

Conservative Polemics Concerning the Supreme Court

Nomination of Robert H. Bork

An Honors Thesis (HONORS 499)

by

Thomas R. Weber

Thomas R. Weber

Thesis Advisor
Dr. John Rouse

John Rouse

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Ball State University

Muncie, Indiana

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Purpose of Thesis

Robert H. Bork's nomination to the United States Supreme Court was rejected by the Senate on October 23, 1987. This paper seeks to identify the tactics and motivations of the people responsible for his defeat. Those involved include members of interest groups and the academic community, southern Democrats and moderate Republicans in the Senate, members of the White House staff and the President of the United States.

Since the dynamics of the two prevailing judicial philosophies would take up considerable space to explain, for the purposes of this paper, a brief description of each theory should be sufficient. Within the context of this paper, a conservative will be regarded as someone who has an interpretivist (or strict constructionist) judicial philosophy. In other words, a conservative is someone who tries to understand the principles that the framers of the Constitution were trying to protect, and applies that principle to today's circumstances. Conversely, a liberal will be defined as someone who has a "noninterpretivist" (or activist) judicial philosophy. A liberal is someone who believes judges are not bound by the intent of the framers, but should seek to create new rights based on their own moral or philosophical views.

Conservatives and liberals have fundamental disagreements over issues such as abortion, affirmative action, defendant's rights, the death penalty and the right to privacy. These disagreements were the basis of the dispute over the confirmation of Robert Bork.

The United States Supreme Court has undergone an ideological reversal during the past decade. Presidents Ronald Reagan and George Bush have replaced retiring liberals with conservative judges such as Antonin Scalia, Anthony Kennedy, Sandra Day O'Connor, David Souter and Clarence Thomas. Meanwhile, liberals, fearing the conservative-dominated court will overturn landmark decisions such as Roe v. Wade, have been searching for a way to have input on the selection process. The proponents of judicial activism have subsequently targeted the confirmation process as the only means by which they can affect the make-up of the Supreme Court, as long as there is a conservative President in the White House.

Robert H. Bork was nominated by Ronald Reagan in 1987 to succeed the retiring Lewis Powell. Bork had a reputation as a scholarly, conservative jurist who was a strong proponent of judicial restraint. Bork believed "judges must be bound by principle and not permitted to make distinctions that depend on value judgments." (1) Bork articulated his conservative views in extensive writings, often criticizing the basis of decisions made by activist courts during the 1970s. His candor made him an easy target for criticism and helped his opponents in the Senate and elsewhere to mobilize an unprecedented campaign to defeat his nomination.

Two days after Powell announced his retirement in June of 1987, the president of the National Organization for Women, Eleanor Smeal, announced that interest groups would engage in a fight to

defeat the nomination of Robert Bork:

Women's groups and civil rights groups have pledged to fight a Right Wing ideological take-over of the Supreme Court with the nomination of U.S. Appeals Court Judge Robert Bork, or for that matter, any nominee who will shift the majority of the Court to oppose legalized abortion and birth control, to abolish the right to privacy, to destroy affirmative action, or to roll back 30 years of civil rights and women's rights progress. Group leaders...made it clear they would fight one-two-or-more nominees who would give reactionaries the coveted fifth vote on the Court. Women's groups see a possible Bork appointment enabling the Right Wing to amend the Constitution with just one vote. (2)

Smeal's announcement was only the beginning. Dozens of groups eventually went on record publicly opposing Bork.

The National Women's Law Center released a study of Bork's record as a scholar and judge on August 18, saying they would oppose his nomination because his record was "unparalleled in its hostility to women's rights and would leave women defenseless against governmental sex discrimination." (3) National Abortion Rights Action League spokesman Richard Mintz announced that his group planned to urge each member to find five friends to pressure senators for a "no" vote on Bork. "They organized public rallies against the nominee; speaking to college students, women's groups and public health groups. They also went to the streets and shopping malls handing out anti-Bork material." (4)

In a joint news conference held by the National Federation of Business and Professional Women's Clubs, the American Association of University Women, NARAL, NOW and the National Institute for Women of Color, it was announced the groups would coordinate efforts to actively oppose Bork because "his recorded view is so

outrageous from our point of view, we decided we couldn't sit this one out." They added that Bork would be "bad for the economy." (5)

After announcing opposition to the nominee and pledging to lobby Senators to oppose Bork, a number of interest groups decided to proceed one step further. They began an unprecedented fund-raising drive to buy negative advertising against Bork. Although private organizations are not required by law to disclose the information, political analyst Suzanne Garment estimates the groups raised between \$18 and \$20 million for advertising purposes. (6)

The day before the hearings began, negative advertising by liberal special interests turned up on the pages of newspapers across the country. Anti-Bork stories originating from interest groups' press releases were combined with a series of full-page advertisements to shape the public's image of Bork. For example, NARAL advised, "You wouldn't vote for a politician who threatened to wipe out every advance women have made in the 20th century. Yet your Senators are poised to cast a vote that could do just that." Planned Parenthood predicted, "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." (7) People for the American Way warned, "Robert Bork has a lot of people worried. With good reason. Bork believes in sterilizing workers, billing consumers for power they never got, no privacy, no day in court, big business is always right." (8) At best, the outrageous accusations were a gross oversimplification of rulings Bork had made at various stages of

his career. At worst, they were a calculated effort to mobilize and energize a movement to defeat the nomination of Bork.

As the hearings began, rumors were spread about Bork's personal life. The contents of a confidential FBI report on the nominee were leaked to the media and were the origin of the rumor suggesting Bork had a problem with alcohol.

Using anonymous sources, an increasing scourge of contemporary journalism, a newspaper reported during the start of the hearings that an FBI investigation of the nominee had revealed he was taken to the emergency room of Sibley Memorial Hospital in Washington, D.C. on two occasions in December of 1983 to treat a broken arm and sprained wrist he had suffered by falling on icy walkways. The report said that although Bork did not drive himself to the hospital, the alcohol found in his blood during the second visit had been one point less than the level considered safe to drive. (9)

Several days later, another story about Bork's personal life appeared in print. Time magazine's David Beckwith reported that Bork was an agnostic. Bork, who was relying on support from religious fundamentalists, denied the accusations and stated,

I don't want to go into my religious beliefs, but the report in a national magazine that I was agnostic arose from the following conversation, and the reporter agrees that it rose from the following conversation. He said, 'You're not terribly religious, are you?' And I said, 'Not in the sense you mean.' That's it. He went bang, 'He's an agnostic.' And I later denied that I was an agnostic, in the New York Times, when I got a chance to. I took him to be talking about regular--you know, great piety and regular church attendance, and that's what I mean...But agnostic does not come out of that conversation in any way, and I am not an agnostic. (10)

It was impractical for Bork to respond to each of the charges levied against him by his opponents. But his son, who worked in the Washington press corps as the assistant editor of U.S. News and

World Report, wrote a letter to the Washington Post when a particularly inflammatory rumor circulated that Bork's wife, Mary Ellen, was anti-Semitic. Robert Bork Jr. wrote,

Three months ago the President honored my father by nominating him to become an associate justice on the U.S. Supreme Court. Since then our family has endured a relentless and bitter campaign against my father. Week by week the campaign has mounted. As the distortions were repeated over and over again, we watched my father portrayed as some villainous ideologue, a racist and a sexist. For his opponents, the more he is made to look like a crazed neanderthal, the better for them. Indeed, one particularly ugly rumor spread by his opponents to injure him is that my stepmother, Mary Ellen, doesn't believe that the Holocaust happened. These characterizations, these rumors, are vicious slander and they hurt. They hurt because the people I meet on the street who took the trouble to watch and listen to his testimony before the Senate Judiciary Committee know that they are untrue. My stepmother, brother, sister and I--who know him better than anyone--know they are untrue. And what's more, the special interest groups who have so masterfully spread these lies know it too. (11)

Never before had there been a national media campaign against a Supreme Court nominee. Nor was there ever a time when constituency interest groups were more solidly organized in opposition to a candidate. Their ultimate goal was to pressure Senators to vote against the nomination.

Judge Bork was not without his supporters. But pro-Bork lobbyists admitted they were underfinanced and poorly organized. Patrick McGuigan, who was trying to mobilize grass-roots support for Bork, once pleaded with a Reagan Administration official for financial support from the White House.

'For God's sake, the other side has Abe Lincoln himself [Gregory Peck in the advertisements distorting Bork's judicial record] in their TV spots. You need to get the President on the horn to some of his rich buddies and the word needs to get out that this needs to happen.' 'We

can't do that. It's just not appropriate for the President to raise money for a lobbying operation,' he replied. I bluntly answered, 'I don't care how you do it. I don't care if it's done with winks and nudges. I'm giving you my honest assessment. As your hard-working outside ally who is delivering the grass-roots part of this effort, I believe that Bob Bork will lose unless, in addition to our stuff, there is a sophisticated, targeted media budget to offset the negative advertisements. We don't have to match the other side, but we do have to be visible and effective in paid media.' (12)

Even if Bork's supporters had the money they needed to buy counter-advertising, they did not have the public relations know-how to use it as effectively as the opposition. McGuigan even confessed their shortcomings during the first week of hearings.

One thing I realized as the week went on is that the other side blanketed the media in the hearing room regularly with analysis and 'spin' documents, serving their need for context for the sometimes convoluted discussions in the hearing room. It was dawning on us that we had missed the boat in that respect. (13)

It is ironic that Reagan, who mastered the art of spin-doctoring during his Presidential campaigns, lost a Supreme Court nominee because of "unwillingness or inability to mount an effective defense of the nomination." (14)

The Reagan Administration eventually responded to some of the attacks against Bork. On September 10, Interior Secretary Donald P. Hodel told reporters,

Judge Bork's critics have totally politicized the process, hoping to turn votes against him without regard to the merit of his credentials or his abilities. It's not enough now just to defend Judge Bork. We've got an obligation to put out the word about how the Left has transformed the debate into character attacks and is using it to raise money for its causes. (15)

The Justice Department issued a 213-page report stating the attacks

on Bork were, "illegitimate and unwarranted. Their shoddy methodology and analysis seek to characterize a distinguished and fair-minded jurist as biased and closed minded." (16) Furthermore, the widely publicized criticisms of Bork:

Should be dismissed for the propoganda that they are and should not confuse the debate over Judge Bork's confirmation...These reports criticize him as being motivated by his own political agenda. Yet Judge Bork neutrally applies the law. In contrast, the special interests evaluate judges precisely the way that they rank politicians--according to the number of times they deliver results desired by a particular special interest to further a political goal. (17)

Senators, of course, could not dismiss the views of constituency interest groups because they are an important part of a politician's constituency.

The Chairman of the Senate Judiciary Committee, Sen. Joseph Biden (D-Delaware), was one of the first Senators to go on record against Bork. Biden, who stated in 1986 that if Bork's background check was clean, "I'd have to vote for him," (18) changed his mind one year later in the midst of his campaign for the Democratic nomination for President. In fact, months **before** the hearings began, Biden announced he would oppose Bork's nomination. Furthermore, he was instrumental in delaying the hearings so that interest groups would have more time to organize opposition.

Biden was roundly criticized by conservatives for delaying the hearings until after the recess. Republican National Committee Chairman Frank Fahrenkopf said Biden's actions were a direct response to the will of interest groups.

I think the nomination of Robert Bork blew the lid off the special interest pot on the Democratic Party burner.

We now see the real Democratic Party coming out. We see the radical feminist groups, we see the radical gay rights groups, we see the radical opponents of the right-to-life, we see all the organized labor groups, coming out and condemning Judge Bork before a hearing was ever held. The minute those special interests started to howl, Biden automatically took the position that he was going to vehemently oppose Judge Bork. Here is the individual charged under the Constitution of the United States with being the one to run the advice-and-consent hearing coming out, before a word is spoken, and condemning the nominee. That's a direct reaction to the special interests and their control over the Democratic nominating process. (19)

Biden spoke first when the Judiciary Committee hearings finally began in September. Claiming to be "deeply troubled" with Bork's writings, Biden predicted Bork would prevent Americans from using birth control, force state population mandates and deny them their right to look at pornography. "We must pass judgment of whether your philosophy is an appropriate one in this century." (20) Before Bork was given a chance to speak in the hearings, another outspoken Bork critic, Sen. Edward Kennedy (D-Massachusetts), proclaimed, "In Robert Bork's America there is no room at the inn for blacks, and no place in the Constitution for women; and, in our America, there should be no seat on the Supreme Court for Robert Bork." (21)

The Senators took turns speaking for several hours before finally beginning to question Bork. Sen. Orrin Hatch (R-Utah), recalling the ad claiming women would need a Constitutional amendment to get birth control if Bork were approved, tried to clear up this obvious misrepresentation of Bork's record by asking the judge if he had anything against birth control. Bork

responded, "Nothing whatsoever! I think the Connecticut law was an outrage, and it would have been more of an outrage if they had ever enforced it against an individual." (22) Later, Hatch bluntly questioned Bork about abortion.

HATCH: You've been criticized for having been critical of this abortion case called Roe v. Wade. Can you explain your apprehensions about this case?

BORK: Roe against Wade contains almost no legal reasoning. We are not told why it is a private act...and if it is, there are lots of private acts that are not protected. Why this one is protected, we're simply not told that.

HATCH: Is it safe to say you haven't made up your mind on (how he would vote to strike down Roe v. Wade)?

BORK: That's true. (23)

Next, it was back to Kennedy who read from a prepared script as he "questioned" the nominee.

KENNEDY: Above all, a Supreme Court justice must be fair but, in a lifetime of [public] writings, Mr. Bork has shown his bias against women and minorities and in favor of big business and presidential power. And it's small comfort to minorities to know that, some years after the Civil Rights Act was passed over his opposition, Mr. Bork changed his mind and said that it had worked all right...[He] asks us to judge him on his record as a judge, but, in his own speeches as a judge, he has shown little respect for the past decisions of the Supreme Court. Again and again, on the public record, he has suggested that he is prepared to roll back the clock.

BORK: If those charges were not so serious, the discrepancy between the evidence and what you say would be highly amusing. I have not asked that either the Congress or the courts be neutral in the face of racial discrimination. I have upheld the laws that outlaw [it]...I have never written a word hostile to women...hostile to privacy...I have never written a word or made a decision from which you can infer that I am pro-big business at the expense of other people...Nothing in my record suggests I have a political or ideological agenda. (24)

Rather than directly question the nominee, Kennedy, a long-time ally of civil rights and women's groups, used his allotted time to read his own simplified version of Bork's judicial philosophy into the record.

On the second day of the hearings, a Washington Post poll showed for the first time that slightly more people opposed the Bork nomination than favored it. However, 80 percent of blacks opposed the nomination, which was extremely significant because "racial harmony is an essential condition for Democrats to remain competitive in the South." (25) Southern Democrats Richard Shelby (Alabama), Wyche Fowler Jr. (Georgia), Terry Sanford (North Carolina), and John Breaux (Louisiana) each relied heavily on the black vote to get elected, and risked losing re-election if they alienated black voters.

The third day of testimony featured Sen. Patrick Leahy's (D-Vermont) probe of Bork's financial history. He reminded the nominee, "In 1979...you made approximately \$197,000 that year for consulting work. In 1980...around \$250 to \$300,000 a year for consulting work. In 1981...around \$150,000. Are those figures at least in the ballpark?" Bork answered quietly, "Those were the only years I made money. There was a reason I made money, but I don't want to go into it here." After reading the figures, Leahy asked Bork if he had ever provided the poor with free legal aid. Moments later, Sen. Gordon Humphrey (R-New Hampshire) interrupted Leahy's questioning, and asked Bork if his extra income, "coincided with heavy medical bills in your family?" Bork covered his eyes

with his hand and whispered "yeah." During that time, Bork's first wife, Claire, had been battling cancer. She died in 1980. That night one of the television network reporters broadcast the sequence of Bork and Leahy, closing with Bork's response to Humphrey and concluding: "The Democrats are not expected to pursue this line of questioning." (26)

The key concern of the Democrats on the committee (and moderate Republican Arlen Specter) was whether or not Bork would seek to bring about social change. It was clear Bork opposed Roe v. Wade, but no one knew for certain whether he would overrule the decision. Sen. Charles Grassley (R-Iowa) questioned him concerning social change:

GRASSLEY: Don't legislatures do dumb things sometimes that only the courts can protect society--only the courts are in a position to protect society?

BORK: I'm bound to say Senator, yes they do dumb things sometimes and often those dumb things are unconstitutional. It's not a reason for making up a new Constitution. No, there is no clause in the Constitution that says, the legislature shall make no dumb law.

GRASSLEY: I want to give you a question that was put to Justice Fortas during his confirmation hearings to be Chief Justice in 1968...I quote: "To what extent and under what circumstances do you believe the Supreme Court should attempt to bring about social, economic or political change?"

BORK: If the social change is mandated by principle in the Constitution or in a statute, then the court should go ahead and bring about social change. Brown against Board of Education brought about enormous social change, and quite properly. If the social change is the judge's idea of what would be a nice social change, then Justice Fortas's answer is correct, 'zero.' (27)

This response came as a mild surprise to some conservatives who had

hoped Bork would be a champion for their causes.

Bork was attempting to assure the Senators he would not allow his personal views to influence his decisions. Bork further explained this philosophy on September 6, when he said, "Anybody who thinks I am going to be an activist is in for some surprises...One group [of backers] is painting me as a judge who tries to interpret the law, and the other group is painting me as a judge who will do conservative things for them. I would disapprove of conservative activism as much as I would of liberal activism." (28) Bork's words did not silence his critics who remained convinced their causes would eventually be in jeopardy if Bork sat on the court.

From time to time the committee hearings contained political bickering between Republicans and Democrats, but nothing as terse or emotional as what happened on the eighth day of the hearings. Chairman Biden, who had just been forced to withdraw from the Presidential race because the media caught him plagiarizing Hubert Humphrey, John F. Kennedy and Robert F. Kennedy in his campaign speeches, argued vehemently with Senator Hatch. Biden stated the committee would only vote on the strength of the testimony. Then he handed out the schedule of witnesses which, with few exceptions, scheduled pro-Bork witnesses late in the day, much too late for coverage on the evening news. This move angered Hatch and caused the dispute.

A big boost in favor of the judge came when former Chief Justice Warren E. Burger praised the nomination of Bork at an

American Bar Association convention. Burger, a liberal who sided with the majority on Roe v. Wade, stated:

I don't think in more than 50 years since I was in law school there has ever been a nomination of a man or woman any better qualified than Judge Bork. He has the experience and training. He has got it all. I don't really know what the problem is. No judge up for nomination under any circumstances should ever be asked to commit himself on how he's going to vote on a case that's coming before the court at some future date. (29)

Burger then made an unprecedented appearance before the committee to speak on behalf of the nominee. He told the committee he had never seen a process "with more hype and more disinformation. If Judge Bork is not in the mainstream then neither am I." (30)

Jewel LaFontant, a deputy solicitor general under Bork, also testified on Bork's behalf. She told the committee that Bork is neither racist or sexist. "I sincerely believe he is devoid of racial prejudice or I wouldn't be here. As a woman, as a black woman, I have no fear of trusting my rights and privileges to Robert Bork." (31) The most intriguing part of her testimony, however, came under questioning by Senator Humphrey, when LaFontant revealed she was pressured by minority groups not to testify.

Bork was also adamantly defended on the witness stand by former Attorney General William French Smith who had an argumentative exchange with Sen. Howard Metzenbaum (D-Ohio).

SMITH: You are propogandizing it...The impression you're creating is that Judge Bork wants to control the use of contraceptives in the bedroom.

METZENBAUM: Propaganda, my eye!

SMITH: That is the image you are projecting and the kind of propoganda and distortions being thrown out. That is not true and I suspect and am willing to say you know

it's not true.

METZENBAUM: Everything's just a figment of our imagination. Is that it, General Smith?

SMITH: That is false and it borders on dishonesty and it borders on lying to the American public. There are some very high people in this government who are lying to the American people. (32)

Even though the witnesses who testified on Bork's behalf outnumbered the opposition by a 2-1 margin, the impact of the anti-Bork witnesses was greater because they took place in time for broadcast on the nightly news. Harvard Law Professor Laurence Tribe, perhaps the most vocal enemy of Bork in the academic community, spoke against the candidate for an entire morning. He claimed, "not one of the 105 past and present justices in the Supreme Court has ever taken a view as consistently radical as Judge Bork's." (33) When all of the testimony had concluded, the committee voted 9-5 (on a party line basis with the exception of Senator Specter) to pass along an unfavorable recommendation of Bork to the full Senate.

After three days of intense debate, the Senate voted at 2 p.m. on October 23, to reject the nomination of Judge Robert H. Bork by a margin of 58-42, ending months of bitter debate. All five of the southern Democrats, who were elected on the basis of the black vote, voted against the nomination. Five of the six Republicans who voted against Bork were moderates from northeastern states. Only two Democrats voted in favor of Bork. Following his rejection by the Senate, Bork issued a poignant statement: "There is now a full and permanent record by which the future may judge not only

me but the proper nature of a confirmation proceeding." (34)

In the final analysis, Bork was the victim of a volatile political confrontation between conservatives and liberals. Liberal interest groups successfully used a media-oriented campaign that oversimplified and distorted his judicial philosophy. The impressions created by the interest groups about Bork tended to be so extreme and so inflated that Americans saw him as a threat to their civil liberties. Bork found out too late "that once broad charges have been made, it is almost impossible to refute them in the television era through resort to a technical, lawyerly vocabulary." (35)

Bork's supporters also blamed President Reagan for failing to forcefully engage in the political battle. Senator Grassley remarked after the vote:

It was very definitely the fault of the White House, which went on vacation in August while the [Bork] opposition was working. Instead of building coalitions to support Judge Bork, they were writing briefing books and caught asleep at the switch. The Bush and Baker loyalists in the White House may have been at fault, but in the final analysis the buck stops with the President.

(36)

Conservatives blamed Reagan for allowing moderates on the White House staff (led by George Bush and Howard Baker), to plan strategy for the confirmation process.

In the Senate, Ted Kennedy set the tone for the debate with his opinion of what America would be like if Robert Bork were confirmed. Kennedy alerted liberals and showed them it was a cause that could be won. In the meantime, Biden, the other leading

figure in opposition to Bork, used his authority as chairman to manipulate the process against the judge.

Although they frequently misrepresented the meaning of Bork's judicial philosophy, his key opponents largely understood what his nomination would mean for liberal jurisprudence. No one feared Bork's potential impact more than liberal Law Professor Laurence Tribe. Columbia Law Professor Stephen Presser even remarked that Tribe gave up a future chance to be nominated to the Supreme Court by testifying against Bork. He wrote concerning Tribe: "the Bork affair represents a descent by constitutional scholars and other law professors from the airy realms of critique and theory to the unruly world of popular campaign and legislative politics, so often driven by the polls and organized special interests." (37)

One of the more effective slogans used against Bork was that he was "out of the mainstream" of judicial thought. To admit to the contrary would have jeopardized the opposition's reasoning for rejecting Bork. But claims that Bork is a radical right-winger have no foundation in evidence.

Statistics prove that Judge Bork voted with the majority in over 94 percent of (his) cases. Judge Bork's record on appeal is impeccable. The Supreme Court has never reversed any of the majority opinions written by Judge Bork, which total over 100. Indeed, the Supreme Court has never reversed any of the over 400 majority opinions in which Judge Bork has joined in one way or another.

(38)

Yet conservatives were never able to make this point register. "Bork's opponents...effectively communicated their fears to the people. Bork's supporters tried to defend the judge, but did not

communicate their message." (39)

Ultimately, the cumulative effect of the negative media campaign by interest groups and the political tactics of Senators Biden and Kennedy, combined with the White House's inability to persuade the swing votes to confirm Bork, resulted in his defeat. Perfect conditions existed for a fierce political struggle. On one side, there was an outspoken conservative judge who condemned the activist rulings of past courts. On the other side, there was a coalition of liberals who were poised to have an impact on the process. Due to the confirmation of Justice Anthony Kennedy, who seems to mirror Bork's judicial philosophy, according to McGuigan, conservatives appear to have lost the battle, but won the war. (39)

Among Bork's closest friends and allies, however, there is no gloating--only bitter memories.

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