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## The Education of Robert Bork

Robert C Power, *Widener University - Harrisburg Campus*



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# THE EDUCATION OF ROBERT BORK

*by Robert C. Power\**

The most momentous event in recent years concerning the Constitution was neither a landmark Supreme Court decision nor the 1987 bicentennial. It was instead the three-act improvisatory drama surrounding the replacement of Justice Lewis F. Powell, Jr., on the Supreme Court. This article examines the first act of that play, the Senate's consideration of President Reagan's nomination of Robert H. Bork as an Associate Justice.<sup>1</sup> The nomination provoked a storm of demagoguery, political gamesmanship, and "legal theory" dishonesty, a highly specialized form of general intellectual dishonesty. The Senate's consideration of the nomination suggests, however, that the constitutional design works when tested and that the President and the Senate can work together to ensure that the Supreme Court consists of justices that deserve the confidence of the people.

The Weicker Collection at the University of Bridgeport School of Law contains the hearings and reports of the Senate Judiciary Committee and the materials submitted to Senator Lowell P. Weicker, Jr., relating to the Bork nomination.<sup>2</sup> These materials constitute a uniquely rich source of contemporary attitudes on the Supreme Court, the appointment process, and the Constitution. Richness does not mean purity; a comparison of

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\* Associate Professor, University of Bridgeport School of Law; J.D., Northwestern University School of Law; A.B., Brown University

1. The second act was the short and farcical nomination of Douglas H. Ginsburg, which was withdrawn largely in response to revelations of his marijuana use. The third act was the successful nomination of Anthony M. Kennedy.

2. *The Record on Robert Bork*, which follows this essay, describes each of the documents in the Weicker Collection. References to documents in the collection are cited as *Record*, Doc.—, with further description where appropriate. The University of Bridgeport community wishes to thank Senator Weicker and David C. Stenbrecher, class of 1986, for donating the materials to the law school. Professor Power also wishes to thank Anita Visentin for her assistance in analyzing the documents in the Weicker Collection.

documents in the Collection suggests that participants on both sides learned their law school lessons in "zealous advocacy" too well. Nevertheless, the conviction and belief reflected in these materials constitute compelling evidence of the importance of the Court and the Constitution today.

The Senate did not consent to the Bork nomination. This article does not address whether this decision was right or wrong but instead traces the process in an attempt to identify its lessons. There are several, and even Robert Bork should be pleased with some of them.

### I. THE EARLY STAGES

Justice Powell announced his retirement on June 26, 1987, setting off a tremendous amount of attention in the press and general sadness at his departure. A quiet, self-effacing gentleman, Justice Powell appeared to be surprised and touched by the affection and attention. While the affection was genuine, based on the respect of the legal profession and the public for this kind and fair man, much of the attention seemed to be based on Justice Powell's role on the Court. His was often a "swing vote," critical to a particular outcome or constitutional interpretation. Justice Powell was known to disagree with this characterization, noting that he was only one of five votes in any majority, but Court-followers knew better. He was often the most moderate member of a majority, holding the Court to a compromise position that accommodated principles urged by both sides of a dispute.<sup>3</sup> Powell was thus perceived by the press, and therefore by the public, as a modern day Henry Clay. However distorted, this perception became important when President Reagan named Robert Bork, then a judge on the United States Court of Appeals for the District of Columbia Circuit, as Powell's successor. No one ever mistook Robert Bork for a

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3. The best-known example of Justice Powell's role in forging compromise constitutional law is *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). Justice Powell joined no other justices but announced the judgment of the Court and wrote an opinion that represented a majority of the Court approving of race-conscious affirmative action and a different majority of the Court disapproving use of racial quotas. *Id.* at 269-320. A number of documents in the Weicker Collection note Justice Powell's unique role on the Court. *E.g.*, The Judicial Record of Judge Robert H. Bork, *Record*, Doc. 7, at 1; Judiciary Committee Consultants' Report, *Record*, Doc. 8, at 11-12; Two Hundred Years, An Issue, *Record*, Doc. 9, at 82.

compromiser.

The White House and the Justice Department, the key players in pressing the Senate to confirm the nomination, did their best to portray Bork as a judge in the Powell tradition. Two sets of documents submitted early in the process, *Materials on Judge Robert H. Bork*,<sup>4</sup> by the Justice Department, and a collection of papers from the White House,<sup>5</sup> stress Bork's qualifications for the Court and suggest, not entirely obliquely, that he would maintain the balance on the Supreme Court. This two-pronged approach would continue throughout the consideration of the Bork nomination.<sup>6</sup> It would ultimately fail, not because anyone challenged Bork's intellectual qualifications, but because everyone knew he was not another Justice Powell.

Nevertheless, the administration's opening gambit seemed well-advised. The Constitution's language concerning the selection of Supreme Court justices is unusually spare; article II, section 2, clause 2 simply states that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the Supreme Court. . . ." This ambiguous description of the Senate's role has often resulted in a hasty and non-partisan review of intellectual and moral qualifications. This historical experience has sometimes led to the notion that the Senate should not weigh the nominee's views on constitutional or other legal issues, but should instead merely inquire into the nominee's ability and character. Apparently supporting this notion, one year previously Senate Judiciary Committee Chairman Joseph Biden suggested that he would support a respectable conservative such as Judge Bork.<sup>7</sup> Accordingly, the Reagan administration seemed to expect that the Bork nomination would receive prompt, favorable consideration in the Senate.

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4. *Record*, Doc. 3.

5. *Record*, Doc. 4.

6. See, e.g., A Response to the Critics of Judge Robert H. Bork, *Record*, Doc. 17, at 3-37 (section entitled "The Real Robert H. Bork," which emphasizes the extent to which his judicial decisions are consistent with those of more liberal Justices and Justices Powell and Scalia); In Support of Bork, *Record*, Doc. 18 (outlining Judge Bork's "outstanding" qualifications and arguing that his views are moderate); Minority Views section, *Record*, Doc. 25, at 217-22 (stressing testimony by Bork's opponents as well as his supporters with regard to his exceptional qualifications).

7. See Greenhouse, *Ideology as Court Issue*, N.Y. Times, July 3, 1987, at A9, col. 6 (reporting a Biden statement from 1986).

But the Senate has not always been so obedient, and this time that body would undertake an active and critical examination of the nominee and his ideology. An indication of the Senate's resolve is a July 23, 1987, speech by Senator Biden that indicated he had reconsidered his automatic support of a Bork nomination.<sup>8</sup> Senator Biden announced that the Senate had the responsibility to consider the nominee's judicial philosophy and opinions on specific issues; the obvious implication was that Judge Bork's views were suspect.

## II. OPPOSING VOICES

More direct criticism soon emerged. Perhaps the best-known attack on Judge Bork was Senator Edward Kennedy's stark vision of a Borkean society:

Robert Bork's America is a land 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, schoolchildren could not be taught about evolution, writers and artists would be censored at the whim [of] government, and the doors of the Federal courts would be shut on the fingers of millions of citizens for whom the judiciary is often the only protector of the individual rights that are the heart of our democracy.<sup>9</sup>

This statement was at best oversimplification, at worst demagoguery. To take just two examples, there was no reason to be-

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8. *Advise and Consent: The Right and Duty of the Senate to Protect the Integrity of the Supreme Court*, *Record*, Doc. 5. Numerous authorities support an aggressive advice and consent role for the Senate. Four of the contributors to the Harvard Law Review's April 1988 Essays on the Appointment Process called for careful Senate review of nominees, although their visions of the perfect process differed in important respects. See Ackerman, *Transformative Appointments*, 101 HARV. L. REV. 1164, 1177-79 (1988); Carter, *The Confirmation Mess*, 101 HARV. L. REV. 1185, 1196-1201 (1988); Monaghan, *The Confirmation Process: Law or Politics?*, 101 HARV. L. REV. 1202, 1205-10 (1988); Totenberg, *The Confirmation Process and the Public: To Know or Not to Know*, 101 HARV. L. REV. 1213, 1213-18 (1988). A variety of submissions to the Senate stressed this theme as well. *E.g.*, Two Hundred Years, An Issue: Ideology in the Nomination and Confirmation Process of Justices to the Supreme Court of the United States, *Record*, Doc. 9; Judiciary Committee Consultants' Report, Response Prepared to White House Analysis of Judge Bork's Record, *Record*, Doc. 8, at 10-11; Why the United States Senate Should Not Consent to the Nomination of Judge Robert H. Bork to be a Justice of the Supreme Court, *Record*, Doc. 14, at 3-5. See also *infra* note 23 and accompanying text regarding the need for careful Senate review of nominees.

9. 133 CONG. REC. S9188 (daily ed. July 1, 1987).

lieve that Bork would countenance outrageous police tactics and there was nothing in his past to suggest that he favored recriminalizing abortion, although he did seem to favor leaving such decisions to legislative bodies.<sup>10</sup> But if Kennedy's speech lowered the plane of discussion in that sense, it raised it in another sense by forcing the Senate to confront Bork's views on the Constitution. Judge Bork and his supporters had to respond to these attacks and their responses effectively ratified the legitimacy of the Senate's consideration of Bork's philosophy and opinions on specific matters.<sup>11</sup>

If Senators Biden and Kennedy provided the "inside" leadership of the "Stop Bork" movement, the NAACP and People for the American Way provided its "outside" leadership. The NAACP submitted several documents during the Senate's consideration of the Bork nomination. One, *Two Hundred Years, An Issue: Ideology in the Nomination and Confirmation Process of Justices to the Supreme Court of the United States*,<sup>12</sup> was prepared by Professor Olive Taylor of Howard University. It analyzed the history and importance of the Senate's consideration of a nominee's legal views. A second document, *Judge Bork's Views Regarding Supreme Court Constitutional Prece-*

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10. Bork never wrote in the area of criminal law, and Senator Kennedy's reference is therefore perplexing. It may have been in response to administration efforts to portray Bork as a "law and order" judge. See, e.g., White House Package, White House Issue Brief, *Record*, Doc. 4, at 10; *id.*, Speech to National Law Enforcement Council, at 3-4. One anti-Bork submission, *The Judicial Record of Judge Robert H. Bork*, contained a section that argued that Judge Bork was pro-prosecution. *Record*, Doc. 7, at 76-80. The record reveals, however, that Bork's votes were almost always consistent with those of his judicial colleagues. *Id.*

Judge Bork's views on abortion were addressed at length in submissions to the Senate and in his testimony before the Judiciary Committee. See *infra* notes 58-61 and 109-111 and accompanying text regarding Bork's views on abortion.

11. Senator Patrick Leahy, a member of the Senate Judiciary Committee, wrote a retrospective on the consideration of the Bork, Ginsburg, and Kennedy nominations. In it he indicated that at first he was displeased that some senators decided against the Bork nomination before there was an opportunity to consider the record. He later changed his mind, however, stating: "Later, I will recognize Kennedy's early announcement as courageous. He draws the right-wing fire while alerting the legal community that some will be willing to stand up against the nomination no matter what the political fallout." Leahy, *Judgment Days*, *THE WASHINGTONIAN*, April 1988, at 97. But see Friedman, *Balance Favoring Restraint*, 9 *CARDOZO L. REV.* 15, 19 (1987) ("Remarks . . . [such as Kennedy's] are not calculated to lead to a temperate discussion of the issues. They are likely to lead the public to regard the issues before the Court as identical to those before the political branches.")

12. *Record*, Doc. 9.

dents,<sup>13</sup> submitted by the NAACP and People for the American Way, specifically challenged Bork's willingness to uphold key Supreme Court decisions in a variety of areas. Setting the tone for other commentators and for the confirmation hearing themselves, this document employed Bork's often hostile language to suggest his strong desire to overturn such decisions. This one-two punch of scholarly analysis followed by sharp ideological argument served as a pincer movement as effective as the Biden-Kennedy tag team in the Senate.

The NAACP and People for the American Way submissions alone would not have forced wavering senators to take a hard look at Judge Bork's views. A variety of other public interest groups chose to participate, however, and the submissions had a cumulative effect on the process. The Public Citizen Litigation Group,<sup>14</sup> the American Civil Liberties Union,<sup>15</sup> the Nation Institute,<sup>16</sup> the National Abortion Rights Action League,<sup>17</sup> Common Cause,<sup>18</sup> and the Natural Resources Defense Council<sup>19</sup> all submitted pre-hearing reports calling for Senate rejection of the nomination. These groups stressed several themes: Bork's radical view of the Constitution; his willingness to overturn well-established precedents; and his result-orientation as an appeals judge. These themes turned the Senate's attention to three more general topics: the nature of Bork's philosophy of law, his views on certain constitutional issues, and his "objectivity." The last seemed almost a code word for veracity, raising a concern that surfaced again in the controversy over Bork's so-called "confirmation conversion."<sup>20</sup>

A number of law professors entered the fray as well. Any expectation that legal scholars of varying ideological colors would support the elevation of one of their own kind to the

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13. *Record*, Doc. 10.

14. The Judicial Record of Judge Robert H. Bork, *Record*, Doc. 7.

15. Briefing Book on the Confirmation of Judge Robert H. Bork to the United States Supreme Court, *Record*, Doc. 11.

16. The Bork Report, *Record*, Doc. 12.

17. The Opposition to Bork: The Case for Women's Liberty, *Record*, Doc. 13.

18. Why the United States Senate Should Not Consent to the Nomination of Judge Robert H. Bork to be a Justice of the Supreme Court, *Record*, Doc. 14.

19. Opposition to Judge Robert H. Bork's Nomination to [the] Supreme Court, *Record*, Doc. 16.

20. See *infra* notes 104-114, 133 and accompanying text for further discussion of the "confirmation conversion" controversy.

Court—by no means a common occurrence<sup>21</sup>—were soon dashed. While many participated and a fair number supported confirmation,<sup>22</sup> the loudest voices came from opponents, and the voices presented strong arguments. One opposition leader was Laurence Tribe, whose *God Save this Honorable Court*<sup>23</sup> presented the theoretical justification for close Senate scrutiny of the legal philosophy of Supreme Court nominees. Perhaps the most significant law school opponent was Professor Philip Kurland of the University of Chicago Law School. Kurland is no traditional liberal, and as a law professor at Chicago—not only Bork's own law school but the spiritual home of conservative law professors—Kurland's crisp and sharp challenge to the nomination epitomized the extent of the opposition and the depth of its commitment. Professor Kurland's views coincided with those expressed by the public interest groups: Bork was a legal radical posing as a constitutional moderate, and his exceptionally narrow view of the Constitution would translate into a substantial diminution of judicially enforceable rights and freedoms.<sup>24</sup>

While all of these efforts were directed primarily at the Senate, a separate lobbying campaign was directed at the public. A number of advocates and opponents sought to inform the public

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21. Justice Scalia was the first professor named to the Court since Felix Frankfurter in 1939.

22. A number of law professors participated in submissions from public interest groups. *E.g.*, The Bork Report, *Record*, Doc. 12 (Prof. Stephen Gillers of New York University Law School); Why the United States Senate Should Not Consent, *Record*, Doc. 14 (Prof. Philip Heymann of Harvard Law School). Numerous law professors testified at the hearings as well. While it is not easy to categorize all such witnesses as either pro- or anti-Bork, it breaks down roughly as 23 law professors testifying for Bork and 18 law professors testifying against him. The "Great Law Professor Letter Writing Campaign" suggested a different gross preference, however, as Bork's opponents submitted for the Judiciary Committee's record letters from roughly 2,000 anti-Bork law professors and deans. See Hearings, *Record*, Doc. 19, vol. 2, at 1240-44 and vol. 3, at 1900, 1905-62.

23. L. TRIBE, *GOD SAVE THIS HONORABLE COURT* (1985). Professor Tribe's book emphasizes the importance of individual Supreme Court Justices (ch. 2), the benefits of a balanced Court (ch. 6), and the need for the Senate to take its responsibilities in the confirmation process seriously (ch. 8). Professor Tribe testified against the nomination. Hearings, *Record*, Doc. 19, vol. 2, at 4-80.

24. Kurland, *Bork: The Transformation of a Conservative Constitutionalist*, Chicago Tribune, August 18, 1987; see ACLU Briefing Book, *Record*, Doc. 11, tab N, reprinted at 9 CARDOZO L. REV. 127 (1987). Professor Kurland also participated in the confirmation process by writing letters to newspaper editors warning of the Reagan administration's packaging of Bork as a moderate, *e.g.*, Blue Binder, *Record*, Doc. 2, tab 19, and by testifying before the Judiciary Committee, Hearings, *Record*, Doc. 19, vol. 3, at 1384-1415.



of the merits of the Bork nomination through routine press accounts and interviews, but the centerpiece of the public campaign was People for the American Way's television spots and newspaper ads.<sup>25</sup> In its most controversial action, the organization put Gregory Peck on national television to recite the dangers of Robert Bork.<sup>26</sup> While this was perhaps a fair rejoinder to the equally conclusory support of the nomination in President Reagan's televised statements, the content of the anti-Bork public relations campaign was grossly oversimplified. Few citizens would devote the hours to reading and discussion that a fair treatment of the issues required. But the senators could explore the issues fully, and this hardball advertising campaign prompted the public to demand that the senators take their responsibility seriously.<sup>27</sup>

The hydra-headed opposition to the Bork nomination prior to the hearings served its purpose. It motivated the Senate to make a searching inquiry and provided the constitutional and political justifications for voting against the nomination. The supporters of Judge Bork, still largely anticipating the traditional superficial grilling about the nominee's qualifications and largely bipartisan support at the confirmation vote, were caught flat-footed.<sup>28</sup> The opponents therefore created the agenda for the

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25. The Committee for a Fair Confirmation Process criticized the advertising campaign in its post-Senate vote report, *Record*, Doc. 29. Included in its submission are a brief memo outlining the errors of the anti-Bork campaign (tab 14), several examples of the campaign's print advertising (tab 15), and a transcript of the Peck television spot (tab 16).

26. Reporter Nina Totenberg's view is that the controversy surrounding the Peck ad was more significant to the confirmation process than the ad itself. Totenberg, *supra* note 9, at 1221-22. She admits that television might have had an impact on the process, however, noting that "[i]f Robert Bork had looked like Cary Grant, perhaps the public would have responded less harshly, perhaps not." *Id.* at 1221. Treating Supreme Court nominees like vegomatics and making them the butt of jokes on Saturday Night Live is new and perhaps distasteful to the judiciary. Society has done this to the rest of government for some time, however, and maybe the Court is just now becoming a coequal branch.

27. Some of the public expressions on the issue provided comic relief. Senator Leahy noted the views of one constituent concerning the nomination of "Bjorn Bork." Leahy, *supra* note 11, at 110.

28. There were a number of responses by groups favoring the nomination. *E.g.*, A Response to the Critics of Judge Robert H. Bork, *Record*, Doc. 17; In Support of Bork, *Record*, Doc. 18. It was too late, however, to change the direction of the proceedings. After the hearings there was a second round of submissions. Once again, the opponents were more prolific. Compare *Record*, Docs. 20-23, 26-28 (anti-Bork) with *Record*, Doc.

confirmation process.

### III. STRAW MEN AND OTHER PERSONS

The Bork nomination forced the Senate to confront several issues that it usually—happily—leaves to the courts. While this Article cannot address these issues in any depth, a brief summary of existing legal doctrine and Bork's previously stated views aids in understanding the potential significance of his appointment and the controversy over his nomination. Four issues stand out: civil rights, equal rights for women, privacy or autonomy rights, and the role of the Supreme Court and its Justices.<sup>29</sup> A related side issue concerned Bork's 1973 dismissal of Watergate Special Prosecutor Archibald Cox while Bork was serving as Acting Attorney General.

Robert Bork's philosophy of judging—his attitudes toward constitutional adjudication and precedent—would seem to be the logical first topic for this section. It is necessary to describe his views on civil rights, women's rights, and privacy first, however, because it is impossible to appreciate the impact of his views on the role of the Court and its justices without a general familiarity with his views on these controversial issues.

#### A. *Civil Rights*

The civil rights community was almost unanimous in opposing the Bork nomination, a fact that necessarily weighed heavily in the Senate. The opposition appears to have been premised on Bork's once outspoken criticism of what became the public ac-

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24, 29 (pro-Bork).

29. Some issues were raised early in the confirmation process but finalized into relatively empty rhetoric by its end. The first amendment provides a good example. A number of submissions contained references to first amendment issues. *E.g.*, ACLU Briefing Book, *Record*, Doc. 11, tab E; The Bork Report, *Record*, Doc. 12, at 1-14. One reason may be that the title of Bork's 1971 Indiana Law Journal piece, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971), suggests that it emphasized first amendment issues. The first amendment was not a major topic in that article, however, and in the end did not seem to be a major issue in the confirmation process. The majority on the Judiciary Committee discussed some of Bork's first amendment views. Report, *Record*, Doc. 25, at 50-57. Senator Spector emphasized first amendment concerns in explaining his vote against confirmation. *Id.* at pp. 213-14. But this seemed to be the weakest of the areas of concern. Most senators and observers appear to have concluded that their first amendment concerns about the nomination were relatively unimportant, at least in comparison to other issues.

commodations provisions of the 1964 Civil Rights Act.<sup>30</sup> Rejecting the notion that businesses should be required to deal with customers even if they preferred not to because of the customers' race or national origin, Bork wrote:

The principle of such legislation is that if I find your behavior ugly by my standards, moral or aesthetic, and if you prove stubborn about adopting my view of the situation, I am justified in having the state coerce you into more righteous paths. That is itself a principle of unsurpassed ugliness.<sup>31</sup>

Although these knee-jerk libertarian views were commonplace in the early 1960s and Bork retracted them in 1973,<sup>32</sup> they set the tone for the examination of his views on civil rights. A subsequent career that demonstrated a dedication to civil rights might have outweighed his earlier comments, but Bork's actions and writings over the years evidence no real change of heart.

Bork's comments on three major Supreme Court civil rights decisions provided substantial support for his opponents. In *Shelley v. Kraemer*,<sup>33</sup> the Supreme Court held that the fourteenth amendment prevents judicial enforcement of covenants forbidding the sale of real property to persons because of their race.<sup>34</sup> In an article in the *Indiana Law Journal* entitled *Neutral Principles and Some First Amendment Problems*,<sup>35</sup> Bork wrote that the decision was unsupportable as it transformed the fourteenth amendment from a protection against "governmental discrimination into a sweeping prohibition of private discrimination."<sup>36</sup> Bork also criticized *Katzenbach v. Morgan*,<sup>37</sup> which up-

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30. Civil Rights Act of 1964, Pub. L. No. 88-352, Title II, §§ 201-07, 78 Stat. 241, 243-45 (1964).

31. Bork, *Civil Rights—A Challenge*, NEW REPUBLIC, Aug. 31, 1963, 21, 22, reprinted in Blue Binder, Record, Doc. 2, tab 2.

32. This occurred in Bork's 1973 confirmation hearings as Solicitor General. See *Nominations of Joseph T. Sneed to be Deputy Attorney General and Robert H. Bork to be Solicitor General, Hearings before the Senate Comm. on the Judiciary*, 93rd Cong., 1st Sess. 14-15 (1973). In the 1987 hearings, Bork again retracted his criticism of the 1964 Act, noting that he had always believed racial discrimination to be exceptionally ugly and had concluded that the 1964 Act did more good than harm on balance. See *Hearings, Record*, Doc. 19, at 126-28.

33. 334 U.S. 1 (1948).

34. *Id.* at 18-23.

35. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971), reprinted in ACLU Briefing Book, Record, Doc. 11, tab W.

36. *Id.* at 15-16. Submissions critical of Bork on this point include Talking Points,

held the authority of Congress to enforce the fourteenth amendment by eliminating English literacy requirements for voting. He believed that the decision was another example of legislative overreaching and judicial abdication, which together threatened to turn the fourteenth amendment into a national police power of Congress.<sup>38</sup> To Bork, this was "very bad, indeed pernicious, constitutional law."<sup>39</sup> A final target of Bork's wrath was the compromise result in *Regents of the University of California v. Bakke*,<sup>40</sup> a matter of great interest during the confirmation process because Justice Powell's opinion had forged the compromise.<sup>41</sup> In an article entitled *The Unpersuasive Bakke Decision*,<sup>42</sup> Bork described *Bakke* as unjustified under any theory of constitutional law. All in all, these views, often expressed in crisp and memorable language, could only reinforce suspicions that a Justice Bork would be instrumental in tearing down some of the most important statutory and constitutional safeguards of hard-won civil rights.<sup>43</sup>

### B. *Equal Rights for Women*

The issue of equal rights for women was another substantive matter of overriding importance during the confirmation process. Here, somewhat ironically, the controversy centered on Bork's previously expressed view that the fourteenth amend-

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*Record*, Doc. 6, at 1; Judge Bork's Views Regarding Supreme Court Constitutional Precedents, *Record*, Doc. 10, at 103-04; The Bork Report, *Record*, Doc. 12, at xii-xiv.

37. 384 U.S. 641 (1966).

38. R. Bork, *Constitutionality of the President's Busing Proposals*, American Enterprise Institute, at 10 (1972), quoted in Judge Bork's Views Regarding Supreme Court Constitutional Precedents, *Record*, Doc. 10, at 106.

39. *Hearings on Human Life Bill before the Subcomm. on Separation of Powers of the Senate Judiciary Comm.*, 97th Cong., 1st Sess. 313-14 (1981), reprinted in *The Opposition to Bork: The Case of Women's Liberty*, *Record*, Doc. 13, tab 8. See also Judge Bork's Views Regarding Supreme Court Constitutional Precedents, *Record*, Doc. 10, at 104-09.

40. 438 U.S. 265 (1978).

41. See *supra* note 3.

42. *Wall Street Journal*, July 21, 1978, reprinted in *Blue Binder*, *Record*, Doc. 2, tab 4.

43. This can be seen in the emphasis on Bork's decisions as a court of appeals judge. See *The Judicial Record of Judge Robert H. Bork*, *Record*, Doc. 7; *Response Prepared to White House Analysis of Judge Bork's Record*, *Record*, Doc. 8; *The Bork Report*, *Record*, Doc. 12; *Opposition to Judge Robert H. Bork's Nomination to the Supreme Court*, *Record*, Doc. 16; *Judge Bork's Civil Rights Record on the Court of Appeals*, *Record*, Doc. 21.

ment's equal protection clause protects racial and ethnic minorities only. In his *Indiana Law Journal* article, Bork stated:

The equal protection clause . . . does require that government not discriminate along racial lines. But much more than that cannot properly be read into the clause. The bare concept of equality provides no guide for courts. All law discriminates and thereby creates inequality. The Supreme Court has no principled way of saying which non-racial inequalities are impermissible.<sup>44</sup>

When Bork wrote these words, the Supreme Court had not yet clarified its position on the nature of the equal protection clause's application to gender discrimination. Since that time, however, the Court has developed an analytical structure that invalidates such discrimination unless it "serve[s] important governmental objectives and . . . the discriminatory means employed [are] substantially related to the achievement of those objectives."<sup>45</sup> Judge Bork nevertheless continued to revile this expanded understanding of equal protection long after the Court adopted this approach. In his view, it added "current fads in sentimentality"<sup>46</sup> to the Constitution and allowed judges to "[pick] out groups which current morality of a particular social class regards as groups that should not have any disabilities laid upon them."<sup>47</sup> His point was that judges view such matters through the limited prism of the elite upper class and that legislative value choices resulting in inequality are entitled to deference from the courts. However supportable in abstract constitutional theory, to observers concerned with protection from the outmoded stereotypes and invidious discriminations perpetuated by many legislative bodies, Bork's reliance on democratic principles provided only cold comfort.

Those who were suspicious of Bork's views on equal protection for women saw a particular danger signal in a case concern-

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44. Bork, *supra* note 35, at 11.

45. *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 150 (1980).

46. Speech at Catholic University, Mar. 31, 1982, pp. 18-19, criticized in Judge Bork's Views Regarding Supreme Court Constitutional Precedents, *Record*, Doc. 10, at 114.

47. "Federalism and Gentrification," Speech before the Federalist Society at Yale University, Apr. 24, 1982, part 2 (Q & A), at 9, *reprinted in* The Opposition to Bork: The Case for Women's Liberty, *Record*, Doc. 13, tab 9. For criticisms, see Judge Bork's Views Regarding Supreme Court Constitutional Precedents, *Record*, Doc. 10, at 114-17; Bork v. Bork, *Record*, Doc. 20, at 22-24.

ing sexual harassment. As a court of appeals judge, Bork wrote a dissenting opinion in *Vinson v. Taylor*,<sup>48</sup> in which he urged an exceptionally narrow interpretation of the employment discrimination provisions of the Civil Rights Act.<sup>49</sup> The Supreme Court unanimously upheld *Vinson*, in an opinion by then Justice Rehnquist, refuting Bork's views on virtually every disputed point.<sup>50</sup> With Robert Bork demanding legislative control of equal protection and at the same time narrowly construing legislative attempts to remedy sex discrimination, the intense concern about his views on these issues during the confirmation process can come as no surprise.

### C. *Privacy*

There was also a great deal of interest in Judge Bork's views concerning the right of privacy or personal autonomy. Recognition of such a right, not expressly stated in the Constitution, dates from the Supreme Court's 1965 decision in *Griswold v. Connecticut*.<sup>51</sup> Although the right was never clearly defined and different justices anchored it in various provisions of the Constitution, the Court relied on the right of privacy in striking down a Connecticut statute that prohibited all couples from using birth control devices.<sup>52</sup> A confirmed "interpretivist,"<sup>53</sup> Bork has

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48. 760 F.2d 1330 (D.C. Cir. 1985) (denial of rehearing *en banc*), *aff'd sub nom.* Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986).

49. Civil Rights Act of 1964, Pub. L. No. 88-352, Title VII, §§ 701-16, 78 Stat. 241, 302-17 (1964), *as amended by* the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103, 103-13 (1972).

50. Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986); *see generally* The Bork Report, *Record*, Doc. 12, at 19-22; The Judicial Record of Judge Robert H. Bork, *Record*, Doc. 7, at 45-47.

51. 381 U.S. 479 (1965).

52. 381 U.S. at 485. Justice Douglas authored the majority opinion, which concluded that the Connecticut statute violated a constitutional right of privacy that falls within the penumbras of several enumerated rights. *Id.* at 482-86. Justice Goldberg concurred based on the ninth amendment's recognition of unenumerated rights. *Id.* at 486-93, 499. Justice Harlan concurred as well, finding that the law "violate[d] basic values 'implicit in the concept of ordered liberty,'" *quoting from* Palko v. Connecticut, 302 U.S. 319, 325 (1937). *Id.* at 500. Finally, Justice White concurred, concluding that the statute deprived Connecticut residents of liberty without due process of law. *Id.* at 502-03. Justices Black and Stewart dissented. *Id.* at 507-31.

53. The notion that judges may enforce only those values stated or reasonably implied in the Constitution is a central aspect of interpretivism. As such, interpretivism is an umbrella category that includes the doctrine of original intent, also followed by Judge Bork. *See infra* notes 64-65 and 93 and accompanying text for further discussion of views

opposed the judicial recognition of such rights because they lack support in the text of the Constitution. Accordingly, he challenged *Griswold* and its analysis as "utterly specious," "unprincipled," and "improper doctrine."<sup>54</sup>

Judge Bork's opposition to the right of privacy extended well beyond the birth control context. He also challenged well-established decisions such as *Meyer v. Nebraska*,<sup>55</sup> which struck down a statute requiring that all school subjects be taught in English, and *Skinner v. Oklahoma*,<sup>56</sup> which invalidated a statute requiring that certain classes of criminals be sterilized. In both cases, as in *Griswold* and in the area of sex discrimination, Bork viewed the problem as one of competing values and asserted that the courts should overrule legislative value choices only in the most extreme cases. There was a clear "chip on the shoulder" tone to some of this criticism, such as his description of *Griswold* and its progeny as the "imposition of upper middle class, college-educated, east-west coast morality."<sup>57</sup>

Purged of such acid, Judge Bork's ideas concerning the right of privacy were hardly extremist. *Griswold*'s vague right of privacy is troublesome in both application and theory. One particularly controversial application of the right is the constitutional protection of a pregnant woman's decision to have an abortion during the first six months of her pregnancy, recognized by the Supreme Court in *Roe v. Wade*.<sup>58</sup> Consistent with

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on original intent. Non-interpretivism is the theory that claims that judges are free to enforce values not found in the Constitution, at least where such values are consistent with other sources of law or legal traditions. See, e.g., J. ELY, *DEMOCRACY AND DISTRUST* 1-72 (1980) (general treatment of problems of constitutional interpretation); G. STONE, L. SEIDMAN, C. SUNSTEIN & M. TUSHNET, *CONSTITUTIONAL LAW* 691-98 (1986) (summary of the nature of the problem and arguments for and against interpretivism). The latter discussion uses Bork's 1972 *Indiana Law Journal* article as its main explanation of interpretivist theory. See *id.* at 692-93.

54. Bork, *supra* note 35, at 9 (utterly specious, unprincipled); *id.* at 11 (improper doctrine). Bork's speeches often focused on the constitutional invalidity of the *Griswold* principles. See, e.g., Catholic University Speech, *supra* note 46, at 4, cited in Bork v. Bork, *Record*, Doc. 20, at 34-35; Federalist Society Speech, *supra* note 47, pt. 2, at 8-9; cited in Bork v. Bork, *Record*, Doc. 20, at 35.

55. 262 U.S. 390 (1922).

56. 312 U.S. 535 (1942).

57. Federalist Society Speech, *supra* note 47, pt. 2, at 8-9, criticized in Bork v. Bork, *Record*, Doc. 20, at 35.

58. 410 U.S. 113 (1973). In the last three months the privacy right is superceded by the compelling state interest in preserving the potential life of the fetus. *Id.* at 163.

the opinions of many mainstream legal scholars,<sup>59</sup> Bork vigorously criticized *Roe* as "an unconstitutional decision, a serious and wholly unjustifiable judicial usurpation of state legislative authority."<sup>60</sup> Again the social class warfare theme permeated his criticism, as Bork argued that too many courts had used the Constitution to protect upper-class values rather than constitutional values.<sup>61</sup>

Such comments left no doubt as to Bork's likely vote on any privacy or abortion case to come before the Supreme Court.<sup>62</sup> With such cases almost an annual tradition on the Court and with Justice Powell one of only five clear supporters of *Roe* by the time of his retirement,<sup>63</sup> Bork's confirmation would necessarily produce a major shift in Supreme Court privacy doctrine. These facts alone guaranteed a war over the nomination.

#### D. *Role of Justices and the Court*

In many cases, a nominee's philosophy of judging is a relatively neutral topic. Yet in Bork's case it became inextricably intertwined with his views on substantive issues. Bork's judicial

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59. The Minority Views section of the Committee Report noted criticism of *Griswold* and *Roe* by law professors such as Archibald Cox, Paul Freund, John Hart Ely, Henry Monaghan, and Gerald Gunther. Report, *Record*, Doc. 25, at 259. Harvard Law Professor Mary Ann Glendon writes: "Disapproval of *Roe v. Wade* among legal scholars spans the entire political spectrum, and is as strong among those who identify themselves as pro-choice as among those who oppose abortion." Glendon, *The Probable Significance of the Bork Appointment for Issues of Particular Concern to Women*, 9 CARDOZO L. REV. 95, 97-98 (1987).

60. *Hearings on Human Life Bill*, *supra* note 39, at 310.

61. See Speech at Harvard Law School, Sept. 15, 1983, at 5-6, *quoted in* Judge Bork's Views Regarding Supreme Court Constitutional Precedents, *Record*, Doc. 10, at 95-97 (noting such comments in various speeches).

62. As with equal rights for women, Judge Bork's record on the court of appeals on the issues of privacy and abortion supported the inferences from his public statements. In *Dronenburg v. Zech*, 741 F.2d 1388, *reh. denied*, 746 F.2d 1579 (D.C. Cir. 1984), the court upheld the Navy's discharge of a sailor for engaging in homosexual acts. While this result is consistent with a later Supreme Court decision denying constitutional protection for homosexual acts, *Bowers v. Hardwick*, 478 U.S. 186 (1986), Judge Bork's opinion for the court took aim on the unenumerated right of privacy in general, 741 F.2d at 1392-97; see also 746 F.2d at 1583-84 (statement of Judge Bork on denial of rehearing *en banc*). His language suggests his contempt for the doctrine and his determination to set it aside. *Id.*

63. See *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986) (reaffirming *Roe* by a five-to-four vote). Justice Scalia was not then on the Court but his vote would probably not strengthen support for *Roe*.



philosophy suggested that as a Supreme Court Justice he would ardently pursue his ideological agenda on controversial issues, giving little weight to precedent, the views of other members of the Court, or, in some instances, the views of legislative bodies. Two aspects of Bork's philosophy were central to this conclusion. First, he was an "originalist," one who believes that the only legitimate method of constitutional interpretation is to determine the intentions of those responsible for its adoption.<sup>64</sup> The White House, for example, quoted Bork as stating: "[O]nly by limiting themselves to the historic intentions underlying each clause of the Constitution can judges avoid becoming legislators, avoid enforcing their own moral predilections, and ensure that the Constitution is law."<sup>65</sup> Second, as noted above, Bork was also an interpretivist, one who believes that courts must consider only values expressed or implied in the Constitution as written.<sup>66</sup> To adherents of these interrelated theories, any other method of constitutional interpretation is unacceptable and all resulting decisions lack constitutional authority.

Bork would have no reluctance in voting to overturn non-interpretivist, non-originalist decisions. Early in 1987, he stated: "I would think that an originalist judge would have no problem whatever in overruling a non-originalist precedent, because that precedent by the very basis of his judicial philosophy, has no legitimacy. It comes from nothing that the framers intended."<sup>67</sup> To Bork, the precedents concerning congressional enforcement

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64. See *supra* note 53 and *infra* note 91 and accompanying text for further discussion of Judge Bork's views on finding the law. See generally Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823 (1986). There are some ambiguities in the notion of "framers' intent." See Stone, *supra* note 53 at 34-36. The doctrine of original intent is at the center of contemporary debates concerning the nature and sources of constitutional interpretation. See L. LEVY, *ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION* (1988). It became a major issue for Bork's opponents during the confirmation hearings. *E.g.*, Testimony of Prof. Philip Kurland, *Record*, Doc. 19, vol. 3, at 1385 ("The fact is that original intent is not a jurisprudential theory, but, like Nixon's strict construction, and Roosevelt's ['B]ack to the Constitution,[] it is merely a slogan to excuse replacing existing Supreme Court judgments with those closer to the personal predilections of their expounders.").

65. White House Issue Brief, *Record*, Doc. 4, at 3.

66. See *supra* note 53 for an explanation of interpretivism.

67. Remarks on the Panel "Precedent, the Amendment Process, and Evolution of Constitutional Doctrine," First Annual Lawyers Convention of the Federalist Society, Jan. 31, 1987, at 124, 126, *quoted in* Judiciary Committee Consultants' Report, *Report*, Doc. 8, at 66.

of civil rights, equal protection for women, and privacy all represented non-originalist, non-interpretivist, judicial value-imposition and would therefore be ripe for overruling. Even outside these areas, a Justice Bork would accord little deference to constitutional precedents. In 1986, he stated that the Supreme Court should "be always open to rethink constitutional problems,"<sup>68</sup> suggesting that *stare decisis* is of relatively little weight in all constitutional cases.

In an attempt to suggest that Bork would not be quick to overturn precedents or well-established legal principles, the Reagan administration stressed that he was a believer in judicial restraint.<sup>69</sup> Bork is a believer in judicial restraint, but primarily as a brake on judicial interference with legislative value choices. If anything, his notion of restraint would prompt him to overturn decisions in those areas, such as civil rights, equal protection, and privacy, in which the Court previously declared laws and private actions unconstitutional. Moreover, his belief in judicial restraint with respect to such jurisdictional doctrines as standing indicated that he would often withhold judicial review of allegedly unconstitutional action.<sup>70</sup>

More significantly, the record demonstrated that Bork preached only selective judicial restraint. His analysis of *Kat-*

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68. Lacovara, *A Talk with Judge Robert H. Bork*, 9 THE DISTRICT LAWYER, No. 5, 29, 32, (May/June 1985), reprinted in Blue Binder, *Record*, Doc. 2, tab 6. Bork explains that the rationale of this approach is that there is no other way to correct errors in constitutional interpretation. *Id.* This is not really a controversial point. As pointed out by the minority members of the Judiciary Committee, this opinion has been expressed by liberal judges such as William O. Douglas and in Supreme Court decisions. See Minority Views, *Record*, Doc. 25, at 285-90. See also *infra* note 114 and accompanying text for Bork's testimony.

69. See Materials on Judge Robert H. Bork, *Record*, Doc. 3, tabs 3-5; White House Issue Brief, *Record*, Doc. 4, at 1; A Response to the Critics of Judge Robert H. Bork, *Record*, Doc. 17, at 3-7.

70. A key Bork opinion is *Barnes v. Kline*, 759 F.2d 21 (D.C. Cir. 1985), in which his lengthy dissent challenged the notion of congressional standing. *Id.* at 41-71. This case was filed by members of the House of Representatives to challenge a "pocket veto" by President Reagan. *Id.* at 23-24. The majority concluded that the members of Congress had standing. *Id.* at 25-30. The majority declared that the bill became law because the pocket veto was ineffective. *Id.* at 30-41. The Supreme Court later agreed to consider the case but dismissed it as moot without considering the validity of congressional standing. *Burke v. Barnes*, 479 U.S. 361 (1987). Bork's dissent in *Barnes v. Kline* argued that members of Congress have no judicial remedy for executive actions that infringe on powers of Congress. *Kline*, 759 F.2d at 41-71 (Bork, J., dissenting). Needless to say, this was not an opinion likely to find favor with the Senate.

*zenbach v. Morgan*<sup>71</sup> suggests that he did not favor deference to congressional value judgments concerning enforcement of the fourteenth amendment.<sup>72</sup> In addition, numerous commentators roundly criticized Bork for ignoring the legislative intent of the antitrust laws and other business regulatory laws.<sup>73</sup> Similar judicial activism could be seen in Bork's hostility toward legislation directed at executive branch actions.<sup>74</sup> Perhaps, as one commentator noted, "Bork is an advocate for judicial restraint in dealing with legislation he favors (mainly that restricting individual rights or liberties) but not in dealing with laws he opposes (mainly those impinging on property interests)."<sup>75</sup>

### E. *Watergate*

Watergate, or more accurately, the 1973 dismissal of Watergate Special Prosecutor Archibald Cox, hung around Bork's neck like an albatross throughout the confirmation process. He was never accused of participation in the Watergate coverup and had even been confirmed by the Senate as a court of appeals judge in 1981. He could never quite wash himself clean of the Cox firing,

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71. 384 U.S. 641 (1966).

72. See *supra* notes 37-39 and accompanying text for discussion of *Katzenbach v. Morgan* and of Judge Bork's views about that case.

73. E.g., Orland, Robert Bork: An Evaluation, Blue Binder, *Record*, Doc. 2, tab 16, reprinted, with minor modifications, at 9 CARDOZO L. REV. 115 (1987); Nader & Glitzenstein, *His Judicial Restraint is a Myth*, N.Y. Times, July 13, 1987, reprinted in Blue Binder, *Record*, Doc. 2, tab 17; The Bork Report, *Record*, Doc. 12, at 67-68, 71-73; The Judicial Record of Judge Robert H. Bork, *Record*, Doc. 7, at 17-34, 117-22. But see A Response to the Critics of Judge Robert H. Bork, *Record*, Doc. 17, at 146-83 (defending Bork's administrative and antitrust views as consistent with legislative policy); Stewart, *The Judicial Performance of Robert H. Bork in Administrative and Regulatory Law*, 9 CARDOZO L. REV. 135 (1987) (analyzing and generally defending Bork's decisions in these areas).

74. E.g., Bork, *Reforming Foreign Intelligence*, Wall St. J., Mar. 9, 1978, reprinted in Blue Binder, *Record*, Doc. 2, tab 8 (op-ed piece arguing that Congress lacks constitutional authority to restrict surveillance of foreign intelligence operations); Bork, *Comments on Legality of U.S. Action in Cambodia*, 65 AM. J. INT'L L. 79 (1971), reprinted in Blue Binder, *Record*, Doc. 2, tab 9 (comments suggesting that Congress may not restrict the President's military decisions); *Special Prosecutor and Watergate Grand Jury Legislation: Hearings on H.J.Res. 784 and H.R. 10937 Before the Subcomm. on Crim. Justice of the House Judiciary Comm.*, 93rd Cong., 1st Sess. (1973) (testimony of Robert H. Bork), reprinted in Blue Binder, *Record*, Doc. 2, tab 11 (claiming that Congress may not authorize the appointment of special prosecutors independent of executive branch control).

75. Talking Points, *Record*, Doc. 6, at 5.

however, and it became one more aspect of his past that was raised against him in 1987.

The Reagan administration could not ignore Bork's role in the Cox matter. In fact, the administration's briefing book on the nomination contained one section entitled "Robert Bork's Role in the 'Saturday Night Massacre.'" <sup>76</sup> That section emphasized several positive aspects of Bork's actions—that he followed the recommendation of Attorney General Elliot Richardson, kept the special prosecution office open and active, selected Leon Jaworski as special prosecutor, and at all times acted "to preserve institutional integrity." <sup>77</sup> This version of the events was generally credible and comported with statements by most other persons involved, including some adamantly opposed to the Cox firing. <sup>78</sup> Moreover, Bork firmly believed that the President has sole authority in executive functions such as prosecution. <sup>79</sup> Clearly a person with this viewpoint would instinctively follow presidential orders in this setting. All in all, however, by the fall of 1987 Bork may have wished that he had followed the leads of Richardson and Deputy Attorney General Ruckleshaus and resigned.

With Bork portrayed as a bureaucrat exercising poor judgment rather than as a villain, opponents seized on Judge Gerhard Gesell's opinion in *Nader v. Bork* <sup>80</sup> as ammunition against Bork. Judge Gesell held that the dismissal was illegal because a Department of Justice regulation provided that the Attorney General could fire the special prosecutor only for "extraordinary improprieties." <sup>81</sup> Bork argued that the regulation was rescinded during the episode, but Judge Gesell concluded that the rescission was not valid. <sup>82</sup> Several commentators cited this conclusion, <sup>83</sup> and some senators later harped on Bork's "illegal firing" of Cox to suggest that Bork was guilty of serious misconduct. <sup>84</sup>

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76. *Record*, Doc. 3, tab 8.

77. *Id.* at 1-3.

78. Some disagreements concerning the firing were aired in the hearings. *See infra* notes 119-21 and accompanying text.

79. *See supra* note 74.

80. 366 F. Supp. 104 (D.D.C. 1973).

81. 28 C.F.R. § 0.37 (1973); 38 Fed. Reg. 14688 (June 4, 1973).

82. 366 F. Supp. at 107-09.

83. *See e.g.*, Talking Points, *Record*, Doc. 6, at 7; Judiciary Committee Consultants' Report, *Record*, Doc. 8, at 61-63; The Bork Report, *Record*, Doc. 12, at xliii-xlvii.

84. *See infra* notes 119-20 and accompanying text for further information about

This was patently unfair. Nothing in the Gesell opinion suggested that Bork knowingly breached the law or that his legal arguments defending the validity of his action were in any way frivolous. The ruling involved a close question on a technical issue of administrative law which no appellate court ever reviewed and which Judge Gesell himself vacated when the court of appeals dismissed the case as moot.<sup>85</sup> Even accepting the Gesell ruling as the final word on this matter, Bork's "illegal conduct" was comparable to that of a judge who is reversed on appeal or a senator who votes for a law later found to be unconstitutional, as had every one of Bork's senatorial critics. But Bork's action occurred in the midst of the greatest governmental scandal in the nation's history, and his opponents made certain that no one could forget it.

All in all, then, history was chasing Robert Bork. He could not elude the Warren Court precedents in civil rights, equal rights for women, and privacy that were perceived, with good reason, to be in danger from a Supreme Court that included Justice Bork. Nor could he fully disavow his own statements challenging well-established decisions in these and other controversial areas. Finally, he could not wipe out his own Rosencrantz and Guildenstern role in the Watergate scandal. Still, in all likelihood, no Senate majority had yet set in against him, and he could win confirmation by a successful performance at the hearings. In that, however, he failed.

#### IV. THE HEARINGS

Confirmation hearings differ from judicial trials in several key respects. The senators serve both as questioners and as fact-finders. Some of them make up their minds before the hearing begins. Each senator is allotted a certain amount of time to question the witness in each round before turning the witness over to another senator.<sup>86</sup> Democrats and Republicans take turns questioning each witness, and the result is much like a sporting event in which opposing teams trade the ball—and

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the questions asked of Judge Bork regarding his firing of Cox.

85. Case No. 74-1260 (D.C. Cir. Aug. 20 and Oct. 22, 1975), *appeal dismissed as moot*, Case No. 1954-73 (D.D.C. Oct. 29, 1975), *vacating* 366 F. Supp. 104 (D.D.C. 1973).

86. In this instance, each senator on the committee was given thirty minutes in each round for questioning. See *Hearings, Record*, vol. 1, at 84, 295, 444.

change the subject—every few minutes. The testimony is not over, however, until each side has run out of questions and sees no possibility of scoring additional points.

### A. *Opening Skirmishes*

The Bork hearings were nasty, brutish, and long. Judge Bork's testimony took most of five days and there were numerous other witnesses representing all points of view on the nominee and on the legal and political issues surrounding the nomination. In the end, however, only the testimony of Robert Bork seemed to matter.

Hearings usually begin with opening statements by the Committee members. The Bork hearings differed in that the Judiciary Committee allowed former President Ford the privilege of testifying first. President Ford trotted out the official administration line on Robert Bork: brilliant attorney, fine judge, Watergate hero.<sup>87</sup> The first inkling of trouble for the nominee came when Senator DeConcini asked Ford if he had read Bork's writings, and Ford said he had only read synopses.<sup>88</sup> Opening statements by the Committee members and several other interested members of Congress followed.<sup>89</sup> Few admitted having reached a conclusion; that, after all, would seem unfair. The opening statements did make clear that an important hearing lay ahead and that the Committee would critically examine Bork's views on a variety of legal issues. The opening statements also suggested that the Republicans would generally be defense attorneys, and the Democrats would generally be prosecutors.<sup>90</sup>

Bork also made an opening statement of his own. While he

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87. Testimony of President Gerald R. Ford, *Record*, Doc. 19, vol. 1, at 2-4.

88. *Id.* at 4. Senator Leahy later noted that Ford presented only "glittering generalities" and that DeConcini "has good instincts." Leahy, *supra* note 11, at 108.

89. Opening Statements of Committee Members, *Record*, Doc. 19, vol. 1, at 18-74, 93-98; Statements of Senators Dole and Danforth and Representative Fish, *id.*, at 5-17.

90. Republican Senator Hatch, for example, was a defender: "Mr. Chairman, I feel honored to welcome to the Committee one of the most qualified individuals ever nominated to serve on the United States Supreme Court. His resume—outstanding law student, successful trial practitioner, leading law professor, esteemed author and lecturer, excellent Solicitor General, and respected judge on the District of Columbia Circuit—speaks for itself." Opening Statement of Senator Hatch, *Record*, Doc. 19, vol. 1, at 24. He was followed by Democratic Senator Metzenbaum, an opponent from the outset: "Now it is clear that the President wants to revise the Constitution through his appointments to the Supreme Court." Opening Statement of Senator Metzenbaum, *id.* at 27.

avoided specifics, his remarks reflected the two key premises of his judicial philosophy. He first stated:

How should a judge go about finding the law? The only legitimate way, in my opinion, is by attempting to discern what those who made the law intended. The intentions of the lawmakers govern whether the lawmakers are the Congress of the United States enacting a statute or whether they are those who ratified our Constitution and its various amendments.<sup>91</sup>

Later in his opening statement he alluded to the theory underlying interpretivism: "[W]hen a judge . . . reads entirely new values into the Constitution, values the Framers and the ratifiers did not put there, he deprives the people of their liberty."<sup>92</sup> Bork made one important concession, probably in response to the expressed concerns that he would readily vote to overrule decisions he had criticized in the past. He noted that:

[A] judge must have great respect for [precedents]. It is one thing as a legal theorist to criticize the reasoning of a prior decision, even to criticize it severely, as I have done. It is another and more serious thing altogether for a judge to ignore or overturn a prior decision. That requires much careful thought.<sup>93</sup>

These descriptions of different forms of judicial restraint would become the competing premises of the debates Judge Bork would have with individual Committee members. How did his view of the Constitution square with issues such as civil rights, women's rights, and privacy? Would he exercise restraint in voting to overturn precedents in such areas? It was evident from the outset that Bork's answers to such questions placed him between the rocks of his controversial past statements and the hard cases put to him by his questioners. Firm adherence to his views left him ideologically unacceptable to a majority of the Committee; recantation left him vulnerable to charges of "confirmation conversion."

## B. *Questioning on the Critical Issues*

Committee Chairman Joseph Biden began the first of what

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91. Opening Statement of Judge Bork, *id.* at 75.

92. *Id.* at 76-77.

93. *Id.* at 76.

became four rounds of questioning.<sup>94</sup> The first significant case he raised was *Shelley v. Kraemer*.<sup>95</sup> Bork adhered to the view that he was pleased that the Court invalidated racial covenants but that he still believed that the decision stood for the dangerous proposition that constitutional limitations on governmental action apply to private action as well.<sup>96</sup> There were few other direct confrontations on civil rights in the racial arena. Senator Thurmond followed Senator Biden's initial inquiries on this subject by permitting Bork to underscore his support for *Brown v. Board of Education*,<sup>97</sup> which struck down the "separate but equal" doctrine, and for some types of affirmative action.<sup>98</sup> Senator Kennedy raised the issue of Bork's opposition to the 1964 Civil Rights Act, and Bork noted that he had long since changed his mind on that issue and that he had proved his support for the rights of racial minorities both as Solicitor General and as a court of appeals judge.<sup>99</sup> This testimony broke no new ground, as Bork emphasized defensible legal theories and well-established recantations of his most controversial views. The most compelling testimony on his civil rights record came from members of the civil rights community. Nearly uniform in opposition yet generally respectful of Bork's achievements and abilities, they reminded the Senate and the public of the symbolic importance of this nomination.<sup>100</sup>

Senator Kennedy raised the issue of equal rights for women early in his questioning. He asked about Bork's recent comments that the equal protection clause guarantees only racial equality

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94. Questioning by Senator Biden, *Record*, Doc. 19, vol. 1, at 85.

95. See *supra* notes 33-36 and accompanying text for information on *Shelley v. Kraemer* and Bork's views on that decision.

96. *Id.* at 85-86.

97. 347 U.S. 483 (1954).

98. Questioning by Senator Thurmond, *Record*, Doc. 19, vol. 1, at 104-05.

99. Questioning by Senator Kennedy, *id.* at 125-28.

100. Witnesses against Judge Bork included the following individuals associated with civil rights movement: former Transportation Secretary William T. Coleman, Jr., *id.* at 734; former Representative Barbara Jordan, *id.* at 785; Atlanta Mayor Andrew Young, *id.* at 800; former Assistant Attorney General for Civil Rights Burke Marshall, *id.* at 823; former Attorney General Nicholas Katzenbach, *id.* at 869; History Professor John Hope Franklin, *Record*, Doc. 19, vol. 2, at 717; and Representatives Mervyn Dymally, *Record*, Doc. 19, vol. 3, at 1683; John Conyers, *id.* at 1684; and Walter Fauntroy, *id.* at 1695. Roy Innis, Chairman of the Congress of Racial Equality, testified on Bork's behalf, *id.* at 2310, but the overwhelming opposition within the movement was evident to all observers.



and not equality between the sexes. In response, Bork conceded the issue, accepting broader coverage but challenging the Supreme Court's use of different levels of scrutiny to analyze different forms of discrimination.<sup>101</sup> Bork announced—apparently for the first time—that gender discrimination should be subjected to a “reasonableness” analysis rather than the “intermediate scrutiny” now used by a majority of the Court.<sup>102</sup> Reasonableness analysis is supportable and potentially effective in striking down unfair gender discrimination if judges require lawmakers to provide cogent justifications for unequal aspects of their laws.<sup>103</sup> But Bork failed to communicate his understanding of the reasonableness inquiry with much clarity. Judge Bork's notion of equal protection analysis became a recurring topic during his testimony, but the senators never got a firm grasp on the concept.<sup>104</sup> Later analyses of his testimony and his prior comments raised questions about the accuracy of some of his testimony, thereby suggesting that Bork's embrace of the reasonableness standard was a confirmation conversion of convenience.<sup>105</sup>

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101. Questioning by Senator Kennedy, *Record*, Doc. 19, vol. 1, at 134-36. The test from *Wengler v. Druggists Mutual Ins. Co.*, *supra* note 45 and accompanying text, is intermediate level scrutiny, applicable to gender discrimination.

102. *Id.* at 134-35. *See also id.* at 105 (response to Senator Thurmond).

103. Justice John Paul Stevens takes this approach. His short concurring opinion in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), illustrates his view. The case concerned a zoning ordinance that required special use permits for group homes for the mentally retarded but imposed no such requirement on other similar uses. *Id.* at 447. The majority struck down the ordinance as a violation of equal protection, concluding that the discrimination was irrational. *Id.* at 447-50. Justice Stevens agreed, explaining that cases are best resolved without reliance on the multi-tiered analysis preferred by the rest of the Court but instead by simply looking at whether there is a rational basis for the classification underlying the law. *Id.* at 451-52. Justice Stevens went on to note that this approach would mean that virtually all racial classifications would be struck down because there is virtually never a valid justification for a distinction. *Id.* at 452-53. Other classifications, such as gender, would be upheld or struck down depending on the sufficiency of the legislative justification. *Id.* at 453-54. In short, this theory differs in method from the intermediate scrutiny applied by the majority of the Court to gender classification, but should in most settings correspond in result. *Cleburne* was discussed in Bork's testimony concerning equal rights for women. *E.g.*, Questioning by Senator Hatch, *Record*, Doc. 19, vol. 1, at 164; Questioning by Senator DeConcini, *id.* at 229-30 (both references incorrectly recorded as “Claiborne”).

104. *E.g.*, Questioning by Senator DeConcini, *Record*, Doc. 19, vol. 1, at 369-73; Questioning by Senator Biden, *id.* at 559-67; Questioning by Senator Spector, *id.* at 259-64; Questioning by Senator Simon, *id.* at 422-23. Toward the end of Bork's testimony, Senator Spector described Bork's approach as based on “fuzzy gradations.” Questioning by Senator Spector, *id.* at 701.

105. *E.g.*, Lessons Learned at the Confirmation Hearing, *Record*, Doc. 22, at 8-13;

Whether or not this was the case, Bork's testimony did nothing to allay the fears of those committed to women's rights.<sup>106</sup>

The right of privacy was another central issue in Bork's testimony. Chairman Biden began the discussion by asking Bork about his past criticisms of *Griswold* and its underlying principles.<sup>107</sup> Bork seemed to shift ground from his earlier statements on privacy, suggesting that his opposition to *Griswold* was to its reasoning rather than to its result, and noting that this was consistent with the views of many legal scholars.<sup>108</sup> Bork's testimony concerning *Roe v. Wade* suggested a similar straddle. The reasoning was flawed, but there might be another route to a constitutional protection for choice in procreation decisions.<sup>109</sup> Continued questioning by Chairman Biden and several other senators exposed the quicksilver nature of Bork's views on these issues.<sup>110</sup>

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Post Hearing Fact Sheet, *Record*, Doc. 23, at 2-5.

106. Two other skirmishes on women's rights are worthy of note. Senator Kennedy questioned Judge Bork about his comment in a 1974 speech that adoption of the Equal Rights Amendment would work "a dangerous constitutional revolution." Questioning by Senator Kennedy, *Record*, Doc. 19, vol. 1, at 136; Bork's speech reprinted in *id.* at 137-49. Senator Metzenbaum and Judge Bork discussed Bork's opinion in *Oil, Chemical & Atomic Workers Int'l Union v. American Cyanamid Co.*, 741 F.2d 444 (D.C. Cir. 1984). Questioning by Senator Metzenbaum, *Record*, Doc. 19, vol. 1, at 447-50, 539; see also submissions for the record, *id.* at 645-56. This was one of the Committee's more demagogic moments. Judge Bork's opinion upheld a decision of the Occupational Safety and Health Review Commission. The Senator seemed to accuse Bork of favoring forced sterilization of women employees, but the opinion suggests no such thing in reality. The company discovered that it could not reduce ambient lead levels that were dangerous to fetuses. The company had no legal duty to close its plant and could lawfully have dismissed all women of child-bearing age. *Oil, Chemical*, at 445. Instead it allowed women who became sterilized to stay on the job. The union challenged that sterilization policy as an "employment hazard" prohibited by federal job safety laws but was rebuffed by the Commission. *Id.* at 446-47. Judge Bork's opinion noted the sadness of the situation, *id.* at 445, 450, but held, consistently with other courts considering similar issues, that the statute could not reasonably be interpreted to apply in this setting. *Id.* at 447-50.

107. Questioning by Senator Biden, *Record*, vol. 1, at 86-90. The discussion then turned to *Skinner v. Oklahoma*, 312 U.S. 535 (1942), *id.* at 90-92.

108. *Id.* at 88-93. See *supra* note 59 for the names of other scholars critical of *Roe v. Wade*.

109. Judge Bork twice noted that equal protection analysis might accommodate a woman's right to choice. See Questioning by Senator DeConcini, *id.* at 225-26; Questioning by Senator Heflin, *id.* at 265-67. He also suggested that the result in *Skinner* could be supported under the eighth amendment's prohibition of cruel and unusual punishment. Questioning by Senator Hatch, *id.* at 163-64.

110. *E.g.*, Questioning by Senator Biden, *id.* at 299-301, 571-73; Questioning by Senator Kennedy, *id.* at 123-25; Questioning by Senator Hatch, *id.* at 156-64; Questioning by Senator DeConcini, *id.* at 225-28; Questioning by Senator Heflin, *id.* at 264-68; Questioning by Senator Simon, *id.* at 420-23. See also *Bork v. Bork*, *Record*, Doc. 20, at

Several points did seem relatively clear: Bork would not accept the principle of non-interpretive rights; as a person or a legislator, he generally supported privacy in such matters;<sup>111</sup> and he would be open to new arguments that privacy is constitutionally guaranteed. Since *Griswold* and the cases following it have been harshly criticized by many mainstream legal scholars, at face value Bork's points should have eased at least some of the doubts concerning Bork's ideology. They did not have that effect, perhaps because they were too general, too self-serving, and too recent to outweigh twenty years of invective.

As at the pre-hearing stage, concern about Judge Bork's general attitudes toward the role of the Supreme Court and its justices pervaded the questioning on these and other issues. Bork tried to assure the Committee that he would give deference to precedent and recognized that some decisions had become so well-established that they should not be overruled even though they were wrongly decided under his originalist, interpretivist principles.<sup>112</sup> Various senators engaged in discussions with Bork concerning the strength of his judicial philosophy and the room it left for upholding erroneous decisions.<sup>113</sup> The senators tried to force him to explain the nature of his commitment to precedent, but Bork declined to clarify his statements other than by pointing to comments by several "liberal" Supreme Court Justices that constitutional precedents are not as binding as the Constitution itself.<sup>114</sup>

Perhaps the most sustained consideration of Bork's philoso-

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34-41 (concerning Bork's views on *Griswold* and *Roe*, before and during the hearings).

111. Bork described the Connecticut statute overturned in *Griswold* as "an outrage." Questioning by Senator Hatch, Hearings, *Record*, vol. 1, at 156. See also *id.* at 157 (agreeing with Justice Stewart's characterization of the law as "uncommonly silly"); Questioning by Senator Biden, *id.* at 299-300, 571 (supporting marital privacy as a fundamental principle); Questioning by Senator DeConcini, *id.* at 225 ("If I were a legislator, I would vote against that [*Griswold*] statute instantly").

112. *E.g.*, Questioning by Senator Thurmond, *id.* at 101, 445; Questioning by Senator Heflin, *id.* at 268; Questioning by Senator Biden, *id.* at 569; Questioning by Senator Leahy, *id.* at 617.

113. *E.g.*, Questioning by Senator Thurmond, *id.* at 101-02, 445; Questioning by Senator Heflin, *id.* at 268, 427-28; Questioning by Senator Spector, *id.* at 411, 694-95; Questioning by Senator Kennedy, *id.* at 523-26; Questioning by Senator Biden, *id.*, at 568-69; Questioning by Senator Leahy, *id.* at 616.

114. *E.g.*, Questioning by Senator Heflin, *id.* at 488 (Justices Douglas and Brandeis); Questioning by Senator Kennedy, *id.* at 525-26 (Justice Brandeis and *Brown v. Board of Education*). See *supra* note 68.

phy came in questioning by Senator Spector. Bork affirmed his commitment to the primacy of the Supreme Court under the Constitution without disavowing his view that the Constitution is superior to the opinions of judges, who merely interpret it.<sup>115</sup> The next day Senator Spector reopened the issue to discuss the nature of judicial review and the importance of history and fundamental values in interpreting the Constitution.<sup>116</sup> Bork's responses did nothing to defuse the concerns that he would readily vote to overturn precedents in the areas of civil rights, women's rights, and privacy. His refusal to specify those erroneous decisions that he would vote to uphold was perhaps appropriate for a judicial nominee;<sup>117</sup> it was dangerous for this one, however, because the clues suggested that the only invulnerable cases were in non-controversial areas.<sup>118</sup>

Judge Bork also had an opportunity during the hearings to defuse the pre-hearing revival of concern over the Cox firing. While most Senators avoided the issue, Senators Metzenbaum and Kennedy raised several questions about Watergate. Senator Metzenbaum began the second day of testimony with questions about Bork's advice to President Nixon concerning executive privilege and a re-examination of the events on the day that

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115. Questioning by Senator Spector, *id.* at 573-75.

116. *Id.* at 680-84.

117. Few nominees have been as specific as Bork in their testimony. As Nina Totenberg notes in her article on the Bork confirmation process:

Senators have found it absolutely impossible, until the Bork hearings, to engage the nominees in a meaningful discussion of their views on the great constitutional issues of our time. Although nominees should not be asked to commit themselves on a question that may come before the Court, it hardly seems right that a nominee should be permitted to give an answer that is a fancy version of "trust me."

Totenberg, *supra* note 8, at 1218. The nature and extent of appropriate questioning remains controversial, if only because judges, unlike senators, must not prejudge matters that may come before them. Judge Bork was required to be responsive to all but the most specific questions because of his long paper trail of opinions, both judicial and extra-judicial.

118. Bork repeatedly referred to the cases establishing the scope of the federal commerce power and permitting use of paper money. *E.g.*, Questioning by Senator Thurmond, *Record*, Doc. 19, vol. 1, at 102, 445; Questioning by Senator Spector, *id.* at 411, 694-95; Questioning by Senator Kennedy, *id.* at 524-26. He did suggest that the scope of press freedom under the first amendment had become similarly well-established. *E.g.* Questioning by Senator Thurmond, *id.* at 102, 445. This may be one factor behind the weakening of opposition to Bork based on his first amendment views. *See supra* note 29.

Bork fired Cox.<sup>119</sup> Metzenbaum and Kennedy later addressed the meaning and impact of *Nader v. Bork* but Bork explained his position clearly,<sup>120</sup> and the senators scored few points. The Watergate issue nevertheless allowed Bork's opponents to raise doubts concerning his integrity,<sup>121</sup> inevitably reducing confidence that he would judge cases fairly and hold to the seemingly moderate views he described to the Committee on controversial issues.

### C. *The Hearings in Retrospect*

Bork was not without his defenders on the Committee. Ranking Republican Thurmond devoted much of his questioning to serving up softballs that gave Bork the opportunity to express his views in the least controversial fashion.<sup>122</sup> The tradition of alternating between Democrats and Republicans underscored the partisan nature of the process. Bork's sessions with Democratic members of the Committee were usually sharp and fast-paced. Between rounds he would figuratively return to his corner for assistance from his "trainers," the Committee's Republicans.<sup>123</sup> His two most effective supporters were Senators

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119. Questioning by Senator Metzenbaum, *id.* at 167-212 (including 31 pages of exhibits).

120. Questioning by Senator Metzenbaum, *id.* at 336-38; Questioning by Senator Kennedy, *id.* at 516-18. *See also id.* at 465-510 (documents relating to the Cox firing).

121. Later testimony by Watergate prosecutors Henry Ruth and George Frampton aggravated Bork's position on the Cox firing. Hearings, *Record*, Doc. 19, vol. 3, at 1712-71. While various memories differed, including Bork's at different times, no firm conclusions could be drawn about what really occurred during a few days fourteen years previously. Perhaps as a result, the discussion of this matter in the majority section of the Committee Report straddled on the issue. Report, *Record*, Doc. 25. It criticized the Cox dismissal as illegal, based largely on *Nader v. Bork*, *id.* at 66-68, and headed the next section: "The Evidence and Testimony on Certain Factual Questions are Contradictory. But at a Minimum They Establish that Judge Bork's Actions Immediately Following the Saturday Night Massacre Reveal a Misunderstanding of the Separation of Powers." *Id.* at 68.

122. For example, Senator Thurmond's first three questions of Judge Bork were: "Would you please comment on what criteria you think are important in deciding whether to re-examine past Supreme Court decisions?"; "Do you feel a distinction should be drawn between your private writings and any responsibilities you would have as a Supreme Court Justice?"; and "Would you briefly explain to the Committee what you believe is the role of a judge in interpreting the Constitution and laws of this country?" Questioning by Senator Thurmond, *Record*, Doc. 19, vol. 1, at 100-01.

123. This characterization is somewhat unfair to both sides. The Democrats were usually fair and courteous as well as doubtful and probing. The Republicans were not

Hatch and Simpson. Senator Hatch, himself a potential Supreme Court nominee, used his sharp legal mind to restate legal principles to bolster Bork's positions and to stress the more "liberal" aspects of his record, such as his civil rights advocacy as Solicitor General.<sup>124</sup> Senator Simpson, in contrast, brought pointed and relevant humor to the proceedings.<sup>125</sup>

The supporters were fighting a losing battle. It became increasingly evident that a majority of senators were not satisfied with Judge Bork's testimony. Either he had not changed his extreme views, or he had changed them too suddenly. Bork seemed to be aware of this when he noted in his final statement that he had "received criticism in some quarters for being too rigid and criticism in other quarters for being inconsistent or self-contradictory."<sup>126</sup> He insisted, however, that he remained true to his basic principles:

I will adhere to my judicial philosophy as I have described it in these hearings and elsewhere. That may lead on occasion to results that conservatives applaud and on other occasions to results that liberals applaud, but in either event, it will not be because of some personal political agenda of my own. It will not be a desire to set a social agenda for the nation. It will be because the result, in my considered judgment, is required by the law.<sup>127</sup>

Bork's concluding statement was not the end of the confirmation hearings in a formal sense. The Committee would continue to hear testimony from over a hundred additional witnesses over seven days and receive hundreds of exhibits.<sup>128</sup> Testifying for the most part in pro- and anti-Bork panels of law

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uniformly supportive; Senator Spector, in fact, voted against the nomination. *See infra* note 140 and accompanying text.

124. *E.g.*, Questioning by Senator Hatch, *Record*, vol. 1, at 153 (Bork's opposition to racial discrimination in private school admissions as Solicitor General in *Runyon v. McCrary*, 427 U.S. 160 (1976); *id.* at 155-59 (noting that recognition of undefined privacy rights could be used to pursue a socially conservative agenda); *id.* at 160 (noting moderate legal scholars opposed to the analysis in *Roe v. Wade*).

125. *E.g.*, Opening Statement of Senator Simpson, *id.* at 29 (description of the confirmation process as "the 4-H Club of hype, hoorah, hysteria and hubris"); *id.* at 212 (description of the typical Washingtonian's emotional response to the Saturday Night Massacre); *id.* at 536-37 (description of the liberal actions in response to fears of a Bork nomination).

126. Final Statement of Judge Bork, *id.* at 721.

127. *Id.*

128. *See Hearings, Record*, vol. 1, at 734-978; vol. 2, at 1-1302; vol. 3, at 1303-2756.

professors, public officials, and leaders of the bar and public interest organizations, the witnesses provided helpful and occasionally moving testimony. Historians and political scientists will find much in this part of the record that illuminates the nature of modern American constitutional government. But looking back, it all seems to have been somewhat beside the point. Bork's testimony was the trial; this was just a show. The meaningful evidence was already before the Committee when Robert Bork went home on September 19, presumably to watch the Boston College football game.<sup>129</sup>

## V. THE VERDICT ON JUDGE BORK

There were various immediate responses to Judge Bork's testimony. Interest groups on both sides of the issue submitted additional documents to the Senate. As was the case before the hearings, however, the opponents were better organized and seemed to be more committed. Their emphasis at this stage was on inconsistencies between Bork's testimony and his prior statements—his alleged "confirmation conversion." The leaders were again the NAACP and People for the American Way, which together submitted the most compelling document on this point, *Bork v. Bork, A Comparison of Judge Bork's Confirmation Testimony With His Previous Speeches and Articles*.<sup>130</sup> Additional anti-Bork documents that surfaced at this stage were submitted by the Public Citizen Litigation Group,<sup>131</sup> People for the American Way,<sup>132</sup> the Alliance for Justice,<sup>133</sup> and the American Civil Liberties Union.<sup>134</sup> The two pro-Bork submissions were too little and too late. One, *The Facts About Judge Bork*,<sup>135</sup> consisted

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129. A humorous moment in the hearings occurred when the Committee negotiated the time of the Saturday, September 19, session around football games to maximize Chairman Biden's and Judge Bork's respective preferences. *Id.*, vol. 1, at 612. The issue was revisited at the Saturday session when the final words from Senator Biden noted that Judge Bork could get home in time to see most of the Boston College game. *Id.* at 731.

130. *Record*, Doc. 20.

131. Judge Bork's Civil Rights Record on the Court of Appeals, *Record*, Doc. 21.

132. Lessons Learned at the Confirmation Hearing: Judge Bork's Testimony Raises New Concerns, *Record*, Doc. 22.

133. Post Hearing Fact Sheet on Nomination of Judge Robert H. Bork, *Record*, Doc. 23.

134. A Decision on the Merits, *Record*, Doc. 28.

135. *Record*, Doc. 24.

solely of excerpts from testimony supporting the nomination. The other, a report by the Committee For a Fair Confirmation Process that included "white papers" on the major issues raised during the hearings,<sup>136</sup> was more substantial, but it was submitted ten days after the Senate vote to disapprove the Bork nomination.

Attention then focused on the "confirmation conversion," as two undecided members of the Committee, Senators Spector and DeConcini, "voiced deep concern about changes [Bork] made in his previous positions."<sup>137</sup> Still, the first Republican to oppose confirmation publicly was Senator Packwood, who reported that his decision was based on Bork's opinions about privacy and abortion.<sup>138</sup> He announced his decision on September 21, the same day that the first post-Bork witnesses testified. News reports over the following ten days emphasized the closeness of the anticipated vote, the pressure on individual senators, and the various tactics used by both sides to gain some advantage.<sup>139</sup> Additional senators announced their decisions, and the tally was mounting against the nomination. On October 1, Republican Senator Spector and five Senate Democrats announced against Bork while only three senators announced support.<sup>140</sup> President Reagan stepped up his efforts on Bork's behalf,<sup>141</sup> and

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136. A Response to the Majority Report in the Senate Confirmation Proceedings of Judge Robert H. Bork, *Record*, Doc. 29.

137. Nash, *Bork Swing Votes Remain Undecided*, N.Y. Times, Sept. 21, 1987, at B14, col. 6.

138. Greenhouse, *Packwood, Seeing Threat to Privacy, Opposes Bork*, N.Y. Times, Sept. 22, 1987, at A1, cols. 3-5; B6, cols. 3-4; Taylor, *How Bork Recast Ideas in His Senate Testimony*, N.Y. Times, September 21, 1987, at B14, cols. 1-5; see also A Decision on the Merits, *Record*, Doc. 28, at 19-20.

139. E.g., Roberts, *White House Says Bork Lacks Votes for Confirmation*, N.Y. Times, Sept. 26, 1987, at 1, col. 1; 32, cols. 2-5; Nash, *Bork is Losing Southern Democrats While Drawing G.O.P.'s Moderates*, N.Y. Times, Sept. 27, 1987, at A26, cols. 1-3; Taylor, *Politics in the Bork Battle*, N.Y. Times, Sept. 28, 1987, at A1, cols. 6-7; B7, cols. 1-6; Greenhouse, *Byrd Asks Panel to Forego A Vote in Debate on Bork*, N.Y. Times, Sept. 29, 1987, at A1, col. 3; A33, cols. 1-2.

140. Noble, *Bork Nomination Will be Opposed by 4 Key Senators*, N.Y. Times, Oct. 2, 1987, at A1, col. 6; A17, cols. 2-5; see also A Decision on the Merits, *Record*, Doc. 28, at 10-11 (Sen. Glenn); at 13-14 (Sen. Johnston); at 15 (Sen. Lautenberg); at 20 (Sen. Pryor); at 22-23 (Sen. Sanford); at 25 (Sen. Spector).

141. Brinkley, *Reagan Intensifies Campaign to Win Bork Nomination*, N.Y. Times, Oct. 1, 1987, at A1, col. 3; B9, cols. 5-6; Roberts, *Time Running Out on Vote for Bork, His Backers Admit*, N.Y. Times, Oct. 3, 1987, at 1, col. 4; 9, cols. 1-6; Roberts, *Reagan Implores the Public to Aid in Fight for Bork*, N.Y. Times, Oct. 4, 1987, at 1, col.



Bork stated that he would continue to fight.<sup>142</sup> The battle was essentially over on October 5, however, when Senators Byrd and DeConcini reported their opposition, thereby making clear that the Judiciary Committee would disapprove the nomination.<sup>143</sup>

The Committee met on October 6 and voted to send the nomination to the Senate with a recommendation that it be rejected.<sup>144</sup> Senator Heflin, the only previously undeclared member of the Committee, voted against approval, making the final vote nine to five. The Committee issued a lengthy report summarizing its views on the critical issues relating to the nomination.<sup>145</sup> Not surprisingly, only six pages of the majority's section of the Report concerned Judge Bork's background and professional achievements, while twenty-two pages concerned his views on unenumerated rights and precedent, and sixty-six pages addressed a variety of specific issues.<sup>146</sup> The conclusion emphasized the Constitution rather than Judge Bork. Its most significant comment about the nominee was, "Judge Bork's constitutional philosophy places him at odds with [the] history and tradition [of the Constitution]."<sup>147</sup> The Report's final sentences spoke to the role of the Senate:

In exercising powers of advice and consent for Justices of the Supreme Court, the Senate must speak for generations yet unborn, whose lives will be shaped by the fundamental principles that those Justices enunciate. As we face that task here today, we keep faith with our forefathers' bold experiment by reaffirming for our time their

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2; 39, col. 1.

142. Greenhouse, *Bork Rejects Seeking Withdrawal of Nomination*, N.Y. Times, Oct. 5, 1987, at B10, cols. 3-6.

143. Greenhouse, *Foes of Bork Gain Majority in Panel; Urge Withdrawal*, N.Y. Times, Oct. 6, 1987, at A1, col. 6; B6, cols. 5-6. Further aggravating the pro-Bork forces, moderate Republican Senators Weicker and Chafee also announced their opposition on October 5. *Id.* See A Decision on the Merits, *Record*, Doc. 28, at 5 (Sen. Byrd); at 5-6 (Sen. Chafee); at 8 (Sen. DeConcini); at 26 (Sen. Weicker).

144. Roberts, *9-5 Panel Vote Against Bork Sends Nomination to Senate Amid Predictions of Defeat*, N.Y. Times, Oct. 7, 1987, at A1, col. 6; B10, cols. 1-5.

145. Report on Nomination of Robert H. Bork to be an Associate Justice of the United States Supreme Court, *Record*, Doc. 25.

146. The Majority's portion of the Report consists of the following: "Part One: Background and Qualifications," at 2-7; "Part Two: The Constitution's Unenumerated Rights," at 8-29; "Part Three: A Critical Analysis of Judge Bork's Positions on Leading Matters," at 30-95, which includes sections on privacy at 30, civil rights at 36-45, equal protection, emphasizing gender discrimination, at 45-50, and Watergate at 65-71.

147. *Id.* at 96.

promise that liberty would be the American birthright for all time.<sup>148</sup>

A majority of the Committee concluded that Robert Bork would not protect that liberty.

The report also included an extensive section setting forth minority views.<sup>149</sup> This section stressed Judge Bork's unquestioned strengths, cataloged the many accolades he had received from respected scholars and officials of various political views, and rebutted about as well as possible the arguments of the majority concerning Bork's views on controversial issues. While in form this document advocated confirmation, in reality it eulogized a defeated nomination. It portrayed the Senate's decision as a "failure" and a "disservice" and it treated the nomination's defeat as a fact rather than as a probability.<sup>150</sup>

The day after the Committee vote, ten more senators announced their opposition to Bork, and some of his supporters urged surrender.<sup>151</sup> The news for the next several days again centered on tactics. Instead of concerns about forging a victory on the confirmation vote, however, the issues now involved the search for a new nominee and assessing the political ramifications of the battle for the President and each senator.<sup>152</sup> Bork insisted on forcing the Senate to a roll call vote, and the administration went along, perhaps reluctantly.<sup>153</sup> The debate began on October 21 and continued until October 23.<sup>154</sup> It was probably cathartic to those involved, but it was by this time

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148. *Id.* at 98-99 (emphasis in original).

149. *Id.* at 215-310, plus appendices.

150. *Id.* at 310. The entire tone of the piece is exemplified by the Minority's use of the term "will" in place of "would" in its final paragraph. For example: "The failure of the Senate to confirm [Bork] will be a failure larger than simply denying one qualified nominee a place on the Court." *Id.*

151. Roberts, *Bork Weighs Withdrawing Name as Reagan Aides Say Cause is Lost*, N.Y. Times, Oct. 9, 1987, at A1, cols. 2-3; A34, cols. 1-3.

152. See, e.g., Taylor, *More Names are Quietly Studied for Nomination to Supreme Court*, N.Y. Times, Oct. 9, 1987, at A22, cols. 1-4; Roberts, *White House Looks Beyond Bork in Setting Aims for Senate Debate*, N.Y. Times, Oct. 11, 1987, at 1, cols. 3-4; 33, cols. 1-3; Schmidt, *DeConcini Tests Fall Out Over Bork*, N.Y. Times, Oct. 12, 1987, at B6, cols. 1-3; Roberts, *Reagan Vows New Appointment As Upsetting to His Foes as Bork's*, N.Y. Times, Oct. 4, 1987, at A1, cols. 3-4; A20, cols. 1-3.

153. Brinkley, *Angry Bork Says He Will Not Quit Nomination Fight*, N.Y. Times, Oct. 10, 1987, at 1, col. 6; 13, cols. 1-6.

154. See 133 CONG. REC. S14659-14741 (daily ed. Oct. 21, 1987); 133 CONG. REC. S14767-14888 (daily ed. Oct. 22, 1987); 133 CONG. REC. 14913-15011 (daily ed. Oct. 23, 1987).

irrelevant.

The Senate voted on October 23. Forty-two senators voted in favor; fifty-eight senators voted in opposition.<sup>155</sup> Two Democrats supported the nomination while six Republicans voted against it. After the vote, Senator Biden described Bork as "a fine man who just had a view of the Constitution that is out of touch with the 1980's and 1990's."<sup>156</sup> Bork said, "There is now a full and permanent record by which the future may judge not only me but the proper method of a confirmation proceeding."<sup>157</sup>

## VI. REFLECTIONS ON THE RECORD

The Weicker Collection provides us with the record Judge Bork sought. Some of its lessons support Bork in his bitterness toward the Senate and those attacking his nomination. The process was dirty in many ways—the sort of "politics as usual" that we accept only reluctantly from election campaigns. There is something that smells very bad when Senator Kennedy attacks Bork for wanting a society with coat hanger abortions and gestapo police tactics when Bork had stated only that legislators such as Kennedy should resolve the abortion controversy and had never made any comments on police authority. It is equally distasteful to read Senator Metzenbaum's badgering tirades about Watergate and the sterilization case. Metzenbaum was a decision-maker, not a prosecutor, and he should have asked questions to elicit the facts rather than distorting case holdings to get good "sound bites" for his next re-election campaign.

Other lessons suggest that the confirmation process was a celebration of the Constitution. The Senate is controlled by moderates, not by extreme liberals or people likely to be swayed by the People for the American Way commercials. Moderate senators such as DeConcini and Spector asked the most searching questions at the Committee Hearings and thereby helped to create an unprecedented record of senatorial consideration of important constitutional issues and legal theory. The thoughtful examination of Bork's legal views was welcome and signified that the Senate took its role in the confirmation process seri-

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155. 133 CONG. REC. S15011 (daily ed. Oct. 23, 1987).

156. N.Y. Times, Oct. 24, 1987, at 10, col. 6.

157. N.Y. Times, Oct. 24, 1987, at 10, col. 4.

ously. Indeed, the curious notion that the Senate should serve only as a resume checker was perhaps finally put to rest. Nothing in the Constitution suggests that the Senate has such a limited role, and if Presidents are to consider ideology and legal views on specific issues in making nominations, the Senate must do so in the confirmation process if it is to serve its constitutional purpose. If the diatribes made this process unseemly in part, the constitutional analysis made it highly appropriate on balance.

The circumstances surrounding the Bork nomination suggest, however, that such a "good/bad" process will only occur sporadically, if at all. Many factors came together to raise the reasonable possibility that Bork could be defeated, and therefore to cause both the demagogic attacks and the careful consideration of the Constitution and its values. Playing "what if?" is usually a meaningless waste of time; in this instance, however, it reveals the normal weakness of the confirmation process. Would Bork have been defeated if he had been nominated to the Court during the first six years of the Reagan presidency, when the Republicans controlled the Senate? This would not only mean that the administration could have withstood the net loss of four Republican votes in the roll call vote, but also that the Republicans would have controlled the Judiciary Committee. The hearings could have been held before the opposition became organized; the witness lists could have been structured differently; the all-important Committee vote and Report would, in all likelihood, have supported the nomination. Would Bork have been defeated if he did not have a long record of pungent statements on controversial constitutional issues and a minor role in Watergate? Bork's caustic comments on critical issues were the focus of virtually all of the anti-Bork submissions. They formed the basis for the most probing questions at the Hearings and placed him in a defensive posture in which even his "good" answers were suspect. The Cox firing made him an unwilling and probably undeserving symbol of executive branch lawbreaking. The answer to this question becomes obvious if one imagines the likely treatment of a less overtly ideological Supreme Court nominee with a strong record as Solicitor General and six years as a federal court of appeals judge. Finally, would Bork have been defeated if he had been nominated to replace a more con-

sistently conservative justice? Antonin Scalia was named, in effect, to replace Chief Justice Burger in 1986. Justice Scalia is probably as conservative as Bork, yet few alarms sounded when Scalia was nominated. After all, his vote would rarely change the outcome of individual cases. But Bork was named to replace Justice Powell, whose vote was often critical to a moderate or liberal result. The fact that Bork's supporters argued strenuously that his views were much like Powell's views shows the importance of this factor; the fact that those arguments were unconvincing shows why the vote went against Bork.

Of course, Bork's supporters, if not the judge himself, may have the last laugh. After the abortive nomination of Douglas Ginsburg, President Reagan named Anthony Kennedy to replace Justice Powell. Without a controversial history but with a reputation as a fair and thoughtful jurist, Kennedy was easily confirmed. The reality, however, is that he may be just a kinder, gentler Bork. If so, the Supreme Court's decisions may be no different from what they would have been if Bork had won his confirmation battle.

What of Robert Bork? One can sympathize with his bad luck in timing and for the somewhat degrading process he endured, and yet recognize the justice of the Senate's decision. Becoming a Supreme Court Justice is always a bit like being struck by lightning. Only nine persons may serve at any one time, and many times that number are qualified by intellect, experience, and legal acumen. No liberal and no Democrat, no matter how superbly qualified, has had any realistic opportunity to be named to the Court for over twenty years, and there is no reason to feel any more sympathy for Bork than for such other potential justices. Moreover, Bork's own temperament was clearly one of his biggest obstacles. Originalism and interpretivism need not be communicated with anger and vitriol, yet Bork usually chose to describe liberal decisions and theories in language that expressed deep contempt. The same bitterness toward upper class values that once led Bork to socialism eventually led him to believe in legislative supremacy—the will of the people, reflected in legislative enactments. This inherently democratic principle appeared radical in application and turned the national legislature against his nomination.

That is the ultimate lesson of the Bork confirmation pro-

cess, and, ironically, it is one that should appeal to those who share Bork's ideology. In considering his nomination, the Senate made its value choices and decided not to consent. While Judge Bork would probably characterize the Senate's decision as at least as "silly" as Connecticut's ban on contraceptives, it is no less an expression of legislative will. The entire thrust of Bork's philosophy is that there is no place under our Constitution for one person's sense of right or justice to overrule the sense of the majority. That is no less true in considering judicial nominations than in enacting statutes. Robert Bork is not a Supreme Court Justice because the people did not want him to be one. That is reason enough in this country.

## APPENDIX: A DESCRIPTION OF THE RECORD ON ROBERT BORK

The Weicker Collection consists of twenty-nine documents concerning the nomination of Robert H. Bork as a Supreme Court justice. Most of the documents are reports submitted to Senator Weicker; others reflect the Senate's consideration of the nomination. This summary describes the documents in the collection. They are organized into categories that reflect the chronology of the confirmation process and the views expressed in the documents. The categories are:

- I. Neutral Collections (Doc. 1-2)
- II. Early Submissions
  - A. Pro-Bork Submissions (Doc. 3-4)
  - B. Anti-Bork Submissions (Doc. 5-6)
- III. Submissions Before and During the Hearings
  - A. Anti-Bork Submissions (Doc. 7-16)
  - B. Pro-Bork Submissions (Doc. 17-18)
- IV. The Hearings and Their Immediate Aftermath
  - A. The Hearing Record (Doc. 19)
  - B. Anti-Bork Submissions (Doc. 20-23)
  - C. Pro-Bork Submission (Doc. 24)
- V. The Committee Report and Final Action
  - A. The Committee Report (Doc. 25)
  - B. Anti-Bork Submissions (Doc. 26-28)
  - C. Pro-Bork Submission (Doc. 29)

### The Weicker Collection

#### I. Neutral Collections

##### Document 1

Title: Congressional Research Service Info Pack; Senate  
Consideration of the Nomination of Robert H. Bork  
to be a Supreme Court Associate Justice  
Prepared by: Congressional Research Service, Library of

### Congress

Date: Various Dates

Length: 195 pages in nine separate items

Summary: This package of materials contains nine items submitted at different times concerning the Bork confirmation process. The lead item is a September 14, 1987 report by Steven Rutkus, an analyst at the Library of Congress. It is a report on the nomination that analyzes the events leading up to and following the Bork nomination, the Senate's role in the confirmation process, and issues concerning Bork's legal philosophy and political, social, and economic views. The second item is a 1986 bibliography on Supreme Court appointments, while the third item is a reprint of a chapter in a text concerning the selection of Supreme Court Justices. These are followed by two collections of editorials on the Bork nomination and a report containing synopses of cases in which Bork wrote an opinion. Also included are a bibliography of writings by and about Judge Bork, a collection of magazine and newspaper articles on the nomination, and a reprint of the New York Times article on the Judiciary Committee's vote to disapprove the nomination.

### Document 2

Title: Untitled Blue Binder

Prepared by: Unknown

Date: Undated

Length: 165 pages, divided into 20 tabbed sections

Summary: This binder compiles excerpts from decisions and articles relevant to the confirmation process. Bork's Indiana Law Journal article, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1 (1971), is briefly summarized (tab 1), as is Bork's retraction of some statements made in the article. Other highlights include Bork's 1982 testimony on the proposed Human Life Bill (S. 158) and a copy of the Bill; an article written by Bork criticizing the *Bakke* decision and affirmative action programs; a Bork article on President Nixon (1968); an article by Bork opposing passage of the Public Accommodations Act (Title II of the 1964 Civil Rights Act); Bork's position on school prayer (criticizing *Engel v. Vitale*, 370 U.S. 421 (1962) (voluntary prayer in public schools held unconstitutional);



Barnes v. Kline, 759 F.2d 21 (D.C. Cir. 1985), in which Bork's dissent challenges the notion of congressional standing, and Nader v. Bork, 366 F. Supp. 104 (D.D.C. 1973), which declared that Bork's dismissal of Watergate Special Prosecutor Archibald Cox was illegal. The compilation also contains several articles that attack Bork's positions on judicial restraint, privacy, and antitrust.

## II. Early Submission

### A. Pro-Bork Submissions

#### Document 3

Title: Materials on Judge Robert H. Bork

Prepared by: United States Department of Justice (handwritten notation; other indications suggest that this was prepared by the White House)

Date: July 27, 1987

Length: 82 pages, divided into 12 separately tabbed sections

Summary: This early administration submission is a collection of materials that present Judge Bork's views throughout his career. The 12 sections consist of the following:

1. One page resume.
2. "The Judicial Record of Robert Bork," a summary of his views and judicial decisions in a variety of controversial areas.
3. An overview of Bork's qualifications and his views on civil rights, the first amendment, labor, abortion, and criminal law. This portion of the report also attacks the claim that Bork would upset the balance of the Supreme Court.
4. An analysis of Judge Bork's judicial philosophy of original intent. It includes selections from writings and speeches made over the course of his career as a professor and judge.
5. *Judicial Review and Democracy*, an article by Bork published in the Encyclopedia of the American Constitution. It criticizes the United States Supreme Court for using non-interpretivist analysis in applying the Constitution.
6. A statistical analysis of Judge Bork's judicial record, emphasizing that the Supreme Court never reversed a decision in which he participated. An appendix lists cases to show compari-

sons between Justice Powell's views and Judge Bork's views.

7. A detailed discussion of "balance" on the United States Supreme Court.

8. Robert Bork's role in the "Saturday Night Massacre."

9. An analysis of Judge Bork's views on the first amendment. It emphasizes his hostility to government censorship and willingness to consider new approaches in this area.

10. A description of a variety of cases in which Judge Bork ruled in favor of labor unions or their members.

11. A synopsis of Bork's statements and decisions concerning civil rights. This section argues that Judge Bork has consistently supported the interests of women and minorities.

12. "Summary of Major Opinions by Judge Bork." This section is a hodgepodge of decisions in the areas of administrative law, antitrust, civil rights, criminal law, federalism, first amendment, interpretivism, and jurisdiction.

Portions of this submission are published at 9 CARDOZO L. REV. 187 (1987).

#### Document 4

Title: White House Package

Prepared by: The Office of the President

Date: August 6, 1987

Length: forty-four pages, in four parts

Summary: This submission begins with a "Dear Colleague" letter from Republican Leader Bob Dole. The second item is a summary of Judge Bork's qualifications, prepared by the White House Office of Public Affairs. It contains statements by Bork explaining his judicial philosophy, a comment by Justice Stevens praising Bork, and several brief summaries of Bork's views on the first amendment, civil rights, criminal justice, abortion, and Watergate. The third item in the package is the text of a July 29, 1987, speech by President Reagan to the National Law Enforcement Council. The speech ends with glowing praises of Robert Bork and his philosophy of judicial restraint. The fourth part is a collection of editorials and columns, most of them endorsing the nomination. Many also criticize the attacks on Bork by those opposed to the nomination.

## B. Anti-Bork Submissions

### Document 5

Title: Advice and Consent: The Right and Duty of the Senate to Protect the Integrity of the Supreme Court

Prepared by: Senator Joseph R. Biden, Jr.

Date: July 23, 1987

Length: 18 pages plus two appendices

Summary: This is the press handout of a speech made by Senator Biden to the Senate concerning its responsibilities in considering nominations to the Supreme Court. The speech traces the Senate's role in the confirmation process back to the Constitutional Convention of 1787 to argue that the original intent of the framers was that the Senate should carefully scrutinize all such nominees. Senator Biden then discusses controversial nominations from the Washington administration through the Nixon administration, noting that ideology was a major concern regardless of whether the nominee was ultimately confirmed. The speech concludes with an argument that the Senate has the duty to respond whenever a President seeks to reshape constitutional law through his appointment power. One appendix lists Supreme Court nominations from 1795 through 1970 that were rejected or withdrawn. The second appendix lists statements by senators concerning the relevance of Senate consideration of a nominee's substantive views during the Fortas, Haynsworth, and Carswell confirmation processes. A comparison of the lists reveals that partisan politics overruled principle for the most part on this issue.

### Document 6

Title: Talking Points on the Bork Record

Prepared by: Unknown ("LCCR" is handwritten on page 1)

Date: July 23, 1987

Length: 14 pages

Summary: Most of this document is a step-by-step analysis of Judge Bork's positions on major constitutional decisions, including *Shelly v. Kramer* (racially restrictive covenants are un-

enforceable in court), *Harper v. West Virginia Board of Elections* (poll tax unconstitutional), *Baker v. Carr* (legislative apportionment subject to constitutional oversight), and *Griswold v. Connecticut* (law prohibiting use of contraceptives unconstitutional). The report also argues that Bork supports restraints on free speech, takes narrow views of congressional authority to enforce the fourteenth amendment and to limit executive authority, and ignores congressional intent in the anti-trust and regulatory areas. The report includes a letter from Professor Philip B. Kurland of the University of Chicago Law School to the Los Angeles Daily Journal criticizing the attempt by supporters to characterize Bork as a liberal. Also included is a copy of Ronald Dworkin's article on the Bork nomination in the August 13, 1987 issue of the New York Review of Books.

### III. Submissions Before and During the Hearings

#### A. Anti-Bork Submissions

##### Document 7

Title: The Judicial Record of Judge Robert H. Bork

Prepared by: Public Citizen Litigation Group

Date: August, 1987

Length: 149 pages

Summary: This report focuses on Judge Bork's votes and opinions in non-unanimous cases. It analyzes Bork's record in the areas of administrative law, constitutional law, criminal law, access to the courts, separation of powers, and antitrust. It accuses Judge Bork of inconsistently applying his philosophy of judicial restraint and claims that Bork's decisions can be predicted merely by identifying the parties. An extensive appendix catalogues opinions in a variety of areas and Bork's articles and speeches.

##### Document 8

Title: Response Prepared to White House Analysis of  
Judge Bork's Record

Prepared by: Consultants to the Senate Judiciary  
Committee

Date: September 2, 1987

Length: 72 pages plus appendices

Summary: This report disputes the administration's characterization of Judge Bork as a "mainstream jurist" by examining Bork's academic writings, views expressed as Solicitor General, and opinions as a circuit judge. This report attacks the analysis on Document 3 as inaccurate and highlights its erroneous statements in areas such as women's rights, privacy, standing, first amendment issues, antitrust, and civil rights. It notes that Bork is a judicial activist with little respect for precedent and that on the Court he would often cast votes that would change the direction of constitutional law. Appendix A discusses the nine cases cited in Document 3's comparison of Justice Powell and Judge Bork. Appendix B lists thirty-two landmark Supreme Court cases that Bork has rejected.

This submission is published, without appendices, at 9 CARDOZO L. REV. 219 (1987).

### Document 9

Title: Two Hundred Years, An Issue: Ideology in the Nomination and Confirmation Process of Justices to the Supreme Court of the United States

Prepared by: Olive Taylor, Dept. of History, Howard University Washington Bureau, NAACP

Date: September 1987

Length: 82 pages plus notes

Summary: Professor Taylor's study examines the role that the ideology of the President and his nominee plays in the Supreme Court appointment process. The submission begins with a discussion of the appointment process and then considers fourteen case studies, concluding with the Bork nomination. Highlights include discussions of the appointments of Justice Brandeis and Chief Justice Warren and the failed nominations of Judges Haynsworth and Carswell. Professor Taylor carefully criticizes Bork's positions on civil rights, the Cox firing, and judicial philosophy. Her analysis of Supreme Court nominations is intended to serve as a warning that the ideology of a justice is instrumental in his or her interpretation of the Constitution.

**Document 10**

**Title: Judge Bork's Views Regarding Supreme Court Constitutional Precedents**

**Prepared by: NAACP Legal Defense and Educational Fund, Inc., People for the American Way Action Fund**

**Date: September 1987**

**Length: 142 pages**

**Summary:** This submission begins with a summary of thirty-one Supreme Court decisions and doctrines that would be endangered if the Bork nomination were confirmed. It then describes Bork's statements that the Court should overturn previous decisions whenever a majority concludes that the decisions were erroneous. The bulk of the report consists of a detailed discussion of Judge Bork's views on specific constitutional decisions in a variety of areas, with special emphasis on first amendment and equal protection issues.

**Document 11**

**Title: Briefing Book on the Confirmation of Judge Robert H. Bork to the United States Supreme Court**

**Prepared by: American Civil Liberties Union**

**Date: Undated**

**Length: 299 pages, divided into 26 separately tabbed sections**

**Summary:** This submission attacks Judge Bork's nomination on several fronts. Its major component is a lengthy report on Bork's civil liberties record, bracketed by a short section entitled "The Judge Bork the White House Wants to Keep Hidden" and short "briefing papers" criticizing Bork's views on judicial philosophy, free speech, church/state matters, privacy, equality, and women's rights. The rest of the submission consists of exhaustive lists of writings by or about Bork, articles opposing the nomination, transcripts of interviews of Bork, and copies of several of his articles and speeches, including the Indiana Law Journal article.

## Document 12

Title: The Bork Report: The Supreme Court Watch Project's Analysis of the Record of Judge Robert H. Bork

Prepared by: The Nation Institute

Date: 1987

Length: 180 pages

Summary: This submission begins with an essay titled "The Compelling Case Against Judge Bork," by New York University law professor Stephen Gillers. Professor Gillers cites six reasons for the rejection of the Bork nomination. Four are Bork's positions on constitutional issues; the fifth reason, which is integrated into the first four, is Bork's philosophy of "judicial restraint;" the final reason is Bork's conduct during Watergate. The rest of the submission is a detailed and critical analysis of Judge Bork's record on freedom of speech, equal rights, privacy, entitlements and welfare rights, the Freedom of Information Act, business regulation, criminal law, special prosecutors and the Ethics in Government Act, foreign affairs, and access to the courts.

The Gillers article is published at 9 CARDOZO L. REV. 23 (1987).

## Document 13

Title: The Opposition to Bork: The Case for Women's Liberty

Prepared by: National Abortion Rights Action League

Date: 1987

Length: 34 pages plus 12 separately tabbed appendices

Summary: This detailed submission opposing confirmation concentrates on *Roe v. Wade*, the Supreme Court decision that recognized a woman's constitutional right to choose to abort her pregnancy. The report argues that *Roe* is consistent with the development of privacy rights since the 19th century. It notes that Judge Bork has been hostile to *Roe* in the past and could be instrumental in overturning the decision if named to the Court. The twelve appendices include maps illustrating state abortion laws, articles on abortion, the *Roe* decision and the plaintiff's

brief, speeches and testimony by Bork suggesting his anti-abortion position, and several federal court decisions relevant to the abortion issue.

#### Document 14

Title: Why the United States Senate Should Not Consent to the Nomination of Judge Bork to be a Justice of the Supreme Court

Prepared by: Common Cause, Phillip Heyman, Senior Counsel, Fred Wetheimer, President

Date: September 1987

Length: 19 pages

Summary: This report argues for the rejection of the nomination of Judge Bork because of his "radical view" of constitutional jurisprudence. The paper begins with a discussion of the need for close scrutiny by the Senate. It then describes Bork's theory of constitutional decisionmaking and argues that he would willingly enforce this theory to overturn established precedents. The report emphasizes Bork's extreme views on first amendment issues, legislative apportionment, privacy, and civil rights.

This submission is published, with minor variations, at 9 CARDOZO L. REV. 21 (1987).

#### Document 15

Title: Bork on Bork—the World According to Robert Bork

Prepared by: Senator Edward M. Kennedy

Date: September 17, 1987

Length: 9 pages

Summary: This anti-Bork document collects a variety of statements from Judge Bork's speeches and writings. These selected quotations cover Bork's views concerning precedent, judicial restraint, civil rights, the application of the equal protection clause to women, the first amendment, the right to privacy, anti-trust and mergers, limitations on judicial review, and executive and congressional authority.



### Document 16

**Title:** Opposition to Judge Robert H. Bork's Nomination to the Supreme Court

**Prepared by:** Natural Resources Defense Council

**Date:** September 22, 1987

**Length:** 10 pages

**Summary:** This submission reviews Judge Bork's judicial record in cases in which his views are relevant to challenges to administrative decisions on the environment. The report criticizes Bork's attitudes on access to the courts and deference to government agencies. It concludes that he upholds agency decisions adverse to non-business parties but overturns agency decisions adverse to business groups.

### B. Pro-Bork Submissions

### Document 17

**Title:** A Response to the Critics of Judge Robert H. Bork

**Prepared by:** United States Department of Justice

**Date:** September 12, 1987

**Length:** 213 pages plus introduction and appendices

**Summary:** This is a detailed analysis and critique of the methods employed by those opposed to the Bork confirmation. The bulk of the report is divided into two sections, 1) "The Real Robert H. Bork" and 2) "Legal Analysis." The first section criticizes the methodology of Judge Bork's opponents, presents Bork's views on various issues while sitting on the D.C. Circuit, and compares Judge Bork's positions on critical issues to those of Justices Powell and Scalia. The second half of the report is devoted to Judge Bork's positions on precedent, constitutional law, and criminal law. The entire report is interspersed with statistical analyses of Judge Bork's decisions and comparisons to opinions by other legal scholars on the same issues.

### Document 18

**Title:** In Support of Bork

**Prepared by:** John C. Sheperd, Chairman, Board of Over-

seers, Hoover Institution

Date: September 1987

Length: 7 pages plus notes

Summary: This pro-Bork article first outlines Judge Bork's qualifications and record on the D.C. Circuit. It then attempts to prove that Bork is in the judicial mainstream, primarily through use of a statistical analysis that compares Bork's votes with those of his judicial colleagues. The submission concludes by noting that many groups opposed the appointments of Justices Powell and Stevens on ideological grounds and suggests that the fears of the anti-Bork groups are similarly unfounded.

#### IV. The Hearings and Their Immediate Aftermath

##### A. The Hearing Record

###### Document 19

Title: Hearings on the Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States

Prepared by: Committee on the Judiciary, United States Senate

Date: September 15-30, 1987

Length: 3,734 pages over three volumes

Summary: The Hearing Record consists of all testimony and exhibits before the Judiciary Committee. Volume 1 contains the opening statements of the members of the committee and testimony from a variety of distinguished witnesses, but its highlight is the approximately 600 pages of testimony from Judge Bork, which begins at page 75. Volumes 2 and 3 continue the testimony and exhibits, largely through presentations by pro- and anti-Bork panels. These two volumes contain many exhibits, ranging from written statements to correspondence to government documents to newspaper and magazine articles.

##### B. Post-Hearing Anti-Bork Submissions

###### Document 20

Title: Bork v. Bork

Prepared by: NAACP Legal Defense and Education Fund,  
Inc. and People for the American Way Ac-  
tion Fund

Date: September, 1987

Length: 59 pages plus preface

Summary: This report compiles statements made by Judge Bork during his confirmation hearing and compares them to views expressed in earlier speeches and articles. Although comprehensive, the submission does not discuss areas where Bork did not depart from previously expressed criticisms of the Supreme Court decisions. The topics covered include a detailed analysis of precedent, free speech, equal protection, the right to privacy, freedom of religion, and a group of miscellaneous inconsistent positions taken by Judge Bork. The phrase "confirmation conversion" is handwritten on the cover.

#### Document 21

Title: Judge Bork's Civil Rights Record on the Court of Appeals

Prepared by: Paul Alan Levy, Public Citizen Litigation Group

Date: updated

Length: 8 pages

Summary: This report responds to Judge Bork's assertions in his testimony that he voted in favor of minority or female plaintiffs in most civil rights cases. It notes that this analysis omits eighteen cases in which Bork participated and which suggest that the bulk of his votes were adverse to such plaintiffs. It then separately describes and analyzes those cases identified by Bork as his "pro-civil rights" cases and all other civil rights cases in which he participated.

#### Document 22

Title: Lessons Learned at the Confirmation Hearing:  
Judge Bork's Testimony Raises New Concerns

Prepared by: People for the American Way Action Fund

Date: September, 1987

Length: 35 pages, with 2 appendices

**Summary:** This is a profoundly negative report on Judge Bork. It covers the confirmation hearing in detail and charges that Bork recanted some of his controversial views to improve his chances for confirmation. The report insists that Bork would be “insensitive to the principle of simple justice” and that he lacks the judgment to be a Supreme Court Justice. It includes numerous references to prior statements inconsistent with his hearing testimony, cites testimony by opponents of the nomination, and even includes adverse comments by some Bork supporters. One appendix lists Bork’s criticisms of established confirmation law principles after becoming a judge; the other appendix disputes Bork’s assertions that his views are consistent with those of Justices Black, Harlan, and Stewart.

#### Document 23

**Title:** Post Hearing Fact Sheet on Nomination of Judge Robert Bork

**Prepared by:** Alliance for Justice

**Date:** Undated

**Length:** 10 pages

**Summary:** This submission is an issue-by-issue analysis of Judge Bork’s confirmation hearing testimony. It asserts that Bork vacillated on many of his earlier views, but would revert to those views once confirmed for the Court. The report discusses freedom of speech, equal protection, privacy rights, civil rights, congressional standing, and precedent.

#### C. Post-Hearing Pro-Bork Submission

#### Document 24

**Title:** The Facts About Judge Bork: A Compilation of Key Excerpts from the Hearings of the Senate Judiciary Committee

**Prepared by:** Unknown

**Date:** September 15-30, 1987

**Length:** 172 Pages, divided into 12 separately tabbed sections.

**Summary:** This is a pro-Bork compilation of testimony for

the committee hearings. The first section highlights Judge Bork's qualifications as a Supreme Court justice with testimony from former President Ford, former Chief Justice Warren Burger, and several respected law professors. The second section discusses the distortion of Bork's record by anti-Bork forces. The remaining sections contain testimony addressing Bork's views on controversial issues such as judicial restraint, civil rights, privacy, women's right, the first amendment, and Watergate.

## V. The Committee Report and Final Action

### A. The Committee Report

#### Document 25

Title: Report on Nomination of Robert H. Bork to be an Associate Justice of the United States Supreme Court

Prepared by: Committee on the Judiciary, United States Senate

Date: October 13, 1987

Length: 99 page Majority Views, with 93 pages of appendices and 22 pages of Individual Views; 97 page Minority Views, with 97 pages of appendices

Summary: The Majority Views section explains the Committee's decision to disapprove the nomination. It includes a discussion of Judge Bork's background and qualifications, but the bulk of the report challenges Bork's judicial philosophy, his views on unenumerated rights, privacy, civil rights, equal protection for women, the first amendment, executive power, and anti-trust, and his actions in Watergate, as a judge in *Vander Jagt v. O'Neill*, as Solicitor General, and as a circuit judge. It also raises questions concerning the so-called "confirmation conversion." Included as appendices are the witness list for the hearing and the written testimony of William Coleman, which was inadvertently omitted from the published Hearings (Doc. 19). Senators Leahy, Heflin, and Spector include separate statements explaining their votes against the nomination. The Minority Views section addresses the same issues as the Report. It emphasizes Bork's undisputed strengths and characterizes him as a main-

stream jurist. The section argues that on some issues the majority misunderstood or misstated Bork's actual views, while on others, such as the general constitutional right to privacy, his views are in keeping with those of many moderate legal scholars. The appendices to the Minority's section of the Report include a variety of government documents, letters, and affidavits, all intended to rebut some of the majority's conclusions.

## B. Anti-Bork Submissions

### Document 26

Title: Public Citizen's Response to White House Critique of its Study of Judge Bork's Judicial Record

Prepared by: Public Citizen Litigation Group

Date: October 14, 1987

Length: 10 pages

Summary: This report replies to criticisms of the Group's earlier report on Judge Bork's judicial record. It defends the report's focus on non-unanimous cases as necessary to identify the important or controversial decisions. The submission asserts that many of the Justice Department's criticisms were factually erroneous and based on an unrealistic method of analyzing cases. The report explains its own analysis of Bork's cases to show that its previous report accurately described his record on the court.

### Document 27

Title: Talking Points: Reports on Judge Bork's Judicial Record

Prepared by: Public Citizen Litigation Group (apparently)

Date: Undated

Length: 5 pages

Summary: This repeats the major conclusions of Public Citizen's earlier report (Doc. 7). It then states and rebuts seven specific pro-Bork assertions concerning the judicial record.

## Document 28

**Title:** A Decision on the Merits; Selected Excerpts from Senate Statements Opposing Judge Bork's Nomination

**Prepared by:** American Civil Liberties Union

**Date:** October 19, 1987

**Length:** 26 pages

**Summary:** This submission consists solely of excerpts from statements given by senators opposed to the Bork nomination. There are fifty-four such statements, thereby accounting for all but four of the senators who ultimately voted to disapprove the nomination. Many senators disagreed with Bork's judicial philosophy; other senators expressed concern with his views on specific issues. These problems seemed exacerbated by his apparent shifts during the Judiciary Committee hearings.

## C. Pro-Bork Submission

## Document 29

**Title:** A Response to the Majority Report in the Senate Confirmation Proceedings of Judge Robert H. Bork

**Prepared by:** Committee for a Fair Confirmation Process

**Date:** November 2, 1987

**Length:** 119 pages in two separate parts, the second part itself divided into 16 separately tabbed sections

**Summary:** The first part includes a cover page noting that the submission seeks "to complete the record" on the Bork nomination. Attached are two newspaper reports concerning the tactics of Senators Kennedy and Biden in the confirmation process. The second part is a self-styled "comprehensive statement of the case." The most striking portion of this part is a letter signed by twenty-three New York federal judges that criticizes the nature and tone of the Bork confirmation process. Much of the remainder is a series of "white papers" that clarify and attempt to justify Judge Bork's positions on such issues as judicial restraint, privacy, and women's rights. The report also includes a defense of Bork's role in Watergate. The report concludes with criticism

and samples of the anti-Bork advertising campaign, and includes a transcript of the Gregory Peck television commercial.