How to Lose a Supreme Court Nominee in 115 Days

The Story of the Robert Bork Confirmation and Its Legacy Today

By Calvin Chiu

How to Lose a Supreme Court Nominee in 115 Days:

The Story of the Robert Bork Confirmation and Its Legacy Today

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Introduction

On October 6, 2018, the Senate confirmed Brett Kavanaugh's nomination to the Supreme Court in a 50-48-1 vote, one of the closest in over a century.[1] It came at the end of a tumultuous public debate, in which the Senate and the American public grappled with allegations of sexual assault against Kavanaugh. His current seat on the Supreme Court previously belonged to Anthony Kennedy, confirmed by the Senate after another controversial nomination—President Reagan's choice of Judge Robert H. Bork in 1987. While unsuccessful nominees in the past had generated their fair share of political controversy, concerns over ethics or qualifications had played the significant role in their rejections. Bork's failed appointment departed from that trend, and marked the first time in at least a century in which the Senate rejected a nominee almost solely on the basis of ideology.

The Supreme Court's expanded role in American political life throughout the mid-twentieth century sparked a political backlash which helped define the modern conservative movement in the United States. As part of their political strategies, Presidents Nixon and Reagan attempted to remake the federal judiciary in their own image, and their efforts slowly polarized the nomination process.

Bork's opponents succeeded because they seized upon those circumstances and turned the confirmation vote into a referendum on the Reagan Administration, a full-blown electoral fight filled with interest group involvement, political lobbying, and manipulation of media coverage. They used Bork's extensive body of writing and speeches to characterize him as an extremist. The Administration's inability to answer

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[1] Chris Keller, "Senate Vote on Kavanaugh Was Historically Close," *Los Angeles Times*, Oct 6, 2018.

those charges, combined with Bork's clumsy performance in the hearings, doomed his nomination. Not every Supreme Court pick since 1987 has generated the same degree of controversy. Nevertheless, the Bork battle has influenced the behavior of both nominees and their opponents since.

Background

Under Article II, section 2 of the Constitution, the Senate has a duty to provide "advice and consent" to a president's nominations of Supreme Court Justices. The executive branch nominates, and the legislative confirms; both branches check the power of the other. In the *Federalist Papers*, Alexander Hamilton justified this arrangement as a means of "promot[ing] a judicious choice of men for filling the offices of the Union."[2]

Throughout the first two-thirds of the twentieth century, the Senate generally confirmed nominees to the high court without much controversy, provided they were relatively qualified and lacked any ethical shortcomings. Of the forty-one nominations to the Supreme Court between 1900 and 1960, the Senate approved thirty-eight.[3] Public hearings for them only began in 1938, and associate justice nominees only consistently appeared at them beginning with John Harlan's in 1955.[4]

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[2] Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers*, ed. Clinton Rossiter (New York, NY: Penguin Group, 2005), 453.
[3] Supreme Court Nominations: Present-1789," U.S. Senate, Oct 6, 2018, accessed March 18, 2019, https://www.senate.gov/pagelayout/reference/nominations/Nominations.htm.
[4] Laura Kalman, *The Long Reach of the Sixties: LBJ, Nixon, and the Making of the Contemporary Supreme Court* (New York, NY: Oxford University Press, 2017), 41.

Polarization Begins: The Warren Court

Polarization of the modern confirmation process began during and after Earl Warren's tenure as Chief Justice, which lasted from 1953 to 1969. The "Warren Court" became a lightning rod of political controversy as it issued a number of rulings which expanded civil liberties and "selectively incorporated" the Bill of Rights (that is, applying its amendments to the states). For example, its decision in *Brown v. Board of Education*, which prohibited legally-mandated racial segregation in public schools, provoked scathing criticism from many Southerners who accused Warren and his colleagues of "exercis[ing] their naked judicial power and substitut[ing] their personal political and social ideas for the established law of the land."[5] The Georgia House even approved a resolution calling for the impeachment of six justices, including Warren, for "high crimes and misdemeanors."[6]

The court's decisions in criminal justice cases incited accusations that justices valued the rights of criminals over public safety. In *Mapp v. Ohio*, a 6-3 majority ruled that state courts had to follow the "exclusionary rule," meaning that evidence acquired by illegal search and seizure could not be used because it violated the Fourth Amendment.[7] *Miranda v. Arizona* became the defining criminal case of the era. Warren authored the 5-4 decision requiring law enforcement officials to inform suspects of their right to remain silent and consult their attorney prior to interrogation. Confessions obtained without fulfilling these criteria would become inadmissible in court. *Miranda*

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5 "Southern Manifesto," In *American Decades Primary Sources*, edited by Cynthia Rose, 313-316. Vol. 6, 1950-1959. Detroit, MI: Gale, 2004, *Gale Virtual Reference Library* (accessed January 2, 2019). http://link.galegroup.com.proxy.library.ucsb.edu:2048/apps/doc/CX3490201127/GVRL?u=ucsantabarbara&sid=GVRL&xid=3124c41b.

6 "Vinson Disapproves Impeachment Plan," *New York Times*, Feb 22, 1957.

7 *Mapp v. Ohio*, 367 U.S. 643 (1961).

sharply divided the public. The *New York Times* observed that, "the decision was both enthusiastically applauded and vigorously criticized, with the reaction coming, in the main, from equally respectable quarters."[8]

This string of cases expanding defendants' rights prompted one *Wall Street Journal* editorial to quip that "the source of the Supreme Court's majority decisions favoring criminals was its own rarified ideology... the same ideology that holds...a criminal is an object of sympathy deserving every break, that society sins against the criminal rather than the other way around, that a lawbreaker bears no individual moral responsibility."[9] One police chief echoed the *Journal's* sentiments and lamented the "progressive emasculation of law enforcement agencies by Supreme Court decisions."[10] The *Richmond Times-Dispatch* scolded the court as "an ally of the criminal element in America" that made "it easier for criminals to assault, rape and murder innocent Americans and escape punishment."[11] Congress waded into the controversy as well. In a move the *New York Times* called "the most sweeping attack on the judiciary since Court-packing effort of 1937," the Senate voted 51-31 to attach amendments shrinking federal courts' authority to review state convictions and to overturn the Supreme Court's restrictions on police confessions.[12] While the move served more as a warning shot (the Senate then overwhelmingly repealed these proposals), this show of displeasure hinted at significant political dissatisfaction.

While relatively uncontentious at the time, the 1965 *Griswold v. Connecticut* decision, in which the court struck down state bans on contraceptives paved the way for

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[8] Irving R. Kaufman, "Miranda and the Police," *New York Times,* Oct 2, 1966.
[9] "Crime and Ideology," *Wall Street Journal,* Mar 14, 1967.
[10] "Letters to the Editor," *Wall Street Journal,* Mar 29, 1967.
[11] "Opinion in the United States," *New York Times,* Jun 19, 1966.
[12] Fred P. Graham, "Congress Still Battling the Court." *New York Times,* May 26, 1968.

future controversy. Justice William Douglas, writing for the 7-2 majority, argued that though the Constitution did not explicitly outline an individual's right to privacy, a 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: *Roe v. Wade*.

Not all the Warren Court's decisions generated a public outcry. Indeed, many of them tended to reflect public opinion throughout the 1950s and 1960s.[13] For example, the country greeted *Gideon v. Wainwright*, which granted felony defendants the right to legal counsel in state courts, with general acclaim.[14] *Baker v. Carr* and *Reynolds v. Sims* allowed the Court to establish the principle of "one person, one vote."[15] Prior to these decisions, states did not need to have equally populous legislative districts—resulting in many states giving rural areas more representation than urban centers.[16] While elected officials understandably raised hell over the two cases, the public received them with enthusiasm.[17]

Nevertheless, the controversy surrounding segregation and defendants' rights cases has reinforced the popular perception of an "activist" Warren Court, one that flouted the will of the people. *Miranda* in particular came at an awkward time. Although scholars have debated its extent, crime rates had begun increasing towards the mid-1960s.[18] The middle of the decade also saw a number of race riots ravage American

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[13] Kalman, *The Long Reach of the Sixties*, 311.
[14] Barry Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution*, 1st ed. (New York, NY: Farrar, Straus and Giroux, 2009), 273-274.
[15] Ibid, 269-270.
[16] Ed Cray, *Chief Justice: A Biography of Earl Warren* (New York, NY: Simon & Schuster, 1997), 379.
[17] Friedman, *The Will of the People*, 269.
[18] Ibid, 276.

cities, like Harlem and Watts. In the immediate aftermath of *Miranda*, the "long, hot summer" of 1967 saw rioting break out across seventy-six cities. Detroit alone saw forty-three dead and over 2,000 buildings destroyed.[19] This tumult fed into a perception of chaos and fear among the public. That impression ultimately turned the public against the Court.

Nixon and "Strict Constructionism"

In his 1968 presidential campaign, Richard Nixon capitalized on these sentiments and consistently hammered away at the justices' decisions. He accused the *Miranda* case of "seriously hamstringing the peace forces in our society and strengthening the criminal forces."[20] Nixon also criticized "these decisions by a majority of one of the Supreme Court," which "point up a genuine need — a need for future Presidents to include in their appointments to the United States Supreme Court men who are thoroughly experienced and versed in the criminal laws of the land."[21] The candidate labelled himself "a judicial conservative" who believed that "it is the Court's duty to protect legitimate rights, but not to raise unreasonable obstacles to the enforcement of the law."[22]

Once president, Nixon made clear his criteria for nominees. He wanted "men who shared my legal philosophy of strict construction of the Constitution" and who would

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[19] Mark McKay, "The Republican Party and the Long, Hot Summer of 1967 in the United States," *The Historical Journal* 61, no. 4 (2018): 1089–1090.
[20] Richard Nixon, "Toward Freedom from Fear" (Speech, New York, NY, May 8, 1968), American Presidency Project, https://www.presidency.ucsb.edu/node/326773.
[21] Ibid.
[22] Richard Nixon, "Order and Justice Under Law" (Speech, Sep 29, 1968), American Presidency Project, https://www.presidency.ucsb.edu/node/326774.

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[21] Ibid.
[22] Richard Nixon, "Order and Justice Under Law" (Speech, Sep 29, 1968), American Presidency Project, https://www.presidency.ucsb.edu/node/326774.

"restore to the United States Supreme Court the balance that it genuinely needs."[23] When Earl Warren retired in 1969, the president successfully replaced him with Warren Burger. Unfortunately for Nixon, his next two nominations fared less well. The Senate rejected Clement Haynsworth, the president's second Supreme Court pick, in part because of allegations that he decided court cases in which he had a financial interest.[24] They also voted down G. Harrold Carswell, Haynsworth's replacement, over concerns that he was "a mediocre judge" and that he had supported white supremacy during a 1948 political campaign.[25] While senators voiced reservations over Haynsworth and Carswell's political views, legislators who rejected them still cited ethics or qualifications as significant reasons.[26] Nevertheless, that nascent introduction of ideological considerations in the confirmation process paved the way for Bork's eventual rejection.

Despite the setbacks of two failed nominations, Nixon still appointed a total of four justices during his time in office.[27] Yet for all of the president's talk of remaking the bench, the Burger Court's legacy proved unsatisfactory. It largely met expectations of being "tough on crime," but its decisions on other issues provided fuel for yet more controversy. For instance, *Furman v. Georgia*, which effectively instituted a moratorium on capital punishment nationwide, provoked "general disbelief."[28] The court's stance on abortion proved even more divisive. In 1973, the court decided *Roe v. Wade*, a 7-2 verdict which banned any restrictions on abortions within the first

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[23] Richard Nixon, "Statement About Nominations to the Supreme Court" (Statement, Washington, DC, April 9, 1970), American Presidency Project, https://www.presidency.ucsb.edu/node/240982.
[24] John H. Averill, "Haynsworth Loses: Vote Climaxes Bitter 3-Month Fight," *Los Angeles Times*, Nov 22, 1969.
[25] "Carswell Nixed by Senate Vote," *Los Angeles Sentinel,* Apr 9, 1970.
[26] Geoffrey R. Stone, "Understanding Supreme Court Confirmations," *Supreme Court Review* 2010, no. 1 (2011): 387-388.
[27] "Supreme Court Nominations: Present-1789."
[28] Friedman, *The Will of the People*, 285.

trimester. The majority cited *Griswold v. Connecticut* 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."[29] To be sure, 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.[30] 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*."[31] *Roe* caused pro-life groups to begin organizing politically, as states attempted to regulate abortions within the boundaries of the decision.[32] The nation's split on *Roe v. Wade* became one of the defining issues of American politics for at least the next two generations.

Robert Bork: Proponent of "Judicial Restraint"

Robert Bork, a sixty-year-old judge on the District of Columbia Court of Appeals, had a lengthy career in academia and government.[33] As a Yale Law Professor, United States Solicitor General, and as a federal judge, he had written and lectured extensively about his views on constitutional law. That paper trail provided both his supporters and detractors with plenty of material to use in the upcoming confirmation fight.

Bork's most infamous article appeared in the August 31, 1963 issue of *New Republic*, then a left-leaning periodical. Titled "Civil Rights—A Challenge," it laid out a case against proposed public accommodation laws that would later become part of the

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[29] *Roe v. Wade*, 410 U.S. 113 (1973).
[30] Friedman, *The Will of the People*, 297.
[31] Ibid, 298.
[32] Ibid, 299.
[33] As of his nomination on July 1, 1987.

1964 Civil Rights Act. Bork voiced his skepticism towards federal laws prohibiting racial discrimination in public facilities, arguing that such measures infringed upon the freedom of association, and that "the occasions upon which it is sacrificed ought to be kept to a minimum."[34] 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."[35]

> *"The trouble with freedom is that it will be used in ways we abhor. It then takes great self restraint to avoid sacrificing it, just this once, to another end. One may agree that it is immoral to treat a man according to his race or religion and yet question whether that moral preference deserves elevation to the level of the principle of individual freedom and self-determination. If, every time an intensely-felt moral principle is involved, we spend freedom, we will run short of it."*[36]

He distanced himself from segregationists, writing that "there need be no argument" on "the ugliness of racial discrimination."[37] Bork lamented "hav[ing] to defend the principle of freedom in this context, but the task ought not to be left to those southern politicians who only a short while ago were defending laws that enforced racial segregation."[38] 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."*[39]

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[34] Robert Bork, "Civil Rights—A Challenge," *The New Republic*, Aug 31, 1963, 22.
[35] Ibid, 24.
[36] Ibid.
[37] Ibid, 22.
[38] Ibid, 23-24.
[39] Ibid, 22.

The characterization of the civil rights legislation as the epitome of "a principle of unsurpassed ugliness" would come back to haunt Bork. He had voiced a principled libertarian argument, but in doing so he unwittingly allied himself with segregationists who made no secret of their prejudices. His criticisms of legally mandated integration came across as tone-deaf at best, and would motivate African-Americans to oppose his nomination to the Supreme Court.

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 tack altogether."[40] He told senators that "the statute has worked very well and...were that to be proposed today I would support it."[41] Bork later ascribed his thoughts on the subject to intellectual curiosity—the result of discussions he had with another conservative Yale colleague, Alexander Bickel.[42] Despite these later statements, Bork never escaped the accusations that he harbored a secret desire to dismantle civil rights measures through judicial fiat.

When the *New Republic* published the piece, the editorial staff took the unusual step of issuing a reply. The editors acknowledged that "Mr. Bork's principle of private liberty is important, and his distrust of public authority often justified."[43] However, they vehemently disagreed with his focus on individual freedom, as they thought that, "Government without principle ends in shipwreck; but government according to any single principle, to the exclusion of all other, ends in madness."[44] That argument—that

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[40] U.S. Congress, Senate, Committee on the Judiciary, *Nominations of Joseph T. Sneed to Be Deputy Attorney General and Robert H. Bork to Be Solicitor General Hearings, Ninety-third Congress, First Session*. Washington: U.S. Govt. Print. Off., 1973, 14.
[41] Ibid, 14-15.
[42] Bronner, *Battle for* Justice, 69.
[43] "Civil Rights—A Reply," *The New Republic*, Aug 31, 1963, 24.
[44] Ibid, 24.

Bork's strict interpretation of law ignored reality and led to absurd outcomes—would come up again during his confirmation hearing.

Bork also became an outspoken Nixon supporter during his time as a Yale professor. He penned yet another *New Republic* article in 1968 titled "Why I Am for Nixon." In it, he praised the former vice-president as "a man who fully shares [classically] liberal values and who goes about achieving them in realistic ways that maximize the opportunities for individual freedom and self-respect."[45] In contrast, Bork called "the Democrats' philosophy which is distinctively theirs...intellectually bankrupt."[46] Bork later wrote a *New York Times* piece explaining his support for Nixon's 1972 reelection. In particular, he lauded the president's choice of justices because their "judicial philosophies...are far more in line with the historical philosophy of the court than were the views of the dominant wing of the Warren Court."[47] He had little praise for the Warren Court, which "represented a sharp challenge to the traditional relationship of the judiciary to the processes of democratic government."[48] His sharp criticism of "judicial activism" and "liberal overreach" placed him on the Nixon Administration's radar. The president's aides contacted the Yale professor and invited him to serve as the Solicitor General, the lawyer responsible for arguing on behalf of the federal government before the Supreme Court.

Around this time, Bork's constitutional philosophy evolved. The libertarian gradually morphed into a Burkean conservative—more accepting of executive power, and convinced of government's need to foster moral restraint.[49] The liberal activism of

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[45] Robert Bork, "Why I Am for Nixon," *The New Republic*, June 1, 1968, 22.
[46] Ibid, 19.
[47] Robert Bork, "For Nixon, *New York Times*, Oct 29, 1972.
[48] Ibid.
[49] Bronner, *Battle for Justice*, 73-74.

the 1960s and the tumult associated with it irked him. In particular, Bork became weary of what he viewed as suspect, politically-motivated jurisprudence.[50] Beginning in the late 1960s and early 1970s, he fired 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. While the professor claimed that his remarks "do not...offer a general theory of constitutional law," he nevertheless detailed an elaborate set of principles.[51] Bork essentially 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. He rationalized this with a zero-sum view, saying 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."[52] 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."[53] 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."[54] He justified this view with the following rationale:

> *"If... [the Supreme Court] merely imposes its own value choices, or worse if it pretends to have a theory but actually follows its own predilections, the Court violates the postulates of the Madisonian model that alone justifies its power. It then necessarily abets the tyranny either of the majority or of the minority."*

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[50] Ibid, 72-73.
[51] Robert H. Bork, "Neutral Principles and Some First Amendment Problems," *Indiana Law Journal* 47, no. 1 (1971): 1.
[52] Ibid, 9.
[53] Ibid, 10-11.
[54] Ibid, 10.

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, "Under no system can the power of courts go far to save a people from ruin."[55] Instead, the judiciary needed to leave a "wide margin of consideration" for legislatures to act.[56] Thayer's contemporaries, in the form of Supreme Court Justices Oliver Wendell Holmes and Louis Brandeis, also shared this philosophy.[57] Even during the Warren Court, Justice Felix Frankfurter forcefully advocated judicial restraint—much to the chagrin of his colleagues.[58] However, at the time of his article, Bork found himself solidly in the minority within academia.

Bork's contribution to this school of thought came in his comprehensive critique of the Warren Court's jurisprudence. In particular, he zeroed in on the *Griswold v. Connecticut* decision. While he did not disagree with the outcome of the case, he savaged the legal rationale behind it. 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."[59] 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

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[55] James B. Thayer, "The Origin and Scope of the American Doctrine of Constitutional Law," *Harvard Law Review* 7, no. 3 (1893): 156.
[56] Ibid, 135.
[57] David Luban, "Justice Holmes and the Metaphysics of Judicial Restraint," *Duke Law Journal* 44, no. 3 (1994): 451.
[58] Richard A. Posner, "The Rise and Fall of Judicial Self-Restraint," *California Law Review* 100, no. 3 (2012): 530.
[59] Bork, "Neutral Principles and Some First Amendment Problems," 7.

which it may or may not be applied in the future."[60] This hostility towards *Griswold* also translated into opposition to *Roe v. Wade*, as both relied upon the idea of an implied right to privacy. Indeed, Bork later told 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."[61]

Bork's most iconoclastic views concerned freedom of speech. He thought that, "Constitutional protection should be accorded only to speech that is explicitily [sic] political. There is no basis for judicial intervention to protect any other form of expression, be it scientific, literary or that variety of expression we call obscene or pornographic."[62] Again, Bork justified his opinion by arguing that an expansive view of the First Amendment protections proved too contradictory:

> *"Is Congress forbidden to prohibit incitement to mutiny aboard a naval vessel engaged in action against an enemy, to prohibit shouted harangues from the visitors' gallery during its own deliberations or to provide any rules for decorum in federal courtrooms? Are the states forbidden, by the incorporation of the first amendment in the fourteenth, to punish the shouting of obscenities in the streets?*
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> *No one, not the most obsessed absolutist, takes any such position, but if one does not, the absolute position is abandoned, revealed as a play on words. Government cannot function if anyone can say anything anywhere at any time. And so we quickly come to the conclusion that lines must be drawn, differentiations made."*[63]

Bork also did not think that all political speech ought to be protected. He distinguished between true political speech, which served to strengthen the process of republican governance, and other, less productive forms. He argued against any

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[60] Ibid, 9.
[61] Bronner, *Battle for Justice*, 92.
[62] Bork, "Neutral Principles and Some First Amendment Problems," 20.
[63] Ibid, 21.

"constitutional obstruction to laws making criminal any speech that advocates forcible overthrow of the government or the violation of any law."[64] Bork rationalized this view by saying that, "Violent overthrow of government breaks the premises of our system concerning the ways in which truth is defined, and yet those premises are the only reasons for protecting political speech."[65]

Despite his methodical reasoning, Bork's views on free speech also ran counter to the general trend of free speech law over the past few decades. By the mid-twentieth century, the Supreme Court had begun moving away from such a restrictive view. If adopted, Bork's philosophy would undo many of the established protections for speech deemed incendiary or controversial. Yet as Ethan Bronner summarized it, "that was where his analysis took him and he happily followed."[66]

Throughout the next decade and a half, Bork continued his critiques of "judicial activism" with a quixotic enthusiasm. In a 1982 *National Review* article, he theorized that only intellectual and moral restraints could limit the powers of the judiciary. While Bork recognized that those forces "may seem a weak control," he thought that "[i]n the long run, ideas will be decisive. That is particularly true with respect to courts, more so perhaps than with any other branch of government."[67] As the Reagan Administration assumed power and appointed more conservatives to the federal judiciary, Bork's prediction appeared to come true. The professor himself became a federal judge on the District of Columbia Circuit Court of Appeals in 1982. His opinions, once solidly in the minority, now gained credence.

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[64] Ibid, 20.
[65] Ibid, 31.
[66] Bronner, *Battle for Justice*, 76.
[67] Robert Bork, "The Struggle Over the Role of the Court," *National Review*, Sep 17, 1982, 1137.

"Jurists of the Highest Competence"

The Reagan Administration painted itself as strictly pro "law-and-order" and anti-abortion. At the 1983 Conservative Political Action Conference dinner, President Reagan followed Nixon's example and disparaged the exclusionary rule established in *Mapp v. Ohio* as "a miscarriage of justice unique to our legal system."[68] 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."[69] The document recommended a repeal of the decision "because of its symbolic status as the epitome of Warren Court activism in the criminal law area."[70] *Miranda*'s overturn would potentially become one of "the most important achievements of this Administration - indeed, of any Administration - in restoring the power of self-government to the people of the United States in the suppression of crime."[71] Throughout his presidency, 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*.[72]

In its pursuit of these goals, the Reagan Administration sought to reshape the federal judiciary in its image. It sought out nominees to federal judgeships and the Supreme Court who demonstrated a conservative judicial philosophy and would not impose their personal views on the rest of the country. The effort yielded results. Barry Friedman observed that, "by the end of Reagan's time in office, he had appointed

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[68] Ronald Reagan, "Remarks at the Conservative Political Action Conference Dinner" (Speech, Washington, DC, February 18, 1983), American Presidency Project, https://www.presidency.ucsb.edu/node/262507.
[69] "Excerpt from the Report to Meese." *New York Times*, Jan 22, 1987.
[70] Ibid.
[71] Ibid.
[72] Reagan, "Remarks at the Conservative Political Action Conference Dinner."

roughly half the federal judiciary, an accomplishment not matched since Franklin Roosevelt."[73] 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."[74]

Above all, the administration sought to place reliable conservatives on the nation's highest court. Reagan succinctly summarized this desire in an August 1986 radio address promoting the nominations of Antonin Scalia and William Rehnquist as Associate and Chief Justices. The president emphasized their qualifications and how they "embod[ied] a certain approach to the law."[75] Reagan insisted, "The Chief Justice and the eight Associate Justices of the Court must not only be jurists of the highest competence, they must also be attentive to the rights specifically guaranteed in our Constitution and to the proper role of the courts in our democratic system."[76] He contrasted Scalia and Rehnquist with other judges that he said "were simply using the courts to strike down laws that displeased them politically or philosophically."[77] The president used this not-so-subtle dig at "activist judges" to undercut the legitimacy of more liberal jurists. In the end, the Republican-controlled Senate confirmed both Scalia and Rehnquist by votes of 98-0 and 65-33.[78]

In that same speech, Reagan promised that, "We will appoint more judges like [Scalia and Rehnquist] to the Federal bench."[79] He received his next, and arguably most

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[73] Friedman, *The Will of the People*, 314.
[74] Ethan Bronner, *Battle for Justice: How the Bork Nomination Shook America*, 1st ed. (New York, NY: W.W. Norton & Company, 1989), 47.
[75] Ronald Reagan, "Radio Address to the Nation on the United States Supreme Court Nominations" (Speech, August 9, 1986), American Presidency Project, https://www.presidency.ucsb.edu/node/259623.
[76] Ibid.
[77] Ibid.
[78] "Supreme Court Nominations: Present-1789."
[79] Ronald Reagan, "Radio Address to the Nation on the United States Supreme Court Nominations."

significant opportunity to do so when Justice Lewis Powell announced his retirement in 1987. President Nixon had nominated Powell, a pragmatic and moderate conservative, as Associate Justice in 1971. The justice had served fifteen years, at a time when the court moved steadily to the right. Throughout his tenure, Powell had often voted with the liberal wing of the court on issues of affirmative action and abortion.[80] By 1987, he had become a decisive swing vote on a Supreme Court split evenly between conservative and liberal justices.[81] 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.

Most Court watchers assumed that the Reagan Administration would nominate Bork to replace Powell.[82] Bork's views on jurisprudence fit neatly with those of the Reagan Administration, though the president had passed on him several times previously. Bork had made it onto the shortlist for the president's first nomination. Reagan then selected Sandra Day O'Connor, fulfilling a campaign promise to appoint a female justice.[83] For his second opening, the president chose Antonin Scalia, a younger conservative judge who sat on the same court as Bork.

Those two snubs had left Bork feeling abandoned by the Administration, and he had seriously considered leaving his seat on the Appeals Court. Bork had accepted the judgeship under the impression that it would pave the way for his future nomination to the Supreme Court. When Powell resigned, Bork dismissively told a colleague that, "The

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[80] Bronner, *Battle for Justice*, 18
[81] Ibid, 17-18.
[82] Ibid, 26.
[83] Ronald Reagan, "Governor Reagan's News Conference" (October 14, 1980), American Presidency Project. https://www.presidency.ucsb.edu/documents/governor-reagans-news-conference.

administration has a well-entrenched tradition of passing me over."[84] Yet Bork had his admirers in Reagan's Justice Department—namely Charles Cooper, head of the Office of Legal Counsel, and John Bolton (yes, *that* John Bolton), the Assistant Attorney General and the department's congressional liaison.[85] They convinced Attorney General Meese to lobby the White House hard for Bork's nomination. This time, Reagan acceded.

Reagan announced his selection on July 1, 1987. At the press conference, the president argued that he chose Bork because the judge was "widely regarded as the most prominent and intellectually powerful advocate of judicial restraint, [and] shares my view that judges' personal preferences and values should not be part of their constitutional interpretations."[86] Reagan reiterated this point in a radio address three days later, saying that, "Judge Bork has always heard each case with an open mind, following the law and legal precedent."[87] By portraying Bork as both a qualified choice and as an ideologically sound one, Reagan appealed to two audiences. His arguments on the basis of Bork's judicial philosophy placated conservative desires for a nominee who would help roll back what they viewed as poorly-decided precedent. Yet in framing Bork as a fair-minded judge with stellar qualifications, Reagan attempted to stave off criticism that he had selected a nominee solely because the judge's philosophy aligned with the Administration's political goals.

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[84] Bronner, *Battle for Justice*, 28.
[85] Ibid.
[86] Ronald Reagan, "Remarks Announcing the Nomination of Robert H. Bork to Be an Associate Justice of the Supreme Court of the United States" (*The White House*, July 1, 1987), American Presidency Project, https://www.presidency.ucsb.edu/documents/remarks-announcing-the-nomination-robert-h-bork-be-associate-justice-the-supreme-court-the.
[87] Ronald Reagan, "Radio Address to the Nation on the Supreme Court Nomination of Robert H. Bork and the Economic Bill of Rights" (Speech, Washington, DC, July 4, 1987), American Presidency Project, https://www.presidency.ucsb.edu/documents/radio-address-the-nation-the-supreme-court-nomination-robert-h-bork-and-the-economic-bill.

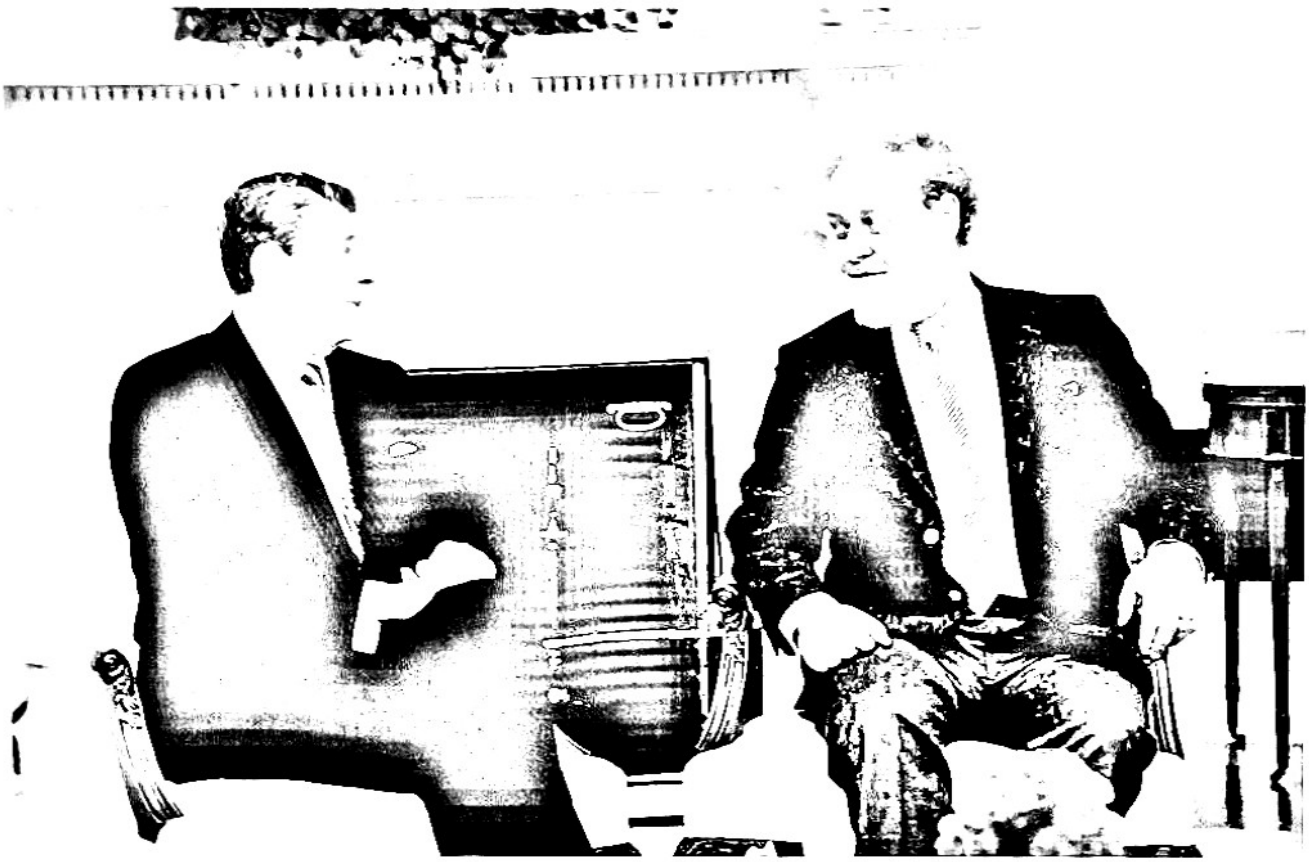

Figure 1: President Ronald Reagan Meeting with Judge Robert Bork in The Oval Office, July 1, 1987, White House Photographic Collection, 1/20/1981 - 1/20/1989, Ronald Reagan Library, Simi Valley, CA.

"Robert Bork's America"

Ted Kennedy's speech in the immediate aftermath of the announcement set a new tone for confirmation politics. The senior senator from Massachusetts had acquired a national reputation throughout his twenty-five years in the Senate as the "liberal lion," the country's most prominent progressive lawmaker. By 1987, he had become the de facto leader of the Democratic Party, and had accumulated a deep knowledge of the Senate's rules and traditions. When he spoke on July 1, in response to President Reagan's nomination of Robert Bork to the Supreme Court just an hour earlier, his remarks made headlines.

Kennedy began his speech by saying that, "I oppose the nomination of Robert Bork to the Supreme Court, and I urge the Senate to reject it."[88] In using arguments that appealed to historical background and shared ideals, Kennedy tailored his speech for the American public whom he hoped would be watching.

Kennedy first used Watergate as a means to disqualify Bork as a nominee. During the so-called 'Saturday Night Massacre,' both the Attorney General Elliot Richardson and Deputy Attorney General William Ruckelshaus resigned after they refused President Nixon's order to fire Archibald Cox, the Special Prosecutor investigating the Watergate scandal. After their departure, Bork became the top official in the Justice Department. He had considered resigning as well, but Richardson and Ruckelshaus urged him to stay at his post in order to maintain continuity. Bork agreed, and carried out the president's order. Senator Kennedy contrasted Richardson and Ruckelshaus's refusals "to do Richard Nixon's dirty work" with how Bork "executed the unconscionable assignment that has become one of the darkest chapters for the rule of law in American history."[89] Kennedy painted the incident in stark terms, hammering home his main point that, "The man who fired Archibald Cox does not deserve to sit on the Supreme Court of the United States."[90] Unfortunately for Kennedy, his appeal to Watergate fell flat. A *New York Times*/CBS News poll conducted later that month found that, "Sixty-nine percent of those surveyed said they could not recall enough about the incident to have an opinion of it."[91]

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[88] Senator Kennedy, "Nomination of Robert Bork," 100th Cong., 1st sess., *Congressional Record 133* (July 1, 1987): 18518.
[89] Ibid.
[90] Ibid.
[91] EJ Dionne Jr., "Senate should Consider the Opinions of High Court Nominees, Poll Finds," *New York Times*, Jul 24, 1987.

Kennedy made his most damning and memorable remarks around the halfway mark:

> *"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."*[92]

Kennedy had significantly distorted or exaggerated Bork's judicial views. He interpreted Bork's criticisms of the Warren Court to mean that the judge personally opposed abortion, civil rights, and disregarded protections against unlawful search and seizure. The idea that "Robert Bork's America is a land in which...blacks would sit at segregated school counters"[93] reflected Bork's thoughts in the *New Republic* piece.

These advances in civil rights and civil liberties came about relatively recently—within the lifetimes of most Americans. The court decisions and legislation which made those gains possible had generated much controversy at the time. However, by the 1980s Americans had begun accepting many of these changes. While abortion still remained deeply divisive, on issues like free speech, the public viewed these developments as well-established and essential to American civic life. By depicting them as fragile and easily reversible achievements, Kennedy aimed to scare the public into opposing the nominee. Painting Bork as an outcast "outside the mainstream of American constitutional jurisprudence" allowed Kennedy to isolate the nominee politically and make him harder for fellow senators to support. [94]

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[92] Sen. Kennedy (MA), *Congressional Record 133 (1987): 18518.*
[93] Ibid.
[94] Ibid, 18518.

Political Machinations

Within the Senate, the Judiciary Committee wielded the most influence in confirming or rejecting Bork. It held the hearings in which the nominee would testify. Afterwards, the Committee's fourteen members—eight Democrats and six Republicans—would vote on what recommendation to give to the full Senate: to accept, reject, or offer no opinion at all on the nominee.[95] While the Senate had the final say on the nomination, the panel's decision held great symbolic importance.

Its chairman, Senator Joseph Biden (D-DE), had previously hinted at a favorable impression of Bork. A November 1986 *Philadelphia Inquirer* article quoted him saying:

> *"Say the administration sends up (former Solicitor General Robert H.) Bork and, after our investigation, he looks a lot like another (Associate Justice Antonin) Scalia...I'd have to vote for him, and if the [interest] groups tear me apart, that's the medicine I'll have to take. I'm not Teddy Kennedy. That kind of vote may turn out to be a liability for the presidential nomination process."*[96]

Just three weeks prior to Bork's selection, Biden had announced his intention to run in the 1988 presidential election. He now faced the awkward process of attempting to walk back his previous statement without alienating moderate voters who might perceive him as a tool of liberal interest groups. On July 6, Biden met with representatives from six organizations—the Leadership Conference on Civil Rights, the NAACP (National Association for the Advancement of Colored People) Legal Defense and Educational Fund, Alliance for Justice, the Women's Legal Defense Fund, the

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[95] U.S. Library of Congress, Congressional Research Service, Senate Committee Party Ratios: 98th-115th Congresses, by Sarah J. Eckman, RL34752 (2018), 19.
U.S. Library of Congress, Congressional Research Service, Supreme Court Appointment Process: Consideration by the Senate Judiciary Committee, by Barry J. McMillion, R44236 (2018), 17.
[96] Larry Eichel, "Judiciary Post to Gauge Biden's Presidential Chances," *Philadelphia Inquirer*, Nov 16, 1986.

Mexican-American Legal Defense and Educational Fund, and the People for the American Way. All opposed Bork's nomination, and they wanted Biden to delay the hearings until they could organize effectively. Biden exceeded their expectations when he told the lobbyists that he would fight Bork, but he asked the representatives to keep his promise secret until he announced it.

In true Washington fashion, the news leaked within hours of the meeting. The *New York Times* and *Washington Post* both ran front page stories on Biden's opposition the next day, creating the very perception problem that Biden had sought to avoid. Nevertheless, Patrick Caddell, one of Senator Biden's closest aides, saw an opportunity in the gaffe. He thought Biden needed to run a socially progressive campaign in order to win the presidency, and that Bork provided the perfect antithesis. If the senator could paint himself as a principled liberal defender in his opposition to the nominee, Biden might win votes and publicity.[97] The chairman used the now-familiar tactic of delaying the start of confirmation hearings for two months. That interregnum allowed Democrats and interest groups opposed to Bork to organize their responses.

Kennedy in particular treated the upcoming fight as a crusade. His office sent out letters to every single one of the 6,200 black elected officials in the country, calling Bork's confirmation vote "the most important vote this year" and urged their opposition.[98] He personally called every executive member of the AFL-CIO (American Federation of Labor and the Congress of Industrial Organizations)—all thirty of them.[99] Kennedy lobbied civil rights and labor groups and urged them to pressure other senators who relied upon them for votes. The strategy worked. Southern Democrats in

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[97] Bronner, *Battle for Justice*, 142.
[98] Ibid, 105.
[99] Ibid.

particular needed African-American support to win elections. Of the eight Democratic senators who represented the Deep South (Georgia, Alabama, South Carolina, Mississippi, Louisiana), all eventually voted against Bork's confirmation.[100]

"Slick, Shrill Advertising Campaigns"

Meanwhile, Bork's supporters and opponents began an aggressive push to define the terms of the public debate. These efforts bore more than 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. Bork's foes followed Kennedy's lead and effectively framed the confirmation as a battle over "mainstream" judicial philosophy, with Judge Bork falling far outside its bounds.

Liberal interest groups had significant incentives to mobilize. For example, Reagan's rhetoric on abortion alienated women's groups like the National Organization for Women and the National Abortion Rights League. Bork's antipathy towards *Roe v. Wade* stoked fears that he might vote to restrict or even ban abortion once on the Court. Meanwhile, the Administration's hostility towards welfare and affirmative action programs alienated civil rights groups like the NAACP, which thought that the president and his policies 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."[101] They viewed Bork as a natural extension of Reagan's social agenda, and a fundamental threat to civil rights. It did not help that Bork had initially opposed the Civil Rights Act. All those factors explained why, for instance, NAACP

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[100] Associated Press, "Senate's Roll-Call On the Bork Vote," *New York Times*, Oct 24, 1987.
[101] Sheila Rule, "Reagan Greeted Politely But Coolly By N.A.A.C.P.," *New York Times*, Jun 30, 1981.

executive director Benjamin Hooks vowed to "fight it all the way—until hell freezes over, and then we'll skate across on the ice."[102]

Opponents also detected a golden opportunity to deal a body blow to the Reagan Administration. The president's popularity had reached its nadir. In the 1986 midterm elections, voters punished the president and the Republican Party at the ballot box. Most crucially for the Bork battle, the Democrats regained control of the Senate, winning eight seats and placing the GOP solidly in the minority with a margin of 55-45.[103] The *New York Times* predicted in January 1987 that the midterm victory meant "[t]he Democrats no longer fear Mr. Reagan's electoral power, and that almost certainly portends two years of strife between the White House and Capitol Hill."[104] Meanwhile, 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. These developments precipitated the public's unfavorable perception of the president—Reagan's approval rating never rose above fifty percent for most of 1987.[105] Suddenly the "Teflon President"—so named because no criticism or scandal appeared to stick to him—seemed vulnerable.

The opposition focus on ideology marked a turning point. Even during William Rehnquist's nomination, Reagan's most controversial pick prior to Bork, those opposed to the choice avoided focusing their ire on the staunchly conservative Justice's political

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[102] United Press International, "NAACP chief vows battle over Bork," *Chicago Tribune*, Jul 7, 1987.
[103] Dallas L. Dendy Jr., "Statistics of the Congressional Election of November 4, 1986," 100th Cong., 1987, Committee Print 66-752, 48.
[104] R.W. Apple Jr., "Echo of Calmer Times; Rejecting Call for 'Fighting Speech,' Reagan Urges Unity and Draws On Themes of Past," *New York Times*, Jan 28, 1987.
[105] "Presidential Job Approval," American Presidency Project, accessed March 18, 2019, https://www.presidency.ucsb.edu/statistics/data/presidential-job-approval.

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."[106] 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.[107]

When Reagan selected Bork, most of the American public had not yet formed an opinion on the nominee. The 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."[108] Meanwhile Americans' views on the Supreme Court remained closely divided. Thirty-six percent thought the court too liberal, and thirty-eight percent too conservative.[109] 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.[110] Only six percent of those surveyed thought that such views should play no part in the confirmation.[111] 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.[112]

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[106] Linda Greenhouse, "Ideology as Court Issue; Democrats Pick Clear Battlefield on Bork, but Political Consequences Are Uncertain," *New York Times*, Jul 3, 1987.
[107] Robert L. Jackson and Ronald J. Ostrow, "Opponents Quiz Rehnquist on Race Covenants," *Los Angeles Times*, Aug 1, 1986.
[108] Dionne, "Senate should Consider the Opinions of High Court Nominees, Poll Finds."
[109] Ibid.
[110] Ibid.
[111] Ibid.
[112] Bronner, *Battle for Justice*, 153.

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."[113] 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."[114] 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."[115] 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 only partially reflected his record, yet could not be dismissed out-of-hand as patently false.

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

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[113] Ibid, 157.
[114] Ibid, 156-157.
[115] Ibid, 157.

Occupational Safety and Health Act.[116] This case went before D.C. Appeals Court, which had to answer the narrow question of whether or not American Cyanamid's policy 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."*[117]

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."[118] Bork noted that the choice of sterilization might qualify as discrimination on the basis of sex, a violation of a different statute. Nevertheless, he had merely judged whether the OSH Act covered the issue in question. 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 personally supported the sterilization of women. The day before hearings began, Planned Parenthood ran a full page ad in the *Washington Post* urging readers to call their senators and voice opposition to Bork. It referred to the *American Cyanamid* case and

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[116] *Oil, Chemical and Atomic Workers v. American Cyanamid*, 741 F.2d 444 (D.C. Cir. 1984).
[117] Ibid.
[118] Ibid.

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...

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.

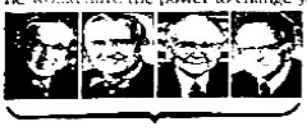
But now, in the waning days of the Reagan Administration, they just might succeed after all.

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?

YOU DON'T HAVE ANY.

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.

Figure 2: "Robert Bork's Position on Reproductive Rights," The Washington Post, Sep 14, 1987.

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."[119] The attack line worked

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

so well that the *Cyanamid* case would emerge as a topic of discussion during the Senate hearings.

The Planned Parenthood ad 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.[120] 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.'"*[121]

In contrast, the White House's outreach merely consisted of a toll-free number which played actualities of Reagan's pro-Bork speeches. Griggs also contacted individual radio stations and tailored his segments to different audiences.[122] 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

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[120] Bronner, *Battle for Justice*, 145-146.
[121] Ibid, 145.
[122] Ibid, 146.

in to television stations offering free interviews. Local stations usually obliged, granting those guests a free platform to explain why they opposed Robert Bork.[123]

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."[124] Other groups, like People for the American Way, produced attention-grabbing commercials or advertisements which generated free media coverage. Their most infamous ad, 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."*[125]

Ironically, the ad 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."[126] The president himself added fuel to the fire by telling a reporter that he thought Gregory Peck was "miscast."[127] After that, network news programs replayed the spot for free in their coverage of it.[128]

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[123] Ibid, 147.
[124] Ibid.
[125] Ibid, 155.
[126] Ronald J. Ostrow and James Gerstenzang, "Bork's Shifting Views on Law Worry Senators," *Los Angeles Times*, Sep 26, 1987.
[127] Ibid.
[128] Bronner, *Battle for Justice*, 155.

A "Mainstream Jurist Strategy"

Meanwhile, the Administration's outreach campaign fell far short of its opponents'. White House Counsel Arthur Culvahouse, who led the White House's effort to confirm Bork, conceded that "groups opposing Judge Bork (AFL-CIO, ACLU, NAACP, NAACP Legal Defense Fund, NOW, Women's Defense Fund, etc.) [were] expert at lobbying the Hill and creating grass roots support."[129] In contrast, the White House effort stalled. An unsigned memo dated August 18 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."[130] 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."[131]

Much of the lackluster response resulted 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 Meese had convinced Reagan to select Bork. The White House attempted make do 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."[132] He grumbled that the judge's "right wing supporters" refused to depict him as a

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[129] Arthur B. Culvahouse to Howard H. Baker Jr., Sept. 8, 1987, folder "Judge Bork, Nomination of (1)," Box 3, Arthur B. Culvahouse Files, Ronald Reagan Library, 5.
[130] Memo, Aug 18, 1987, folder "PMB Supreme Court—Bork, Robert—Notes (2), Box 14, Patricia Mack Bryan Files, Ronald Reagan Library, 1.
[131] Ibid.
[132] Arthur B. Culvahouse to Howard H. Baker Jr., Sept. 8, 1987, 2.

"mainstream jurist." The document also voiced concern about a "brand-new Newsweek distressingly [which] quotes a senior White House aide as saying that Bork is a 'right wing zealot,'—which statement is very unhelpful."[133]

Meanwhile, Justice Department officials like Attorney General Meese, Charles Cooper, and John Bolton saw the upcoming confirmation battle as an ideological battle—the perfect opportunity to tilt the Supreme Court to the right.[134] 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, Bolton told Bork to, "Come listen to me because we at Justice have your best interests at heart."[135] This advice rattled the nominee, who felt torn between both the White House and DOJ.[136] 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."[137] Other conservatives echoed the Justice Department's views. For example, Representative Jack Kemp (R-NY) proclaimed that "a Reagan majority on the Supreme Court will set back

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[133] Ibid.
[134] Bronner, *Battle for Justice*, 29.
[135] Ibid, 189.
[136] Ibid, 190.
[137] Kenneth B. Nobles, "Bork Backers Flood Senate with Mail," *New York Times*, Sept. 3, 1987.

the liberal agenda a generation or more."[138] These overtly partisan messages in Bork's favor added credibility to liberal charges that Reagan had chosen him strictly on the basis of 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 (R-UT), 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."[139] 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, between what portions of his 1971 Indiana Law Journal piece he continues to endorse and what he does not, between his personal preferences and his judicial preferences."[140] 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 in order 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

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[138] Ibid.
[139] Randy Rader to William Ball, Tom Korologos, Brad Reynolds, and John Bolton, Aug. 20, 1987, folder "Supreme Court—Robert Bork—Senate Judiciary Committee (3)," Box 10, Arthur B. Culvahouse Files, Ronald Reagan Library, 1.
[140] Ibid, 2.

desks are literally stacked with opponents' studies."[141] 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."[142] 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."[143]

The Department of Justice released "A Response to the Critics of Judge Robert H. Bork," on September 12. The report lambasted outside criticism on his record, and focused almost exclusively on Bork's government career. It attempted to reinforce the "mainstream" narrative of Bork as a non-partisan official, and at times it appeared to almost characterize 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."[144] 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, previously confirmed unanimously by the Senate, "voted with Judge Bork

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[141] Arthur B. Culvahouse to Howard H. Baker Jr., Sept. 8, 1987, 3.
[142] Ibid.
[143] Ibid.
[144] "Ibid, 2.

98% of the time in the 86 panels on which they sat together on the appeals court."[145] 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."[146] Senator Kennedy echoed these sentiments, calling it "a White House whitewash of Bork's reactionary record."[147] Ralph G. Neas, executive director of the Leadership Conference on Civil Rights, accused the White House of perpetuating a "campaign of disinformation."[148]

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.[149] 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

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[145] "A Response to the Critics of Judge Robert H. Bork," Sept. 12, 1987, folder "Judge Bork, Nomination of (1), Box 3, Howard H. Baker Files, Ronald Reagan Library, 3.
[146] Ruth Marcus, "Justice Dept. Hits Bork Critics; 213-Page Agency Report Says Studies Employ `Spurious Techniques'," *Washington Post*, Sep 13, 1987.
[147] Ibid.
[148] Ruth Marcus and David Hoffman, "Who is Robert Bork? Two Profiles Emerge; Contradictory Portraits of Court Nominee Put Forward by White House, Opposition," *Washington Post*, Aug 11, 1987.
[149] Bronner, *Battle for Justice*, 129.

> conservative or liberal bias, then that Senator can and should vote against confirmation. To vote otherwise would be to abdicate a solemn trust."[150]

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 confirmation hearings began on September 15, 1987 and would last a then-unprecedented twelve days. Bork testified for the first five, providing thirty hours of testimony. Witnesses both for and against him delivered fifty-seven hours over the course of eight days.[151]

On the first day, former president Gerald Ford testified on Bork's behalf, a highly unusual show of support. The Reagan Administration hoped that he could lend credibility to Bork's case. Ford's testimony touched upon the standard pro-Bork arguments that had already circulated in the past two months. He insisted it was "vital that the nominee selected be of unquestioned character, broad training in the law, in-depth experience in the legal profession, and have a capability to analyze the facts with objectivity and articulate one's decision on the basis of the law and the Constitution."[152] After listing Bork's qualifications and including Justice John Paul Steven's endorsement

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[150] Laurence Tribe, *God Save This Honorable Court: How the Choice of Supreme Court Justices Shapes Our History*, 1st ed. (New York, NY: Random House, 1985), ix.
[151] Norman Vieira and Leonard Gross, *Supreme Court Appointments: Judge Bork and the Politicization of Senate Confirmations* (Carbondale, IL: Southern Illinois University Press, 1998), 138.
[152] U.S. Congress, Senate, Committee on the Judiciary, Nomination of Robert H. Bork to Be Associate Justice of the Supreme Court of the United States: Hearings Before the Committee On the Judiciary, 100th Cong., 1st sess., 1987, 3.

of the nominee, Ford concluded that, "Judge Robert Bork is uniquely qualified to sit on the United States Supreme Court."

Despite the limited success of the White House's talking points, they found some degree of acceptance in Ford's testimony. The former president told senators that, "There are four kinds of occupations that a lawyer can have: private practitioner, law professor, government lawyer and judge. Robert Bork has distinguished himself in not one, but in all four endeavors."[153] The former president's assertion bore a striking resemblance to a July 15 White House memo which stated: "Any of Judge Robert Bork's four positions in private practice, academia, the Executive Branch and the Judiciary would have been the high point of a brilliant career, but he managed all of them."[154]

On the surface, this unprecedented testimony from a former president lent substantial legitimacy to the nomination. However, his statement parroting White House's arguments failed to add anything new to the debate. Ford also gravely undermined his endorsement when he admitted, after some prodding from Senator DeConcini (D-AZ), that he had only read "a limited number" of Bork's opinions and no individual Law Review articles.[155] In other words, Ford's appearance served as nothing more than unimpressive window dressing.

Senator John Danforth, the Republican senator from Missouri, spoke next. Danforth had studied under Bork during the former's last year at Yale Law School. The senator used this opportunity to humanize Bork, calling the judge a "first-rate professor"

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[153] Ibid, 4.
[154] Rhett Dawson to Kenneth Duberstein, July 15, 1987, Series I: Subject File, Box 3, Kenneth M. Duberstein Files, Ronald Reagan Library, 2.
[155] U.S. Congress, Nomination of Robert H. Bork to Be Associate Justice of the Supreme Court of the United States, 11.

who "delighted in the give-and-take of the classroom in the clash of ideas."[156] Danforth went further and charged that, "Those who say that Judge Bork is an unyielding ideologue are not describing the man I know. In my experience, unyielding ideologues do not resemble Judge Bork. They do not encourage dissent; they do not have a sense of humor; and they do not evolve in their own thinking."[157] Despite saying afterwards that, "I do not believe that the Senate's decision will or should be made on the basis of personality," Danforth clearly attempted to push back against the idea that Bork was cold and uncaring. The senator's attempt to address accusations of the judge's extremism evinced the success of opposition narratives in the prior two months. By acknowledging those arguments, Danforth also recognized their potency.

When Senator Kennedy gave his opening statement, he aimed it at the television audience. His rhetoric touched upon broader themes—like equality and justice—meant to simplify the issues into terms that Americans could understand. Kennedy listed off a number of qualities he deemed necessary for a Supreme Court justice—and ones he claimed that Robert Bork lacked:

> *"A commitment to individual liberty as the cornerstone of American democracy. A dedication to equality for all Americans...A respect for justice for all whose rights are too readily abused by powerful institutions...respect for the Supreme Court itself, for our constitutional system of government, and for the history and heritage by which that system has evolved...Above all...the special quality that enables a justice to render justice. This is the attribute whose presence we describe by the words such as fairness, impartiality, open-mindedness, and judicial temperament, and whose absence we call prejudice or bias."*

Just as Danforth sought to tear down the "ideologue" accusation, Kennedy attempted to reinforce it. The Massachusetts senator accused Bork of viewing women

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[156] Ibid, 17.
[157] Ibid.

and African-Americans as "second-class citizens under the Constitution." Kennedy continued his rhetorical broadside by characterizing Bork as "an activist of the right," and criticized Reagan for not appointing "a real judicial conservative."[158] According to him, Bork "has harshly opposed—and is publicly itching to overrule—many of the great decisions of the Supreme Court that seek to fulfill the promise of justice for all Americans." Kennedy's attack line co-opted the rhetoric of the right. For two past decades, conservatives had invoked charges of activism against their judicial opponents. Now the tables had turned. It reflected the Advocacy Institute's earlier recommendations to Bork's opponents to paint themselves as the true "conservers of personal rights."[159]

Biden aimed his opening statement at his television audience both practically and rhetorically. He had moved his speech to the afternoon, when television networks began broadcasting the hearing. Like Kennedy, he waxed poetic about broader themes of liberty and justice. However, he refrained from attacking Bork directly. Instead, Biden attempted to maintain a semblance of neutrality. He framed the focus on ideology as part of a constitutional obligation:

> *"And thus the Senate, in exercising its constitutional role of advice and consent, has not only the right in my opinion but the duty to weigh the philosophy of the nominee as it reaches its own independent decision."*

When Bork gave his opening statement, he specified his legal philosophy:

> *"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*

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[158] Ibid, 88.
[159] Bronner, *Battle for Justice*, 157.

> *the United States enacting a statute or whether they are those who ratified our Constitution and its various amendments."*[160]

The hearings delved straight into Bork's views on a right to privacy—one of the most significant points of contention. In his 1971 *Indiana Law Journal* article, Bork had said that "the Court could not reach its result in *Griswold* through principle."[161] Since that decision paved the way for *Roe v. Wade*, the issue of privacy acted as a proxy for Bork's views on abortion. Now Biden attempted to interrogate Bork on his stance:

> *"In all your short life, have you come up with any other way to protect a married couple, under the Constitution, against an action by a government telling them what they can or cannot do about birth control in their bedroom? Is there any constitutional right, anywhere in the Constitution?"*

Bork's replies descended into a dizzying jumble of history and legalese. For example:

> *"What I objected to was the way in which this right of privacy was created and that was simply this. Justice Douglas observed, quite correctly, that a number of provisions of the Bill of Rights protect aspects of privacy and indeed they do and indeed they should.*
>
> *But he went on from there to say that since a number of the provisions did that and since they had emanations, by which I think he meant buffer zones to protect the basic right, he would find a penumbra which created a new right of privacy that existed where no provision of the Constitution applied..."*

He reiterated his position that he disagreed with the reasoning behind *Griswold* because it created a "free-floating right that was not derived in a principled fashion from constitutional materials." At the same time, he dissected the constitutional amendments used to justify the decision and conceded that, "There may be other arguments and I do

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[160] U.S. Congress, Nomination of Robert H. Bork to Be Associate Justice of the Supreme Court of the United States, 103.
[161] Bork, "Neutral Principles and Some First Amendment Problems," 9.

not want to pass upon those."[162] Later on in the hearing, he stated his rationale more clearly:

> *"My objection—I think the law was an utterly silly law, but my objection is simply to the undefined nature of what the court did there. And I have tried to illustrate that for you by asking you whether you would vote for a statute that said nothing more than that everybody has a right of privacy, and the court shall enforce it. I do not think you would."*

Despite his later improvement, Bork's answers about privacy foreshadowed his fundamental weakness: his detailed explanations were lost on the public and left room for opponents to mischaracterize. As Senator Howell Heflin (D-AL) told John Bolton during a break in the hearings, "[Bork's] good on substance but there's too much judge talk. He's too professorial."[163] In contrast, Biden and Kennedy delved into details, but managed to bring the discussion back to broader principles. In the end, their approach spoke much more effectively to the public.

Bork also failed to capitalize on softball questions lobbed at him by sympathetic Republican senators. For instance, Strom Thurmond (R-SC) asked if the judge would like to correct any charges against him that were "based on selective citation and taking [his] statements out of context."[164] It presented the perfect opportunity for Bork to refute mischaracterizations of his record. Instead, he replied that, "I do not think I have time to discuss all of them right now but thank you for the opportunity."[165]

In another instance, Senator Orrin Hatch (R-UT) listed a number of legal scholars who criticized *Roe v. Wade*, with the intent of painting Bork's opposition to the

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[162] U.S. Congress, Nomination of Robert H. Bork to Be Associate Justice of the Supreme Court of the United States, 117.
[163] Bronner, *Battle for Justice*, 227.
[164] U.S. Congress, Nomination of Robert H. Bork to Be Associate Justice of the Supreme Court of the United States, 178.
[165] Ibid.

case as a reasonable view shared by others. He then asked the judge, "In your lengthy constitutional studies, is there any Supreme Court decision that has stirred more controversy or criticism amongst scholars and citizens than that particular case?"[166] Bork replied, "the only candidate for that, Senator, would be *Brown v. Board of Education*."[167] Of course, he had a point—*Brown* indeed generated significant controversy. But the case had become one of the Court's most widely accepted and venerated decisions. Bork's response made it sound as if he wanted to cast doubt on the outcome of a long settled debate. He already had trouble disavowing his 1963 *New Republic* article, and his answer now gave further ammunition to Bork's foes in the civil rights community.

The hearings also gave rise to the idea that Bork had undergone what Senator Patrick Leahy (D-VT) called a "confirmation conversion." While Bork maintained his criticisms of a number of 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."[168] For example, Bork's views on free speech, as stated in his *Indiana Law Journal* article, contradicted the Supreme Court's 1969 ruling in *Brandenburg v. Ohio*, which said that speech could not be prohibited unless it could provoke "imminent lawless action." Now, Bork said, "There is now a vast corpus of first amendment decisions, and I accept those decisions as law, and I am not troubled by them. If I wanted to start over again and say what line would I draw, I do not know."[169]

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[166] Ibid, 186.
[167] Ibid.
[168] Ibid, 587.
[169] Ibid, 327.

He told the Committee that he respected precedent because of "a need for stability and continuity in the law."[170] 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."[171] Kennedy dealt his argument a severe blow when he played aloud an audio recording of a response Bork gave at a 1985 question-and answer session:

> "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."[172]

Bork protested that his response came during the course of a conversation and not a prepared statement, and argued that it was taken out of context.[173] Regardless, the damage was done. To many in the hearing room and those watching on television, Bork's statements on respecting precedent came across as disingenuous. The Leadership Conference on Civil Rights released a statement accusing 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."[174] For Bork's vocally conservative proponents, they viewed his seeming moderation as a disappointing

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[170] Ibid, 128.
[171] Ibid, 129.
[172] Ibid, 663.
[173] Ibid, 666-667.
[174] Al Kamen and Edward Walsh, "Senators Increase Pressure Over Bork's Shifting Opinions," *Washington Post*, Sep 18, 1987.

submission to the 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 (D-OH) questioned him on his ruling in the *American Cyanamid* case, 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."*[175]

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, who then read it aloud:

> *"I cannot believe that Judge Bork thinks we were glad to have the choice of getting sterilized or getting fired. Only a judge who knows nothing about women who need to work could say that. I was only 26 years old, but I had to work, so I had no choice. It is incredible that a judge who is supposed to be fair can support a company that does not follow OSHA rules. This was the most awful thing that happened to me. I still believe it's against the law, whatever Bork says."*[176]

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..."*[177]

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[175] U.S. Congress, Nomination of Robert H. Bork to Be Associate Justice of the Supreme Court of the United States, 468-470.
[176] Ibid, 678.
[177] Ibid, 679.

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

> *"Senator, I guess the answer to that is that I have spent my life in intellectual pursuits in the law and since I have been a judge, I particularly like the courtroom. I liked the courtroom as an advocate, and I like the courtroom as a judge, and I enjoy the give and take and the intellectual effort involved.*
>
> *It is just a life—and that is, of course, the 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.*
>
> *The second answer is, I would like to leave a reputation as a judge who understood constitutional governance and contributed his bit to maintaining it in the ways I have described before this committee. Our constitutional structure is the most important thing this nation has and I would like to help maintain it and to be remembered for that."*[178]

From most jurists, Bork's reply would seem ordinary. The retiring Justice Powell, for example, admitted that he would most miss "working on opinions" because they were "intellectually challenging and stimulating, at times quite exciting."[179] 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."[180] Bork's answer came on September 19, the last day that he testified. After five grueling days, he had only confirmed the narratives against him.

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[178] Ibid, 854.
[179] Bronner, *Battle for Justice*, 276.
[180] Edward Walsh, "In the End, Bork Himself was His Own Worst Enemy; Intellectual Approach Lacked Appeal," *Washington Post*, Oct 24, 1987.

"A Crucial Principle"

The Judiciary Committee continued its hearings until September 30. It called a total of 110 witnesses, a varied assortment that included academics, police chiefs, and lawyers. Even before the hearings ended, the tide of public opinion had begun to shift against Bork. A *Washington Post*/ABC poll from September 25 found that a slight plurality—forty-eight percent of those aware of the nomination—opposed it.[181]

At the end of deliberations, the Committee voted 9-5 to recommend rejecting Bork's confirmation.[182] By then, fifty-three senators, a clear majority, had committed publicly to opposing him. Despite this death blow, Bork refused to withdraw his name from consideration.[183] At a press conference with President Reagan, he remained defiant:

> *"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.*
>
> *The tactics and techniques of national political campaigns have been unleashed on the process of confirming judges. That is not simply disturbing, it is dangerous...In 200 years, no nominee for justice has ever campaigned for that high office. None ever should, and I will not...There should be a full debate and a final Senate decision. In deciding this course, I harbor no illusions.*
>
> *But a crucial principle is at stake. That principle is the way we select the men and women who guard the liberties of all the American people. That should not be done through public campaigns of distortion. If I withdraw now, that campaign would be seen as a success and it would be mounted against future nominees."*[184]

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[181] Edward Walsh, "Public Opposition to Bork Grows; in Shift, Plurality Objects to Confirmation, Post-ABC Poll Finds," Washington *Post*, Sep 25, 1987.
[182] Edward Walsh and Al Kamen, "Senate Panel Votes 9-5 to Reject Bork," *Washington Post*, Oct 7, 1987.
[183] Lou Cannon and Edward Walsh, "Bork to Fight, Won't Withdraw: Nominee Has 'No Illusions' Of High Court Confirmation," *Washington Post*, Oct 10, 1987.
[184] Associated Press, "'Ask That Voices Be Lowered'," *Washington Post*, Oct 10, 1987.

On Friday, October 23, 1987, the Senate voted 58-42 to reject Robert Bork's confirmation to the United States Supreme Court.

Epilogue

The legacy of Bork's nomination presents a unique and compelling case study. The judge's name 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."[185] 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 journalist 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."[186] Rejected nominees before him had almost always possessed some serious ethical or credential shortcoming which provided senators the political cover necessary to vote them down. 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.

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[185] "Bork," Merriam-Webster, accessed March 19, 2019, https://www.merriam-webster.com/dictionary/bork.
[186] Linda Greenhouse, "Ideology as Court Issue; Democrats Pick Clear Battlefield on Bork, but Political Consequences Are Uncertain," *New York Times,* Jul 3, 1987.

Democrats and liberal interest groups successfully blocked Bork's confirmation because they recognized that the American public was willing to consider ideology as a criterion for high court nominees. These opponents mobilized effectively because they treated the confirmation as a no-holds-barred battle and voiced compelling arguments against it. The fact that the conservative Bork would replace a swing vote on the Court 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."[187] 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.

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[187] Ronald J. Ostrow and David Lauter, "Bork Assures Senators He Respects Precedent Testifies He was Acting as `Theorist' in Criticizing High Court Decisions; Unsure on Abortion Issue," *Los Angeles Times*, Sept. 16, 1987.

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."[188] 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.[189] During her confirmation, Ruth Bader Ginsburg dodged questions about the death penalty because it was "an area [she had] never written about."[190] More recently, Neil Gorsuch earned the dubious distinction of having been the least responsive nominee in half a century.[191]

It is perhaps poetically fitting that Justice Powell's seat, which Bork had hoped to occupy, would later fall to Justice Anthony Kennedy, yet another justice who would gain a reputation as a "swing vote" on the bench. When Kennedy retired and President Donald Trump selected Brett Kavanaugh to replace him, some opponents painted the new nominee as a destabilizing choice who would upset the balance of the Court.[192] They argued that Kavanaugh's legal philosophy, especially his expansive views of executive power, placed him outside the mainstream and threatened the Supreme Court's status as an independent arbiter.[193] Of course, this is not a like-for-like comparison. Doctor

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[188] Nina Totenberg, "Robert Bork's Supreme Court Nomination 'Changed Everything, Maybe Forever'," NPR, December 19, 2012, accessed March 19, 2019, https://www.npr.org/sections/itsallpolitics/2012/12/19/167645600/robert-borks-supreme-court-nomination-changed-everything-maybe-forever.
[189] Ruth Marcus and Michael Isikoff, "Souter Declines Comment on Abortion; Nominee Moves to Dispel Image as Judge Lacking Compassion," *Washington Post*, Sep 14, 1990.
[190] Neil A. Lewis, "The Supreme Court; Ginsburg Deflects Pressure to Talk On Death Penalty," *New York Times*, Jul 23, 1993.
[191] Nina Totenberg, "The Ginsburg Rule: False Advertising By The GOP," NPR, July 13, 2018, accessed March 19, 2019, https://www.npr.org/2018/07/13/628626965/the-ginsburg-rule-false-advertising-by-the-gop.
[192] Paul Haber and Jim Murray, "Kavanaugh Would Tip Balance on Supreme Court," *Missoulian*, September 26, 2018, accessed March 19, 2019, https://missoulian.com/opinion/columnists/kavanaugh-would-tip-balance-on-supreme-court/article_36dd2a7a-3eee-5512-bd0f-a22c8eeef234.html.
[193] Corey Brettschneider, "Brett Kavanaugh's Radical View of Executive Power," *Politico*, Sep 4, 2018.

Christine Blasey Ford's allegations of sexual assault against Kavanaugh add a serious ethical dimension to his story. Nevertheless, the similarity of the legal arguments against Kavanaugh to those leveled against Bork is no coincidence.

Bork's rejection ultimately highlights a broader problem affecting the United States. The American political system relies upon norms and social trust in order to function effectively. Yet those elements have eroded precipitously in the past few decades, and political polarization has increased substantially. As the 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."[194] Indeed, Americans by and large still to believe in the judiciary's impartiality, but even that norm's longevity is far from guaranteed.[195] It requires responsibility from public officials to refrain from politicizing the judicial process. For example, President Trump has denigrated judges by labeling them "Obama judges," implying that their decisions were illegitimate because of the political affiliation of the president who appointed them.[196] Chief Justice John Roberts replied to one of Trump's tirades by saying, "The independent judiciary is something we should all be thankful for."[197] The injection of 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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[194] *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).
[195] Jeffrey M. Jones, "Trust in Judicial Branch Up, Executive Branch Down," Gallup.com, September 20, 2017, accessed March 18, 2019, https://news.gallup.com/poll/219674/trust-judicial-branch-executive-branch-down.aspx.
[196] Mark Sherman, "Roberts, Trump Spar in Extraordinary Scrap over Judges," AP News, November 21, 2018, accessed March 20, 2019, https://www.apnews.com/c4b34f9639c141069c08cf1e3deb6b84.
[197] Ibid.

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