How to Lose a Supreme Court Nominee in 115 Days:

The Story of the Robert Bork Confirmation and Its Legacy Today

Calvin Chiu[1]

It is 1 July 1987. President Ronald Reagan walks into a packed White House Press Room, followed by a man sporting what a *Washington Post* columnist called "Fu Manchuish facial hair."[2] The president steps up to the podium and announces to the assembled reporters that, "it's with great pleasure ... that I today announce my intention to nominate United States Court of Appeals Judge Robert H. Bork to be an Associate Justice of the Supreme Court."[3] With that sentence, Reagan set off one of the most contentious nomination battles in recent history. This particular saga occupies a prominent place in the popular imagination. Media coverage of recent Supreme Court nominations often cites Bork as the primary explanation for how modern confirmations have become so bitter.[4] Some scholars, like Laura Kalman, contend that the true change began earlier—in the 1960s and 1970s.[5] This paper offers a comprehensive analysis of the Bork battle not as a singular event, but as the culmination of two decades of growing politicization over the role of the Supreme Court in American life.

While previous unsuccessful nominees generated their fair share of political controversy, concerns over ethics or qualifications played a significant role in their rejections. Bork's failed appointment departed from that trend and marked the first time in nearly a century in which the Senate rejected a nominee on the basis of ideology. Indeed, Bork's was the first truly modern Supreme Court confirmation: a full-blown electoral fight filled with interest group involvement, political lobbying, and manipulation of media coverage. Bork's opponents used his extensive body of writing and speeches to characterize him as an extremist. The Reagan Administration's inability to answer those charges, combined with Bork's clumsy performance in the hearings, doomed his chances. Though not every Supreme Court pick since 1987 has generated the same degree of controversy, the Bork battle continues to influence the behavior of both nominees and their opponents.

Background

Throughout the first two-thirds of the twentieth century, the Senate generally confirmed nominees to the Supreme Court without much controversy, provided they were relatively qualified and without any ethical shortcomings. Of the forty-one nominations put forward between 1900 and 1960, the Senate approved thirty-eight.[6] Public hearings for nominees only began in 1938, and

Associate Justice picks only consistently appeared at the beginning with John Harlan's nomination in 1955.[7] Politicization of the modern confirmation process began as the Supreme Court assumed a larger role in American political life during the mid-twentieth century, most notably during and after Earl Warren's tenure as Chief Justice from 1953 to 1969. The "Warren Court" became a lightning rod of political controversy as it issued a number of rulings that expanded civil liberties and "selectively incorporated" the Bill of Rights (that is, applying its amendments to the states). For example, the Court's decisions in criminal justice cases, notably in *Miranda v. Arizona* (requiring law enforcement to notify suspects of their rights), incited accusations that justices valued the rights of criminals over public safety.

Not all the justices' decisions generated a public outcry. Indeed, they often reflected public opinion throughout the 1950s and 1960s.[8] For example, the country greeted *Gideon v. Wainwright*, which granted felony defendants the right to legal counsel in state courts, with general acclaim.[9] *Baker v. Carr* and *Reynolds v. Sims* allowed the Court to establish the principle of "one person, one vote," a change also popular with the public.[10] Yet one seemingly uncontentious decision, in particular, would help solidify the image of an "activist" Supreme Court and define the politics of nominations for decades to come. In 1965, the Court struck down state bans on contraceptives in *Griswold v. Connecticut*. Justice William Douglas, writing for the 7-2 majority, argued that though the Constitution did not explicitly outline an individual's right to privacy, protection existed under what Douglas called a "penumbra" created by various other protections in the Bill of Rights. *Griswold's* legal reasoning provided the basis for a later, far more divisive decision.

Eight years later, the Court (now under Chief Justice Warren Burger) decided *Roe v. Wade*, a 7-2 verdict which banned any restrictions on abortions within the first trimester. The majority cited *Griswold* to justify its decision, saying that, "a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist ... in the penumbras of the Bill of Rights."[11] Public and professional concerns for illegal abortions had already begun to shift public opinion in favor of keeping the decision between women and their doctors.[12] However, the *Roe* decision proved a bridge too far. As Barry Friedman wrote, "What was plainly noteworthy about the decision in *Roe* was its breadth and sweep—altogether reminiscent of *Miranda*."[13] *Roe* motivated pro-life groups to begin organizing politically, as states attempted to regulate abortions within the boundaries of the decision.[14] The nation's split on *Roe v. Wade* became one of the defining issues of American politics for at least the next two generations. Conservatives, in particular, rallied against *Roe* as a prime example of judicial overreach and evidence of a secular assault on Christian morality in public life.

The conservative movement carried Ronald Reagan into the White House in 1980. Reagan and his administration painted themselves as strictly pro "law-and-order" and pro-life. An internal Department of Justice report from early 1987 excoriated *Miranda v. Arizona* as a "decision without a past" which "reflected ... a willful disregard of the authoritative sources of law."[15] Reagan also called

"the more than 1½ million abortions performed in America in 1980 ... a great moral evil" and "an assault on the sacredness of human life," and stressed his desire to overturn *Roe v. Wade*.[16]

In its pursuit of these goals, Reagan's administration sought to reshape the federal judiciary in its own image. It sought out nominees to federal judgeships and the Supreme Court who demonstrated a conservative judicial philosophy. The effort yielded results. Barry Friedman observed that "by the end of Reagan's time in office, he had appointed roughly half the federal judiciary, an accomplishment not matched since Franklin Roosevelt."[17] According to Ethan Bronner, "When Reagan took office in 1981, federal judges were divided about three to two between Democrats and Republicans. On Reagan's departure from office eight years later, the ratio was reversed."[18] Above all, the administration sought to place reliable conservatives on the nation's highest court. By the sixth year of his presidency, Reagan had successfully appointed two justices to the bench.[19] Yet the body still remained evenly divided between conservative and liberal justices. That changed when Justice Lewis Powell announced his retirement in 1987. Though initially conservative, by the end of his tenure Powell had become a decisive swing vote on a Supreme Court split evenly between conservative and liberal justices.[20] The sudden decision to retire, spurred on by health problems and his disdain of partisan politics, set off a media frenzy. Powell's replacement could well decide the ideological balance of the court.

President Ronald Reagan Meeting with Judge Robert Bork in The Oval Office, July 1, 1987, White House Photographic Collection, 1/20/1981 - 1/20/1989, Ronald Reagan Library, Simi Valley, CA.

Reagan announced his selection on 1 July 1987. He nominated Robert H. Bork, a sixty-year-old judge on the District of Columbia Court of Appeals. An avowed conservative, Bork's lengthy career in academia and government included stints as a Yale Law School professor and U.S.

Solicitor General under President Nixon. He had often criticized the Supreme Court's legal rationale on a variety of decisions—including those concerning freedom of speech and abortion. At Yale, these views placed him in the minority among his colleagues. Nevertheless, he continued to fire off a number of scathing critiques of contemporary constitutional law, which he thought pursued outcomes at the expense of principle.

Bork laid out a manifesto of sorts in a series of lectures published in a 1971 *Indiana Law Journal* article. He argued in favor of giving legislatures broad latitude to pass any laws they wished, as long as these measures did not contradict any values explicitly mentioned in the Constitution, stating that, "Every clash between a minority claiming freedom and a majority claiming power to regulate involves a choice between the gratifications of the two groups."[21] In a republican system of government, the courts "must accept any value choice the legislature makes unless it clearly runs contrary to a choice made in the framing of the Constitution."[22] According to this perspective, the judiciary serves a narrow purpose—it "has no role to play other than that of applying the statutes in a fair and impartial manner."[23]

Bork was hardly the first scholar to voice this particular view, loosely known as "judicial restraint." In 1893, for example, Harvard Law Professor James B. Thayer declared that the judiciary needed to leave a "wide margin of consideration" for legislatures to act.[24] Thayer's contemporaries, Supreme Court Justices Oliver Wendell Holmes and Louis Brandeis, also shared this philosophy.[25] Even during the Warren Court, Justice Felix Frankfurter forcefully advocated judicial restraint—much to the chagrin of his colleagues.[26] Bork's most cogent contribution to this view came in his comprehensive critique of the Warren Court's jurisprudence. In particular, he zeroed in on the Court's view of privacy, which underpinned the *Griswold* and *Roe* decisions. Bork viewed with deep skepticism the idea that "government may not interfere with any acts done in private" because "we know at once that the Court will not apply it neutrally. The Court, we may confidently predict, is not going to throw constitutional protection around heroin use or sexual acts with a consenting minor."[27] He also thought that the Court had failed to justify both how it found and defined an implied right to privacy within the Constitution. As a result, "we are left with no idea of the sweep of the right of privacy and ... no notion of the cases to which it may or may not be applied in the future."[28] This naturally led to his conclusion that "the Court could not reach its result in *Griswold* through principle."[29] Bork also signaled his disdain for the legal reasoning behind *Roe v. Wade*, telling Congress in 1981 that, "I am convinced, as I think most legal scholars are, that *Roe v. Wade* is itself, an unconstitutional decision, a serious and wholly unjustifiable judicial usurpation of state legislative authority."[30]

Bork's outspokenness on this topic and others made him a darling of the growing conservative movement. As Suzanne Garment noted in *Commentary*, a right-leaning magazine, "to conservatives Bork was far more than a collection of views. He had become a symbol of the intellectual force of

contemporary American conservatism and an exemplar of its success in challenging previously dominant liberal ideas."[31] The paper trail he left behind would prove to be his undoing.

"Slick, Shrill Advertising Campaigns"

Upon the announcement of Judge Bork's nomination, his supporters and opponents began an aggressive push to define the terms of the public debate. The Chairman of the Senate Judiciary Committee, Senator Joseph Biden, delayed the start of confirmation hearings for an unprecedented two months. That interregnum allowed Democrats and interest groups opposed to Bork to organize their responses. By the time hearings began, anti-Bork groups raised $12 million, while pro-Bork groups raised $6 million.[32] Opposition efforts bore a striking resemblance to a political campaign—close observation of media coverage, distribution of talking points, and the use of prominent figures to influence debate.

Opponents had seized upon a key moment in their campaign against the nominee. At the very moment that Reagan sought to confirm Bork, the president's popularity had reached its nadir. In the 1986 midterm elections, the Democrats regained control of the Senate, winning eight seats and placing the GOP solidly in the minority with a margin of 55-45.[33] The Iran-Contra scandal, in which certain administration officials facilitated arms sales to Iran and used the proceeds to fund rebels in Central America, raged on. Internal turmoil within the White House itself led to the departure of Chief of Staff Donald Regan, replaced by Senator Howard Baker. Meanwhile, Reagan's approval rating never rose above fifty percent for most of 1987.[34] Suddenly the "Teflon President"—so named because no criticism or scandal appeared to stick to him—seemed stuck.

Liberal interest groups had significant incentives to mobilize. Reagan's rhetoric on abortion alienated groups like the National Organization for Women and the National Abortion Rights League. Meanwhile, Bork's antipathy towards the Court's prior decisions stoked fears that he might vote to restrict or even ban abortion if confirmed. Civil rights groups like the NAACP viewed Bork as a natural extension of Reagan's social agenda, which they believed caused "hardship, havoc, despair, pain and suffering on that huge body of the poor and the working poor of which blacks and other minorities are a disproportionate share."[35] Bork had initially opposed what would become the Civil Rights Act.

In 1963, Bork wrote an article in the *New Republic* in which he voiced skepticism towards federal laws prohibiting racial discrimination in public facilities, arguing that though "there need be no argument" on "the ugliness of racial discrimination," such measures infringed upon the freedom of association, and that "the occasions upon which it is sacrificed ought to be kept to a minimum."[36] He framed the debate as a question of "whether individual men ought to be free to deal and associate with whom they please for whatever reasons appeal to them."[37] In other words, Bork approached the issue from a libertarian point of view, not a racial one. However, this disclaimer did him little good. In what

would become the most infamous excerpt from the piece, the Yale professor 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."[38]

The characterization of the government-mandated desegregation as the epitome of "a principle of unsurpassed ugliness" would come back to haunt Bork. Even though he made the argument from principle, in doing so he placed himself on the same side as segregationists who made no secret of their prejudices. Bork would later attempt to walk back what he wrote. During his 1973 confirmation hearings to be Solicitor General, Bork admitted that he no longer agreed with the article because he had been "on the wrong track altogether."[39] He told senators that "the statute has worked very well and ... were that to be proposed today I would support it."[40] Bork later ascribed his thoughts on the subject to intellectual curiosity—the result of discussions he had with another conservative Yale colleague, Alexander Bickel.[41] Despite these later statements, that article helped explain why NAACP executive director Benjamin Hooks vowed to "fight it all the way—until hell freezes over, and then we'll skate across on the ice."[42]

The opposition's focus on ideology marked a turning point. Even during William Rehnquist's nomination, Reagan's most controversial pick before Bork, those opposed to the choice avoided focusing their ire on Rehnquist's staunchly conservative political leanings. As journalist Linda Greenhouse put it, "many liberal Democrats went through contortions to deflect any appearance that they were opposing Justice Rehnquist because they didn't like his views."[43] Instead, they focused on potential ethical issues as a proxy for ideological concerns—like the existence of a racially restrictive covenant (which prohibited certain minorities from buying a property) in Rehnquist's home deed.[44]

When Reagan selected Bork, most of the American public had not yet formed an opinion on the nominee. A 24 July *New York Times*/CBS News poll found that "only 23 percent expressed a view: 11 percent said they had a favorable opinion of him, 12 percent an unfavorable opinion."[45] Meanwhile Americans' views on the Supreme Court remained closely divided. Thirty-six percent thought the court too liberal, and thirty-eight percent too conservative.[46] However, in a sign of things to come, sixty-two percent thought that senators ought to strongly consider a nominee's position on major constitutional issues.[47] Only six percent of those surveyed thought that such views should play no part in the confirmation.[48] While the administration argued that a nominee's qualifications, character, and experience ought to be the determining factors, those opposed to Bork focused instead on his ideology. In the popular imagination, the latter became more compelling.[49]

Two weeks after Bork's nomination, the Advocacy Institute, a liberal group, published a paper titled *The Bork Nomination: Seizing the Symbols of the Debate*. The report conceded that "Like it or not, Bork falls (perhaps barely) at the borderline of respectability."[50] Therefore, his opponents needed to challenge the administration's characterizations of Bork as "brilliant, fair-minded, seasoned, genial"

by painting the judge as a "judicial extremist" and a "right-wing ideologue."[51] The term "ideologue," the document added, worked well because it had negative connotations. Most crucially for the battle ahead, the paper advised Bork's opponents to paint themselves as "conservers of personal rights—the privacy of the bedroom, public health and safety, a fair and honest marketplace, preservers of the environment, restrainers of excessive government intrusion."[52] In other words, they needed to paint Bork as a dangerous reactionary who sought to undo fundamental tenets of American public life. To that end, Bork's opponents successfully reduced his positions to convenient and compelling sound bites—lines that drastically simplified his record, yet could not be dismissed as patently untrue.

In particular, they seized upon Bork's 1984 ruling in *Oil, Chemical and Atomic Workers v. American Cyanamid*. Federal law mandated that employers could not expose female employees of childbearing age to substances toxic to fetuses. In this case, American Cyanamid, a chemical manufacturer, could not reduce lead levels below the safe limit in one of its departments. The company then offered the female employees a choice: they could stay in the division if they underwent voluntary sterilization. The Secretary of Labor cited the company for this policy, saying that it violated the Occupational Safety and Health Act.[53] This case went before the D.C. Appeals Court, which decided whether or not American Cyanamid's choice of sterilization qualified as a "hazard" under the law. If it did, the Occupational Safety and Health Administration could punish them. Bork authored the Appeals Court's unanimous opinion that it did not:

> As we understand the law, we are not free to make a legislative judgment. We may not, on the one hand, decide that the company is innocent because it chose to let the women decide for themselves which course was less harmful to them. Nor may we decide that the company is guilty because it offered an option of sterilization that the women might ultimately regret choosing. These are moral issues of no small complexity, but they are not for us. Congress has enacted a statute and our only task is the mundane one of interpreting its language and applying its policy.[54]

The judge conceded that the women involved faced "a most unhappy choice," but reasoned that "[t]he kind of 'hazard' complained of here is not ... sufficiently comparable to the hazards Congress had in mind in passing this law."[55] In saying that it did not, the Court echoed the judgment of the Occupational Safety and Health Review Commission, the organization responsible for arbitrating such matters.

Nevertheless, his opponents interpreted his decision to mean that he supported the sterilization of women. The day before hearings began, Planned Parenthood ran a full-page advertisement in the *Washington Post* urging readers to call their senators and voice opposition to Bork. It referred to the *American Cyanamid* case and accused Bork of "refus[ing] to strike down a company policy which required female employees to become sterilized, or to be fired from their jobs."[56] The advertisements provided the impetus for the *Cyanamid* case to emerge as a topic of discussion during the Senate hearings.

The Planned Parenthood advertisement was not the only shot fired that summer. Throughout August and September, the anti-Bork coalition circulated pre-packaged segments to media outlets. Henry Griggs, a spokesperson with the American Federation of State, County, and Municipal Employees (AFSCME), voiced and distributed "actualities" to radio stations across the country. These spots, used mainly in political campaigns, usually feature snippets of speeches. However, Griggs's actualities sounded like news reports, and this gave the adverts a veneer of journalistic legitimacy.[57] A typical one went like this:

> As the Senate hearings on the nomination of Robert Bork to the Supreme Court continue, a number of civil rights leaders raised opposition to Bork, saying his stands on constitutional rights of minorities are critical. The Reverend Jesse Jackson had these comments: 'Judge Bork is a threat to the future of civil rights, workers' rights, and women's rights. The achievements of the last 30 years are threatened by Judge Bork not only because he disagreed with those decisions and the Civil Rights Act of '64 or the Voting Rights Act, but he also would have the power on the Supreme Court to overrule or undercut those decisions. He is not just a conservative; he is backwards. He is activist in his intent to undercut progress.'[58]

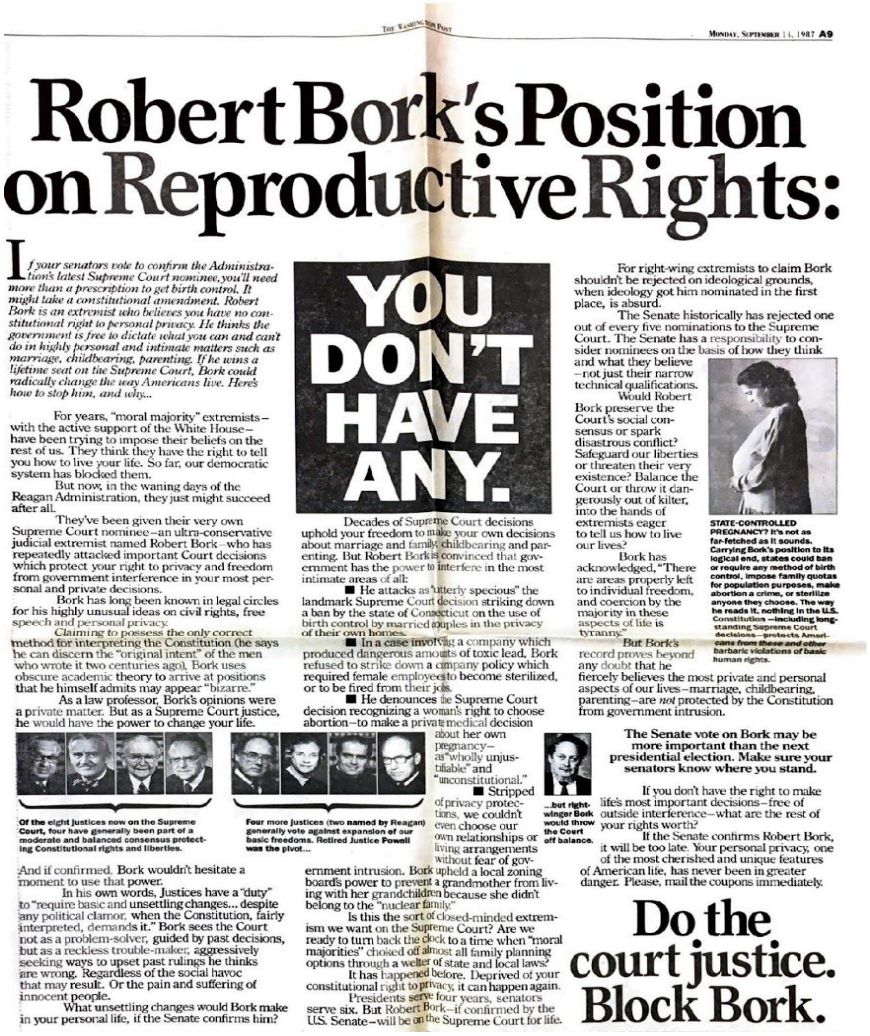
In contrast, the White House's outreach merely consisted of a toll-free number that played actualities of Reagan's pro-Bork speeches. Griggs also contacted individual radio stations and tailored his segments to different audiences.[59] His colleague, James Prior, the telecommunications coordinator at AFSCME, carried out the same campaign for television. He produced video news releases, or VNRs, in which spokespeople called into television stations offering free interviews. Local stations usually obliged, granting those guests a free platform to explain why they opposed Robert Bork.[60]

The opposition exhibited an impressive degree of coordination and media savvy. Phil Sparks, another spokesman at AFSCME, spoke of how they "put out a three-page memo, listing the key themes" and "identified the two hundred most important reporters on the issue in Washington and constantly sent them huge amounts of stuff."[61] Other groups, like People for the American Way, produced attention-grabbing commercials or advertisements which generated free media coverage. One advertisement, which generated significant backlash from conservatives, aired around the time of the Senate hearings. The commercial featured actor Gregory Peck as the narrator, who ominously warned audiences that:

> Robert Bork can have the last word on your rights as citizens, but the Senate has the last word on him. Please urge your senators to vote against the Bork nomination, because if Robert Bork wins a seat on the Supreme Court, it will be for life. His life and yours.[62]

Ironically, the advertisement languished in obscurity until White House Press Secretary Marlin Fitzwater singled it out at a press conference as an example of the "slick, shrill advertising campaigns that ... purposely distort the judge's record."[63] The president himself added fuel to the fire by telling a

reporter that he thought Gregory Peck was "miscast."[64] After that, network news programs replayed the spot for free in their coverage of it.[65]



THE WASHINGTON POST — MONDAY, SEPTEMBER 14, 1987 A9

Robert Bork's Position on Reproductive Rights:

If your senators vote to confirm the Administration's latest Supreme Court nominee, you'll need more than a prescription to get birth control. It might take a constitutional amendment. Robert Bork is an extremist who believes you have no constitutional right to personal privacy. He thinks the government is free to dictate what you can and can't do in highly personal and intimate matters such as marriage, childbearing, parenting. If he wins a lifetime seat on the Supreme Court, Bork could radically change the way Americans live. Here's how to stop him, and why...

YOU DON'T HAVE ANY.

For years, "moral majority" extremists—with the active support of the White House—have been trying to impose their beliefs on the rest of us. They think they have the right to tell you how to live your life. So far, our democratic system has blocked them.

But now, in the waning days of the Reagan Administration, they just might succeed after all.

They've been given their very own Supreme Court nominee—an ultra-conservative judicial extremist named Robert Bork—who has repeatedly attacked important Court decisions which protect your right to privacy and freedom from government interference in your most personal and private decisions.

Bork has long been known in legal circles for his highly unusual ideas on civil rights, free speech and personal privacy.

Claiming to possess the only correct method for interpreting the Constitution (he says he can discern the "original intent" of the men who wrote it two centuries ago), Bork uses obscure academic theory to arrive at positions that he himself admits may appear "bizarre."

As a law professor, Bork's opinions were a private matter. But as a Supreme Court justice, he would have the power to change your life.

Of the eight justices now on the Supreme Court, four have generally been part of a moderate and balanced consensus protecting Constitutional rights and liberties.

Four more justices (two named by Reagan) generally vote against expansion of our basic freedoms. Retired Justice Powell was the pivot...

And if confirmed, Bork wouldn't hesitate a moment to use that power.

In his own words, Justices have a "duty" to "require basic and unsettling changes... despite any political clamor, when the Constitution, fairly interpreted, demands it." Bork sees the Court not as a problem-solver, guided by past decisions, but as a reckless trouble-maker, aggressively seeking ways to upset past rulings he thinks are wrong. Regardless of the social havoc that may result. Or the pain and suffering of innocent people.

What unsettling changes would Bork make in your personal life, if the Senate confirms him?

Decades of Supreme Court decisions uphold your freedom to make your own decisions about marriage and family, childbearing and parenting. But Robert Bork is convinced that government has the power to interfere in the most intimate areas of all:

■ He attacks as "utterly specious" the landmark Supreme Court decision striking down a ban by the state of Connecticut on the use of birth control by married couples in the privacy of their own homes.

■ In a case involving a company which produced dangerous amounts of toxic lead, Bork refused to strike down a company policy which required female employees to become sterilized, or to be fired from their jobs.

■ He denounces the Supreme Court decision recognizing a woman's right to choose abortion—to make a private medical decision about her own pregnancy—as "wholly unjustifiable" and "unconstitutional."

■ Stripped of privacy protections, we couldn't even choose our own relationships or living arrangements without fear of government intrusion. Bork upheld a local zoning board's power to prevent a grandmother from living with her grandchildren because she didn't belong to the "nuclear family."

Is this the sort of closed-minded extremism we want on the Supreme Court? Are we ready to turn back the clock to a time when "moral majorities" choked off almost all family planning options through a welter of state and local laws?

It has happened before. Deprived of your constitutional right to privacy, it can happen again.

Presidents serve four years, senators serve six. But Robert Bork—if confirmed by the U.S. Senate—will be on the Supreme Court for life.

For right-wing extremists to claim Bork shouldn't be rejected on ideological grounds, when ideology got him nominated in the first place, is absurd.

The Senate historically has rejected one out of every five nominations to the Supreme Court. The Senate has a responsibility to consider nominees on the basis of how they think and what they believe—not just their narrow technical qualifications.

Would Robert Bork preserve the Court's social consensus or spark disastrous conflict? Safeguard our liberties or threaten their very existence? Balance the Court or throw it dangerously out of kilter, into the hands of extremists eager to tell us how to live our lives?

Bork has acknowledged, "There are areas properly left to individual freedom, and coercion by the majority in these aspects of life is tyranny."

But Bork's record proves beyond any doubt that he fiercely believes the most private and personal aspects of our lives—marriage, childbearing, parenting—are *not* protected by the Constitution from government intrusion.

STATE-CONTROLLED PREGNANCY? It's not as far-fetched as it sounds. Carrying Bork's position to its logical end, states could ban or require any method of birth control, impose family quotas for population purposes, make abortion a crime, or sterilize anyone they choose. The way he reads it, nothing in the U.S. Constitution —including long-standing Supreme Court decisions—protects Americans from these and other barbaric violations of basic human rights.

...but right-winger Bork would throw the Court off balance.

The Senate vote on Bork may be more important than the next presidential election. Make sure your senators know where you stand.

If you don't have the right to make life's most important decisions—free of outside interference—what are the rest of your rights worth?

If the Senate confirms Robert Bork, it will be too late. Your personal privacy, one of the most cherished and unique features of American life, has never been in greater danger. Please, mail the coupons immediately.

Do the court justice. Block Bork.

"Robert Bork's Position on Reproductive Rights," *The Washington Post, Sep 14, 1987.*

A "Mainstream Jurist Strategy"

That blunder by Fitzwater evidenced the administration's clumsy, unprepared response. White House Counsel Arthur Culvahouse, who led the White House's effort to confirm Bork, conceded that "groups opposing Judge Bork ... [were] expert at lobbying the Hill and creating grassroots support."[66] An unsigned memo dated 18 August lamented that "the mobilization is not nearly at the level it ought to be," and that "the President and [Chief of Staff] Baker appear to be the only members of the Administration speaking out on the nomination; no Cabinet Secretary has yet joined them."[67] Additionally, the administration's "original idea of organizing local members of the bar in key states

seems never to have been attempted. Those who are 'organizing states' appear to be simply calling their friends."[68]

Much of the lackluster response stemmed from a divide between the White House and the Justice Department. White House officials like Culvahouse and Baker, both moderate southerners, viewed Bork's selection with some weariness. They had initially hoped for a more moderate nominee, but Attorney General Edwin Meese had convinced Reagan to select Bork. The White House split the difference by pitching the judge as a "mainstream jurist." In a memo, Culvahouse insisted that "The mainstream jurist strategy is our strategy; there is no time for another strategy; and it is true that Judge Bork is a mainstream jurist."[69] He grumbled that the judge's "right wing supporters" refused to depict him as a "mainstream jurist." The document also voiced concern about a "brand-new Newsweek [that] distressingly quotes a senior White House aide as saying that Bork is a 'right wing zealot,'—which statement is very unhelpful."[70]

Meanwhile, Justice Department officials saw the upcoming confirmation battle as an ideological battle—the perfect opportunity to tilt the Supreme Court to the right.[71] These staunch conservatives had waited years for Bork's selection and they now chafed at the White House's insistence on a conciliatory approach. In a meeting two hours after Reagan announced the nomination, Assistant Attorney General John Bolton (yes, *that* John Bolton) told Bork to, "Come listen to me because we at Justice have your best interests at heart."[72] This advice rattled the nominee, who felt torn between both the White House and DOJ.[73] In the coming months, the Department begrudgingly cooperated with the White House, but the schism would become public in the aftermath of Bork's defeat.

The rhetoric from conservatives outside the administration further hobbled pro-Bork efforts. Some activists openly praised the judge as a near-messianic figure. Evangelicals lauded him as a bulwark against what they saw as society's moral decay. Robert Grant, chairman of Christian Voice, ebulliently told his members that, "Robert Bork does not support the idea of a constitutional right to engage in sodomy ... He may help us stop the gay rights issue and thus help stem the spread of AIDS."[74] Other conservatives echoed the Justice Department's views. For example, Representative Jack Kemp proclaimed that "a Reagan majority on the Supreme Court will set back the liberal agenda a generation or more."[75] These overtly partisan messages in Bork's favor added credibility to liberal charges that Reagan had chosen him strictly based on ideology. If, they argued, the president used a political litmus test to select a nominee, then the Senate had the right to use that same metric as well. The pro-Bork campaign's dissonant messages, combined with its inability to remedy them, wounded Bork's nomination before the hearings even began.

In late August, Randy Rader, counsel to Senator Orrin Hatch, wrote a memo to administration officials warning that the White House still needed better answers to accusations against Bork. Rader recognized one of the key arguments against the judge—that he "is a conservative

judicial activist, not an interpretivist, despite his claims."[76] In that vein, he also relayed the concerns of a Democratic staffer who thought "Bork is drawing a very 'wavy line' between when he will respect precedent and when he will not."[77] Rader's memo proved prescient—a significant portion of the upcoming hearings focused upon Bork's willingness to undo previous Court decisions.

Administration officials prepared an extensive body of written material for distribution to the press to combat what they saw as a paucity of positive media coverage. Culvahouse reported to Baker that, "More than one reporter has advised me that the only pro-Bork piece they have is the White House Briefing Book and that their desks are literally stacked with opponents' studies."[78] He also thought that "the vast majority" of outside analyses on Bork's career "give very little attention to or otherwise dismiss as 'uninformative' Judge Bork's record during the past five years as a United States Court of Appeals Judge," and that, "[a]ll of these studies give scant or no attention to his four-year record as Solicitor General of the United States."[79] Culvahouse reasoned that Bork possessed such an impeccable record in both roles that critics had no choice but to focus on his more controversial academic writing and speeches. As a result, the Department of Justice produced a "global" response. Culvahouse justified it as a retort "to the allegations in the previous studies, and to fairly present Judge Bork's record in great detail."[80]

The Department of Justice released "A Response to the Critics of Judge Robert H. Bork," on 12 September. The report lambasted outside criticism of his record, and focused almost exclusively on Bork's government career—reinforcing the "mainstream" narrative of Bork as a non-partisan official, and at times characterizing him as a liberal champion. "A Response" noted how "in 7 of 8 civil rights cases Judge Bork voted for the claimant—88% of the time," and "in 46 cases involving labor and workplace safety in which the outcome was unambiguous he voted for the union or employee 74% of the time."[81] The report also observed that Bork agreed with his fellow D.C. Circuit colleague (and future Supreme Court Justice) Ruth Bader Ginsburg in ninety-one percent of cases. Yet it also referred to the fact that Justice Scalia, a conservative Reagan appointee unanimously confirmed by the Senate, "voted with Judge Bork 98% of the time in the 86 panels on which they sat together on the appeals court."[82] This mishmash of statistics reflected the administration's dual desire to appease undecided moderates while still maintaining Bork's conservative bona fides.

This effort to counter the narratives against Bork had a limited effect. While the press covered the report, they also picked up the anti-Bork responses. Art Kropp, the executive director of People for the American Way, described the document as "nothing more than a shabby last-ditch effort to whitewash the many serious problems in Bork's record."[83] Senator Ted Kennedy echoed these sentiments, calling it "a White House whitewash of Bork's reactionary record."[84] Ralph G. Neas, executive director of the Leadership Conference on Civil Rights, accused the White House of perpetuating a "campaign of disinformation."[85]

The anti-Bork forces furnished legal firepower of their own. Laurence Tribe, a professor at Harvard Law School, came out publicly against the nomination. He possessed an impressive resume. Tribe had won nine of the twelve cases he argued before the Supreme Court and earned a reputation as an accomplished constitutional scholar.[86] In his book *God Save This Honorable Court*, Tribe argued that the Senate needed to consider the balance of the Court in its deliberations. In his view:

> [I]f the appointment of a particular nominee would push the Court in a substantive direction that a Senator conscientiously deems undesirable because it would upset the Court's equilibrium or exacerbate what he views as an excessive conservative or liberal bias, then that Senator can and should vote against confirmation. To vote otherwise would be to abdicate a solemn trust.[87]

Tribe's public opposition provoked the ire of conservatives, who accused the liberal-leaning professor of manipulating legal philosophy for political purposes. Nevertheless, his arguments gave legislators the cover they needed to explicitly consider ideology as a criterion for confirmation.

Advice and Consent: The Hearings Begin

Robert Bork's Senate confirmation hearings began on 15 September 1987 and would last a then-unprecedented twelve days. Bork testified for the first five, providing thirty hours of testimony. Yet the hearings would only solidify the image of Bork as a cold-hearted jurist who had little regard for the real-world consequences of his legal decisions. His detailed explanations of constitutional interpretation, though nuanced, were lost on the public and left room for opponents to mischaracterize. As Senator Howell Heflin (D-AL) told Bolton during a break in the hearings, "[Bork's] good on substance but there's too much judge talk. He's too professorial."[88] Bork also failed to capitalize on softball questions lobbed at him by sympathetic Republican senators. For instance, Senator Strom Thurmond asked if the judge would like to correct any mischaracterizations of his views, Bork meekly replied that, "I do not think I have time to discuss all of them right now but thank you for the opportunity."[89]

The hearings also gave rise to the idea that the judge had undergone what Senator Patrick Leahy called a "confirmation conversion." While Bork maintained his criticisms of several Supreme Court cases, he softened his rhetoric. He told the Committee that, "I accept them as settled law. I have not said that I agree with all of those opinions now, but they are settled law, and as a judge that does it for me."[90] He told the Committee that he respected precedent because of "a need for stability and continuity in the law."[91] Bork conceded that he had harshly criticized precedent, but justified it as an intellectual exercise, saying that, "In a classroom, nobody gets hurt. In a courtroom, somebody always gets hurt, which calls for a great deal more caution and circumspection than you are required to show when you give a speech at Indiana or some other place."[92] Kennedy dealt Bork's argument a severe blow when he played aloud an audio recording of a response the judge gave at a 1985

question-and-answer session where he said, "I don't think that in the field, of constitutional law, precedent is all that important. And if you become convinced that a prior court has misread the Constitution, I think it's your duty to go back and correct it."[93]

Bork argued that it was taken out of context—that his comments had come in the course of a back-and-forth conversation.[94] Regardless, the damage was done. To many in the room and those watching on television, Bork's statements on respecting precedent came across as disingenuous. The Leadership Conference on Civil Rights accused him of flip-flopping and charged that then-Professor Bork "had little incentive to recast his views in a manner likely to be more palatable to the Senate, [and his writings] are a truer indication of what Judge Bork would do if he became a member of the Supreme Court."[95] Bork's vocally conservative proponents viewed his seeming moderation as a disappointing submission to political pressure. The accusations of Bork as a close-minded ideologue now coincided with charges that he was an opportunistic turncoat.

Bork's answers also exacerbated the accusations of callousness against him. When Senator Howard Metzenbaum questioned him on his ruling in *American Cyanamid*, Bork gave a detailed explanation of the decision's background and rationale. However, he then undermined it by saying:

> [American Cyanamid] offered a choice to the women. Some of them, I guess, did not want to have children... I suppose the 5 women who chose to stay on that job with higher pay and chose sterilization—I suppose that they were glad to have the choice—they apparently were—that the company gave them.[96]

It was a shockingly insensitive statement and prompted a swift backlash. One of the women involved in the case, Betty J. Riggs, sent a telegram that same day to Metzenbaum, saying:

> I cannot believe that Judge Bork thinks we were glad to have the choice of getting sterilized or getting fired...I was only 26 years old, but I had to work, so I had no choice...This was the most awful thing that happened to me. I still believe it's against the law, whatever Bork says.[97]

In response, Bork offered up a slightly more humane reply:

> That was certainly a terrible thing for that lady, and it was certainly a terrible choice to have to make. Of course, the only alternative was that she would have been discharged and had no choice.
>
> I think it was a wrenching case, a wrenching decision for her, a wrenching decision for us...[98]

Nevertheless, the damage was done. In another incident, the judge also botched a question from Alan Simpson. The senator asked Bork why he wanted to be a Supreme Court Justice, to which he replied:

> [T]he court that has the most interesting cases and issues, and I think it would be an intellectual feast just to be there and to read the briefs and discuss things with counsel and discuss things with my colleagues. That is the first answer...[99]

From most jurists, Bork's reply would seem ordinary. However, that same sentiment from Bork seemed especially grating in light of his other comments. In the words of the *Washington Post*, his

comment only "deepened the impression of Bork as an oddly detached legal scholar, an intellectual without feeling."[100] Bork's answer came on 19 September, the last day that he testified. After five grueling days, he had only confirmed the narratives against him.

Even before the hearings ended, the tide of public opinion had begun to shift against Bork. A *Washington Post*/ABC poll from 25 September found that a slight plurality—forty-eight percent of those aware of the nomination—opposed it.[101] At the end of deliberations, the Committee voted 9-5 to recommend rejecting Bork's confirmation.[102] By then, fifty-three senators, a clear majority, had committed publicly to opposing him. Despite this death blow, Bork refused to withdraw. In a press conference, he adamantly declared, "The process of confirming justices for our nation's highest court has been transformed in a way that should not and indeed must not be permitted to occur again ... If I withdraw now, that campaign would be seen as a success and it would be mounted against future nominees."[103] On Friday, 23 October 1987, 115 days after President Reagan's announcement, the Senate voted 58-42 to reject Robert Bork's confirmation to the Supreme Court.

Epilogue

The legacy of Bork's nomination presents a compelling retrospective. "Borking" has entered the American political lexicon to mean "attack[ing] or defeat[ing] (a nominee or candidate for public office) unfairly through an organized campaign of harsh public criticism or vilification."[104] With hindsight, one might be tempted to view Bork's "borking" as inevitable. Certainly, he held conservative views, even if one debates how mainstream they were. Yet as Linda Greenhouse observed at the time, "the choice of a prominent legal scholar, whom the Senate confirmed unanimously to his current seat on the Federal appeals court here only five years ago, presents the Democrats with the hardest case for departing from the tradition of examining only the competence and character of Supreme Court nominees."[105] For all the accusations of insensitivity against him, no one denied Bork's distinguished record of government service. He had not accepted improper payments or voiced any personal prejudice against minorities. Instead, the arguments against him concerned his political philosophy.

Democrats and liberal interest groups successfully blocked Bork's confirmation because they mobilized effectively at an opportune moment and treated the confirmation as a no-holds-barred confrontation. The fact that the conservative Bork would replace a swing vote lent legitimacy to fears that the Court would move to the right. While conservatives relished that possibility, they had underestimated the public's resistance to it.

Of course, not every nomination since Bork's has generated as much controversy. Anthony Kennedy, Powell's eventual replacement, earned a 97-0 approval from the Senate. David Souter, George H.W. Bush's first nominee, breezed through his selection with a 90-9 vote. Yet Bork's saga has become historically significant because it has defined many of the norms associated with modern

confirmations. As the *Los Angeles Times* noted in an article published the day after the hearings began, "Bork broke with the precedent of Supreme Court confirmation hearings in which nominees generally are reluctant to discuss their judicial philosophy or to explain how they came to a legal conclusion, contending that it might prejudice their participation in similar cases in the future."[106] The judge and his advisers thought that this transparency would disarm his opposition. Instead, Bork provided ammunition for both his critics and his supporters. His detractors used his testimony as further evidence of his extremism and callousness. Meanwhile, those who had supported his nomination grew dissatisfied with what they perceived as politically-motivated backtracking.

Future administrations and their nominees would not make the same mistake. As Tom Goldstein, publisher of "SCOTUSblog," observed, "we have this ridiculous system now where nominees shut up and don't say anything that might signal what they really think."[107] For example, Souter gained a reputation as a "stealth nominee" because he refused to answer questions about his philosophy and he lacked any paper trail which would reveal it.[108] During her confirmation, Ruth Bader Ginsburg dodged questions about the death penalty because it was "an area [she had] never written about."[109] More recently, Neil Gorsuch earned the dubious distinction of having been the least responsive nominee in half a century.[110]

Ultimately Bork's failed nomination highlights a broader problem affecting the body politic. The political partisanship roiling the two other branches of government—the executive and the legislative—has pushed the Court into the delicate role of weighing in on the contentious political and social questions of our time—issues like abortion, immigration, or the role of government. As the Supreme Court itself acknowledged in *Planned Parenthood v. Casey*, it "cannot buy support for its decisions by spending money, and ... it cannot independently coerce obedience to its decrees. The Court's power lies, rather, in its legitimacy."[111]

While Americans by and large still believe in the judiciary's impartiality, that norm's longevity is far from guaranteed.[112] It requires responsibility from public officials—both to refrain from politicizing the judicial process and to cooperatively tackle the difficult political questions of the day. Yet that restraint has become sorely lacking as of late. The injection of rancorous partisan politics into the process threatens to cast doubt on the impartiality necessary to make the courts function. That possibility ought to concern every American.

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