

Correspondence

Judicial Activism

TO THE EDITORS:

In “Barak’s Rule” (AZURE 27, Winter 2007), there is a point that Robert Bork does not raise regarding judges—or, dare I say, philosopher kings—legislating from the bench. Yes, the judicial usurpation of power is anti-constitutional and anti-democratic, and, hence, lawless. But the legislators are not innocent victims in all of this. Too often, a good segment of the legislators actually *want* the actions that the court decrees, but are deathly afraid to vote for them, for fear of a voter backlash.

In actuality, then, the people’s representatives are complicit in this judicial tyranny. They may sit back and complain about the court’s overreach to their constituents, but this is just a fig leaf. For in fact, the legislators have yet to use any of a number of powers at their disposal to lasso the courts back to constitutional reality. In the United States, these powers include impeaching judges through a simple majority of the legislature; cutting court budgets; reorganizing judicial districts and/or creating new ones; and removing specific matters from the court’s jurisdiction.

The bottom line is that many legislators are part of the “elite” of which Bork speaks, and do their part to see that small technical matters, such as the will of the people, do not get in the way of their desired policy outcomes. If this state of affairs is not defused by judges who recognize the limited jurisdiction of their role in society—namely, interpreting the law written by the legislators—the democratic character of both the United States and Israel will be destroyed.

Peter Skurkiss

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ROBERT H. BORK RESPONDS:

Peter Skurkiss is quite right that legislators are complicit in the outrageously political behavior of the American judiciary, in particular the Supreme Court, which steadily diminishes self-government and continues to press our culture to the left. The cure is not as easy as Skurkiss believes, however, for two reasons. The first is that the court’s adventures in anti-constitutional policymaking are supported by substantial and powerful segments of the public, because the court has made itself a prized weapon in our culture wars. It

is not the case that the court's activism is opposed by the entire public. Arrayed against the reforms Skurkiss seeks are the leading organizations of the intellectual Left and the cultural elite. The second reason for a degree of pessimism about the prospect for reform is that the tactics Skurkiss recommends would not work even if non-complicit legislators dominated Congress.

Because the court is now obviously a political institution, activist groups fight to control it, primarily by controlling appointments. The stakes are high for the court as it is the only political branch of government that not only claims, but is accorded, finality. Thus, it takes a practiced eye to distinguish a rough-and-tumble battle for elective office from a judicial confirmation proceeding. Public discussion in the one as in the other proceeds by the bandying of slogans, often features personal smears, and emphasizes predictions of the nominee's likely votes. Very little attention is paid to the nominee's conception of the proper role of the judge in a democracy. The public does not demand such a discussion and, on the evidence of past elections, would not respond to one even if it were offered. Skurkiss must accept the dispiriting conclusion that the electorate is as complicit in our arrival at the present state of affairs as are its elected representatives.

There is a related reason why Skurkiss' recommended tactics cannot achieve a general reform of an illegitimate judicial process. Consider the number and range of the issues that disturb people like Skurkiss (and me). To achieve a general reform, the legislature would have to take up each of these subjects separately. Undoing the court's damage would entail an almost endless series of intense battles. No legislative majority could conceivably hold together long enough to fight even a fraction of these issues to victory.

Skurkiss concludes with a bleak prediction, but one, I fear, that is not bleak enough. He writes that if the situation he describes is not defused by judges, it will surely explode. I am afraid not. We have been living with what Skurkiss aptly terms "judicial tyranny" for over half a century, and so far there are no signs of an explosion. Nor is it clear what an explosion would entail. Surely Skurkiss does not envisage armed struggle.

The more likely prospect is that we will continue to defer to the unconstitutional diktats of the courts on social and cultural matters, and so will come to resemble sheep who are no longer allowed to make important moral choices for ourselves as we passively acquiesce to our diminished status.

This is not to say that the situation is hopeless, but recovery will require

political victories that enable presidents to nominate and the Senate to confirm men and women who take their guidance from the principles of the historic Constitution. So far, through a long list of Republican appointees to the court, that strategy has not worked. Perhaps it will never work, but it seems the only solution open to us.

Historical Land Rights

TO THE EDITORS:

In note 7 of his essay, "Is There a Historical Right to the Land of Israel?" (AZURE 27, Winter 27), Chaim Gans characterizes as "notorious" and "misleading" Israel Zangwill's 1901 description of Palestine as "a land without a nation which should therefore be given to a nation without a land." However, whether or not such a designation and proposition is, in fact, "notorious" or "misleading," Gans should know that Zangwill's remark was by no means outlandish, or even original, in its day: Half a century earlier, in 1853, the British social reformer Lord Shaftesbury, in reference to Palestine and the Jews, had proposed, in almost precisely the same language, "a land without a people for a people without a land."

This not-uncommon sentiment had gained considerable purchase by the end of the nineteenth century, not only because the land was overwhelmingly desolate, virtually unpopulated, and largely uncultivated. It was also because, notwithstanding the strenuous assertions and wishful thinking of people like George Antonious (who had personal difficulties distinguishing the modest *literary* "awakening" localized in Beirut, and dominated by Lebanese Christians, from anything even approaching the foundations of a national political movement at the time), there was no "national feeling," to use T.E. Lawrence's recurrent locution, among the Arabs in general, let alone among the local ones in the Palestine region during the period, as Albert Hourani, Philip K. Hitti, and Bernard Lewis, among others, attest.

Had there, in fact, existed any such "national feeling" within the Arab world at the time, then Lawrence's call for a "Great Arab Revolt" against the Ottoman Empire would have been answered by more than just the Hashemites, instead of being drowned out by the overwhelming support given by the Arabs to the Sublime Porte, as evidenced by—among other things—the three to four hundred thousand troops the Arabs contributed for their Turkish overlords in the Great War.

In light of such inescapable and well-documented realities, one is obliged to ask, “A land without a nation for a nation without a land”—notorious? Misleading? Really?

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War of Fog

TO THE EDITORS:

In “The War of Fog” (AZURE 26, Autumn 2006), David Hazony asserts that there was more “good news” to emerge from Israel’s war with Hezbollah than bad.

I, for one, fail to see how Israel can be said to have won its war with Hezbollah when Hazony himself concedes that Israel achieved “none of the objectives” it declared at the war’s outset. Moreover, even the areas in which Hazony rightly finds that Israel did well—weakening Hezbollah and its standing in the country, debunking the wisdom of unilateral disengagement, identifying Iran as the unmistakable regional menace, and demonstrating the resolve of the Israeli people—none of these, even when combined, amounts to victory in the immediate sense of the term.

Israel, it goes without saying, could have gained much by delivering a fatal military and, in turn, political blow to Hezbollah. With the benefit of six months’ hindsight, neither of the two has actually happened. Media reports now suggest that Hezbollah is as, or more, equipped today than it was before the war. This is because Iran and Syria have continued to arm Hezbollah, undaunted by yet another feckless United Nations Security Council resolution for stabilizing Southern Lebanon. Hezbollah has also demonstrated a newfound ability to manipulate the Lebanese government, its ministers quitting the cabinet the moment it suits them. At present, Hezbollah’s military and political health are so vibrant that the United States has been forced to bolster, or better, rescue Prime Minister Fouad Siniora with a \$770 million military aid package.

This is all of secondary concern to the war’s long-term implications, which, as Hazony recognizes, are of greater consequence. To my mind, these outweigh any short-term tactical successes that the Israel Defense Forces did or did not have.

Now in doubt, as Hazony points out, is Israel’s status as a strategic United States ally, as well as Israel’s deterrence factor. Indeed, the Bush administration must privately be stewing and fretting over the IDF’s

failure to deal Iran's front-line proxy a crippling blow. Yet this is more than an academic point. Why? Because if the United States, or Israel for that matter, believes that only a military strike can prevent Iran from acquiring nuclear weapons, either country might ultimately refrain from such a strike given the probability of renewed Hezbollah attacks against Israeli population centers—which Israel will apparently not devote the manpower to stopping.

Israel's unfulfilled declarations in 2006 have surely hastened the likelihood of another round of fighting in Lebanon. If the mood in Israel now smacks of the initial disaster of the 1973 Yom Kippur War, as Hazony notes, one can only hope that history serves as a lesson to teach the IDF the dangers of arrogance and unpreparedness.

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