a man who wrote his first piece of legal scholarship almost half a century ago, and a scholar who only last summer published yet another important book.

Professor Berger is not simply a man of great learning and scholarship, but also one who has proved himself willing to take the political heat for his views. He drew the wrath of the left for *Government By Judiciary,* published in 1977. He drew the wrath of some conservatives for his earlier work, *Executive Privilege.* But critics have not deterred him. He has courageously followed his convictions wherever they have led, and has contributed immeasurably to the enlightenment of us all.

His book *Government by Judiciary* remains a classic, the volume that probably more than any other helped trigger the great debate over constitutional interpretation in which we find thinking people vigorously engaged as we head into this century's final decade. I know I speak for all of us here tonight in saying that we have learned much from you and we thank you for all you have accomplished.

As for Judge Bork, he is an epochal figure in the history of American constitutional law. He has built a reputation of excellence which is based on his scholarly achievements and his distinguished judicial record. His fearless intellectual search for a principled approach to the art of judging, his challenge to the reigning establishment in the field of antitrust law, and his principled decisions in the District of Columbia Circuit Court of Appeals attest to his outstanding qualities.

I am convinced that it is these attributes that will ultimately guide objective historians to the conclusion held by all of us here tonight: namely that to this day, no one in this great nation deserves a seat on the U.S. Supreme Court more than Robert H. Bork. Last year, those partisans who would impermissibly seek to reshape the Constitution into a vehicle for their own limited political beliefs used political muscle and character assassination to thwart the appointment of a most deserving person. But for us here tonight, and for the thousands of young lawyers and law students who have been influenced by tonight's honorees, this means that the battle for Constitutional integrity is only beginning. On behalf of us and them, Judge Bork, we thank you.

The school of thought against which our two honorees have fought — what Judge Bork calls non-interpretivism, a species of judicial activism — is deeply anti-democratic. It is advocated by those forces who like to be called progressive. But if that term is correct, then it only

goes to show that their version of modern progressivism has passed democracy by, leaving it to today's conservatives to do what yesterday's progressives did: defend democracy.

Now it is important to be careful here. When we say that judicial activism is undemocratic we are not condemning judicial review as a process. Indeed, "we the people," in forming our government, intended it. Article III of the Constitution makes no sense without it. The purpose of judicial review of the actions of other branches and levels of government is ultimately to ensure that those actions stay within constitutional boundaries. Pure majoritarianism is not what the Constitution is about. The Constitution, in recognition of the danger arising from temporary passions, places some things beyond the control of majorities; it gives definitive answers to some questions. But it does not answer or close off all questions or most of them, or even very many of them. The enduring quality of the Constitution is that it leaves to the people themselves and their elected representatives most of the important questions of political life.

Judicial activism may be defined as those acts of the judiciary that are unjustified, that are without constitutional or legal warrant, and that close off questions that should remain open in a democracy. It invades areas in which a free people ought to be able to govern themselves. And it thus corrodes the very institutions that a republic needs in order to survive.

This is where I wish to focus my brief remarks this evening, to illustrate that the concerns about judicial activism are not just matters for dusty law books or crusty philosophers, but are vital interests that affect the lives and futures of ordinary American citizens.

History shows us that a republic needs a measure of shared values among its citizens. Needless to say, these shared values leave room for differences of religion, politics, art, and the like. But without a measure of consensus, there is no real republic; we would have nothing more than a set of governing institutions and a series of contending interest groups.

Because we are a people who love freedom, we have never looked to government to provide us with our societal values. Instead, Americans have always had available to them a rich assortment of mediating institutions. These include voluntary associations, civic and vocational organizations, as well as movements that represent a variety of interests. In the aggregate, these entities help Americans to develop and live by core values, such as honesty, industry, respect for each another, and the other precepts that are essential to the quality of life we enjoy. I have in mind first and foremost the institution of the family; also churches, fraternal organizations, schools and colleges, political parties, labor unions, and community organizations — as diverse an array of institutions as one could want, yet all helping to integrate the individual into the wider society. Added to these are the opportunities for local self-government, where citizens participate in determining the nature and quality of their own communities.

It is through institutions like these — not in the halls of Congress or the White House, and still less in the federal courtroom — that our values are formed. It is here that the hammer of experience strikes the anvil of first principles, and forges the metal of our values. But judicial activism cuts this process short, foreclosing opportunities for local expression and leaving a drastically reduced scope for the institutions that are representative of citizen views. Let us look at a few illustrative federal court decisions.

Consider, for instance, the case of *Deweese* v. *Town of Palm Beach,* a decision last year in the 11th Circuit. The town of Palm Beach had a municipal ordinance that reflected the consensus of the community with regard to proper attire in public. It was challenged by a male jogger

who wished to jog shirtless, and who challenged the ordinance as an infringement of his constitutional rights. The court agreed, stretching the Fourteenth Amendment so as to encompass a so-called "liberty interest in personal dress." In vain did the town argue that the ordinance was within the community's right to preserve its "history, tradition, identity, or quality of life." Under a regime of judicial activism, history and tradition and localism go out the window whenever someone strides into a federal court shouting "rights."

Or consider *Johnson* v. *City of Opelousas* a case from Louisiana decided in 1985, in which the Fifth Circuit Court of Appeals struck down a curfew. Now, the wisdom of the curfew ordinance is open to debate — but what the court did was to choke off that debate and remove the whole question from the voters and elected officials of Opelousas, Louisiana.

Or consider the federal judge in Kansas City who ordered massive, expensive additions to the facilities of local schools, and also ordered a doubling of the property tax rate to pay for them. No longer did the town's voters have democratic jurisdiction over that most basic element of local decision-making — their taxes. The will of a federal judge ordained that higher property taxes for them were now supposedly required by the Constitution. Perhaps that was the judge's way to insure, as the song says, that "everything's up to date in Kansas City."

Then again there was the judge in St. Louis who decreed a busing scheme for schools and warned voters that if they failed to vote themselves higher property taxes to pay for it, he would do exactly what that judge in the Kansas City case did: he would simply mandate them.

We could go on and talk about federal courts intervening in the election of a high school homecoming queen, or the suspension of a football player, or whether there is a fundamental right to send a child to summer basketball camp, or what programs a television station must broadcast. The list goes on, not only gratuitously providing the grist for judicial activist mills, but in the process trivializing Constitutional doctrine and the protection of essential liberties.

The pattern here is a subtle but dangerous transformation of the Constitution, such that it becomes less a plan of government and more an instrument for the regulation of potentially every personal action or policy decision — regulation that the people themselves become powerless to control.

And what does all this mean for the average citizen? After all, he might not know much about constitutional law; he might take the word "non-interpretivism" to be something he heard at an extension course on modern literature. But he can certainly understand, from decisions like these, that the personal authority that is exercised through participation in local politics, and in society's other mediating institutions, is being whittled away by thundering abstractions coming from the federal bench, and the enforced conformity that follows in their wake.

Under a regime of judicial activism, our churches, schools, hospitals, local police, and the like, are thrown into confusion and uncertainty. When judges reach out to substitute their judgment for the will of the people, expressed through their political and community institutions, the opportunity and the incentive for participation in self-government is dramatically reduced. We hear a lot of calls today to civic responsibility and community involvement. I endorse those calls 100 percent. But they must ring hollow to the average citizen when he no longer knows whether his legitimate actions will become effective or whether they will be nullified by an unelected Platonic Guardian. Judicial activism has the power to eviscerate our small-scale institutions by making it pointless to participate in them.

Now, at the present time, we hear from those who support judicial activism a lot of talk about what they call basic "rights." Sometimes it sounds as though some sort of revival of natural-law jurisprudence is in the offing. Yet most of these calls come from the very people who are most contemptuous of the mediating institutions through which Americans have traditionally formed and learned their ethical values.

Our judicial activist friends say to us: if we have fundamental shared values, then why should the courts not impose them? But we must ask in response: if we have fundamental shared values, why do we need the courts to impose them? Why is the Constitution and the will of the people, as reflected through their elected representatives, not adequate for the task? The argument of the judicial activists contains a contradiction. The rhetoric of unenumerated rights implies the idea of a moral consensus. Yet at the same time, there has probably never been a period in American history in which actual moral consensus has been called into question more than now. It looks as though the more the old absolutes are thrown out the window, the more people turn up in court urging that democratically enacted measures be overturned in the name of supposedly unalterable absolutes.

This contradiction reaches its height in the work of certain theorists such as Ronald Dworkin, Michael Perry, and others, who argue for an "emerging morality" based on "moral evolution," to be somehow delphically divined by judges. This sort of "evolved" morality can and should be imposed, these theorists seem to say. Yet at the same time, they treat traditional moral norms as wholly undeserving of enforcement, or even of deference. On the contrary, traditional morals and norms, as reflected in duly enacted public actions, are some of the very things that they want to strike down on the basis of some emerging, evolving morality.

In practice, this means the wholesale imposition of the values of what some sociologists call the "new class," or the "knowledge class," at the expense of the values of rank-and-file American citizens. The mediating institutions to which the knowledge class and the judicial activists are hostile — the entities that are always being charged with violating someone's rights — are in fact the glue that holds our shared value system together. To batter away at those institutions is to cause our moral system to come apart.

I said a little earlier that without a measure of consensus, there is no real republic: only a set of governing institutions and interest groups. Now I'd like to tie up the threads. A situation like that — in which our republic is reduced to an omnipotent government and a coterie of interest groups that petitions that government for what it claims are rights — this is precisely what is implied by judicial activism, taken to its logical end.

Tonight I wish to emphasize that fortifying the moral and ethical values of America and promoting the Constitutional restraint of our judiciary are really two sides of the same coin. Judicial activism is not a neutral instrument. Often it damages traditional American values. These values live in the hearts of ordinary Americans. They are expressed in the communities we Americans create. They go with us into the voting booth, thence to be reflected in representative institutions. Too often, judicial activism disturbs this process of self-government. It becomes the tool of those who would uproot values, not of those who would defend them.

For these reasons, it is no exaggeration to say that the cause of Judge Bork's nomination, and the cause of the constitutionalism for which he now fights as a free scholar, is the cause of democracy. A democratic republic needs publicly involved citizens. Reducing self-government to the right to file a federal lawsuit erodes this concept of citizenship, and ultimately erodes democracy itself.

Fortunately, as you show by your presence here tonight, there are many who understand that the Constitution itself, as the supreme law of the land, fortifies the fundamental values which have characterized our Republic for over 200 years.

As the late Attorney General and Supreme Court Justice Robert Jackson once said:

> We may remind ourselves that there is not only a past and a present, there is also a future. And we are among its founders.

As the founders of the future and the perpetuators of sound Constitutional jurisprudence we have an important and challenging task that continues beyond this critical year. But it is our great fortune that tonight's honored guests give us great examples to follow.

Thank you.