

2014

Advice or Consent: The U. S. Senate's Role in Confirming Supreme Court Nominees and the Robert H. Bork Confirmation Hearing

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Recommended Citation

O'Leary, Marjory, "Advice or Consent: The U. S. Senate's Role in Confirming Supreme Court Nominees and the Robert H. Bork Confirmation Hearing" (2014). *Undergraduate Research Awards*. Paper 22.

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The major project for the course, Presidential Leadership, (History 317), in Spring Semester 2013, required the submission of a 15-20 page seminar paper based on primary sources. My interest in constitutional history and, specifically, the balances of power among the three branches of the United States Government led me to examine the “advice and consent” doctrine in the U. S. Constitution, and how it pertained to the nomination and confirmation of justices to the Supreme Court. Shortly before the semester commenced, one of the most famous judges ever nominated for the Supreme Court, Robert H. Bork, died, and with his death came multiple news accounts of memories of the controversial hearings in 1987, and discussions of the lasting effects of what had become common lingo among politicians as the “Borking of Bork.” Pundits focused on how the confirmation process had deteriorated since Bork’s rejection in November of 1987. I decided to research primary sources, and back it up with academic scholarship to either confirm this contemporary theory or to argue in the opposite.

I used many of WGR’s Library’s resources extensively in locating and retrieving both primary sources and academic monographs and scholarly journal articles focusing on this topic. From a historical standpoint, the sources ranged chronologically from the constitutional convention in 1787 all the way to a political science monograph published in 2009. Primary sources ran the gamut from founding fathers, James Madison and George Washington, to Supreme Court Chief Justice Roger Taney, author of the Dred Scott opinion precipitating the Civil War, to Presidents Theodore Roosevelt, Henry Truman, Richard Nixon, and Ronald Reagan. Congressional hearings and other historical documents maintained by government departments throughout the three branches of government provided essential perspectives of how the country, and its government, has changed over the past 226 years.

The research I gathered took several forms, from the constitutional convention hearings in 1787, and a separate diary account kept by Delegate Madison, to parts of the Federalist Papers used in the debates ratifying the U.S. Constitution forward to contemporary congressional and presidential documents. A significant aspect of my argument, that the Bork hearings were not substantially different in demeanor or conduct than prior controversial hearings, was aided greatly by access to a novel source for this student of history: I found 40 hours of videotape in C-Span’s video library chronicling the Bork hearings from first gavel to the end of the testimony. These tapes gave a full public viewing of the respectful demeanor of all participants and also dissipated partisan criticisms during and after the process.

The breadth and depth of my research, and the wide variety of the information that I was able to gather and analyze, kept my enthusiasm for the project very high from beginning to final submission. The resources and expertise of the WGR Library, including the helpful guidance of the librarians, played a central role in my ability to satisfactorily complete the project.

ADVICE OR CONSENT?
The U. S. Senate’s Role in Confirming Supreme Court Nominees
and the Robert H. Bork Confirmation Hearing

Today’s common wisdom about the nomination and confirmation of justices to the U.S. Supreme Court presumes the process has deteriorated to an alarmingly dangerous state. Political pundits as well as political science scholars have argued that Democratic members of the U. S Senate Committee on the Judiciary have effected a ‘sea-change’ in the advice and consent role of the Senate as found in Article 2, Section 2 of the U.S. Constitution. They argue that Senate Democrats have egregiously overstepped their bounds by their intense scrutiny of presidential nominees. To these commentators, the recent descent into the tendentious and sectarian confirmation hearings accelerated dramatically during the confirmation hearings of Judge Robert H. Bork in the fall of 1987. The ideological and highly partisan tactics employed by liberal Democratic senators during this process, they say, transformed what had been in the past a simple method for senate affirmation of the president’s selection: If the candidate was well-qualified and of sound character and mind, he/she would be a good match with the other ‘neutral arbiters of the law,’ already sitting on the bench. Instead, since Bork, the confirmation process has become, in their view, a dysfunctional spectacle in which judicial confirmations have been “held hostage” in the Senate. They conclude that this battle between the executive and congressional branches of government has divided and weakened, and thereby threatened, the Republic. “The bottom has clearly fallen out of the confirmation process...” argue the authors of a 2009 book, *Advice and Dissent*.¹

In sharp disparity with the ‘sea change’ argument, several legal scholars and historians have claimed that past confirmation hearings were at least as contentious as the Bork hearings. They maintain that intense probing into a Supreme Court nominee’s political ideology, legal philosophy, and personal beliefs has been a feature of the senate’s advice and consent role since early in the country’s history. Members of the Senate Judiciary Committee both before and after Bork have actively explored such

issues as judicial temperament, activism, past writings, speeches and opinions, all of which revealed a candidate's interpretation of the Constitution. Senator Patrick Leahy (D-VT) remarked in 2002 that the Senate's role in confirmations hearings was indeed, "...advise and consent. It isn't advise and rubber stamp."² These scholars have typically ascribed a necessary and active role to the U.S. Senate in the confirmation process in contrast to those political analysts who blame a newly provocative senate. Legal and history scholars have effectively argued that "... 'Advice' was intended to be *more than* a redundant synonym for Consent (*emphasis added.*)"³ These scholars concluded that the U.S. Senate's role was to provide an additional check against the executive's potential nomination of capricious, extreme, and ill-chosen candidates. The significance of this role became most evident when considering a lifetime appointment of a justice to the Court. Since most confirmed nominees would serve well beyond the terms of the presidents who appointed them, it was incumbent upon senators to address the confirmation process with a depth and seriousness that assured the true independence of the court.⁴

Primary resources in evaluating these two competing positions include debates over the roles of the executive and legislative branches during the Constitutional Convention held in Philadelphia from the end of May through much of September in 1787, and then the final wording of the U.S. Constitution itself. An analysis of the enumerated and un-enumerated rights articulated in the Bill of Rights, and the meaning of the words 'advice and consent,' found in Article II, Section 2, shed light on those who have argued for a strict constructionist reading of the 'original intent' of the framers found within the Constitution. Those arguing against this highly limiting and strict reading see in these same words an expansive spirit, tone, and broad intent in the penumbra of the founding document.

Three areas of ideological inquiry were particularly contentious in the Bork hearings and will be the focus of this study. Equal Protection of the Law and Due Process of Law (*habeas corpus*), found in Amendment Fourteen, Section 1 (with the due process clause also enumerated in Amendment Five of the Bill of Rights) comprised an important area of exploration. A second debate concerned 'privacy

rights' of individuals. These two words are not connected in the wording of the Constitution, but the concept has evolved over time as various courts found rights, interpreted from the Ninth and Fourteenth Amendments which bolstered the protection of an individual citizen against the colossal power of the state. The third issue, civil rights, encompassed many of the issues above, with the addition of civil rights legislation such as the Civil Rights Act of 1964, and the Voting Rights Act of 1965.

Other essential sources in investigating the debate include the contemporaneous statements and speeches made by President Ronald Reagan in support of Judge Bork's nomination before, during, and following the Bork affair. Reagan's speeches and remarks provided ample delineations of his understanding of the confirmation process and of the role of the Supreme Court in contemporary society. Another key player supporting the president's nominee in the Senate was James "Strom" Thurmond (R-SC), who was the ranking member of the Republican Party on the Committee during the Bork hearings. The committee hearings and debate evinced Senator Thurmond's position as to Judge Bork's qualifications, and his views of the unfair slander and misrepresentations of Democratic senators challenging the judge's record on equal protection, due process, and civil rights.

In contrast, the chairman of the Judiciary Committee, Joseph Biden (D-DE), joined with his Democratic colleagues in articulating a very different theory of the Constitution and the Supreme Court. This paper will scrutinize the questions and statements made by Senator Biden and his colleagues, and several of his colleagues on the committee, specifically relating to the three major issues delineated above. Both the court hearings and the Senate debate will be used to piece together these arguments in opposition to the president's nominee. The hearings themselves were videotaped and are available online at C-Span.org.⁵ The Senate debate that followed the hearings is available from congressional records of the period.⁶

Through this analysis of the various statements, speeches, written transcripts, and forty hours of television coverage of the hearings and debate over the three key issues, the study will determine if the

Bork hearings were a radical departure from the ‘normal’ (historical) confirmation process before Bork, or if the nature of the debate was consistent with other contentious confirmation proceedings. Applying various political and legal opinions to the Bork confirmation process, can demonstrate whether this controversial event had a transformative effect resulting in a major power shift from the executive branch to the senate. Were the statements made by President Reagan or the conduct of those senate committee members opposing the nominee truly notorious? If so, was the Bork confirmation process so thoroughly damaging, as some argue, that the laws of the Republic (and, accordingly, the U.S. Constitution) were endangered by the liberal Senate Democrats’ ‘left-wing’ power grab?

Part 1 – The Arguments

In “The Changing Dynamics of Senate Voting on Supreme Court Nominees,” authors Lee Epstein, René Lindstädt, Jeffrey A., Segal, and Chad Westerland argued that a “near universal consensus” existed that the Bork nomination sparked a regime change in the U.S. Senate. From 1987 on, senators interrogating Supreme Court nominees relegated the traditional (and formerly central, so they argued) considerations of competence and integrity to a lesser role, in favor of a new and transformative emphasis on politics, ideology and judicial philosophy.⁷ To prove this thesis, they updated a statistical model (the Cameron, Cover and Segal model published in 1990, known as the CCS) evaluating the relative effects of ideology and legal qualifications on nominee confirmation voting behavior from 1937 – 2005. They invented two independent variables – measuring a senator’s view of the legal competency of the candidate and, more importantly, a measure of the candidate’s “ideological distance” from the senator. The dependent variable in the study was defined as the yea or nay vote on each candidate. If a qualified candidate’s ideological ranking was “sufficiently proximate to the senator’s,” the nominee had a better chance of earning the senator’s vote. Applying these tools to the analysis of 3,709 votes from 1936 – 2005, the authors concluded that senatorial tolerance towards voting for those candidates who may be well-qualified, yet are perceived to have wide ideological gulfs, had declined significantly

following the Bork hearings.⁸ In what they referred to as the “Bork Effect,” they reported that an additional emphasis on ideological compatibility between senators and candidates had a large substantive impact: “...the president’s discretion over whom to nominate to the Supreme Court has grown far more circumscribed over the last two decades.”⁹ They concurred with other political pundits and scholars who argued that the dynamics of senate confirmation hearings post-Bork transformed the traditional power balance from the executive to the legislative branch in the Supreme Court confirmation game.

In a similar vein, a 2004 article published in the *Journal of Politics* by Timothy Johnson and Jason Roberts, political scientists at the University of Minnesota, agreed with the findings of the “Changing Dynamics” article. They noted an upsurge, since the Bork event, in an ideologically “seismic struggle,” between the executive and the legislature over appointments to the Supreme Court. They maintained that these disputes were triggered by the perceived significance of the results: each side believed it should play the decisive role in the process. In this “winner-take-all” contest, both sides risked the political power each needed to successfully control public and legislative agendas and thereby chalk up votes in the next election cycle.¹⁰ President Richard Nixon, for example, was well-known for his passionate stance against senate interference with his Supreme Court nominees. As he wrote: “If the senate attempts to substitute its judgment as to who should be appointed, the traditional constitutional balance is in jeopardy and the duty of the president under the Constitution is impaired.”¹¹ Johnson and Roberts examined the effectiveness of those presidents who expended political capital to bring about a favorable vote on their most highly valued nominees. They defined the presidential investment of political power during the process as “going public” – and counted the number and types of comments presidents made to bolster their candidate’s chances for approval in the senate. They distinguished among three types of statements: those endorsing strong legal qualifications, those which called upon the public to vocally support the president’s choice, by contacting their representatives in the senate, and

those intended to pressure the senate to acquiesce to the president’s nomination. Their methodology relied upon previous statistical models such as the CCS and the updated model used in the article by Epstein, Lindstädt, Segal and Westerland, and added a raw count of the frequency of each type of presidential statement extending from the nomination of Justice Tom C. Clark by President Truman in 1949, to President Clinton’s successful nomination of Justice Stephen Bryer in 1994.¹² They were able to conclude, with one extraordinary caveat described below, that the expenditure of political currency by presidents on valued candidates had been successful over time in at least reducing the number of “no” votes in the senate.¹³

The exceptional caveat affecting the conclusions reached by Johnson and Roberts is particularly relevant to this examination of the Bork hearings, and in this context, more significant than their general findings. While examining the results of the statistical models, the scholars discovered a stunning “outlier” in the data. The number of presidential statements by Reagan on behalf of Bork’s nomination represented 32% of *all* statements made by *all* presidents in support of all Supreme Court candidates during the study period. The number of statements Reagan made which were characterized as applying pressure on the senate was a whopping 46% of the total in that specific category.¹⁴ Reagan expended much more political capital on Bork, ultimately in a losing cause, than any other president during a time-frame spanning forty-five years. This period included such contentious hearings as those of Justice Thurgood Marshall (1967), Judge G. Harrold Carswell (1970); the elevation of Judge Rehnquist to the position of Chief Justice (1986) and Justice Clarence Thomas (1991). Clearly President Reagan invested heavily in his attempts to affect the confirmation of his most highly-prized Supreme Court candidate, Judge Bork.

Using a different approach, journalist and self-appointed political pundit, Patrick B. McGuigan, concluded in his 1990 book, *Ninth Justice: The Fight for Bork*, “The liars got their way on this one.”¹⁵ While congratulating President Reagan on his triumph in “placing” (court-packing?) four candidates on

the Court during his first term in office, McGuigan lamented the results of the 1986 mid-term elections, in which the Democrats dangerously “seized control of the upper chamber,” as well as the Judiciary Committee. He also bemoaned the way that Chairman Biden “thrust himself into the media spotlight by threatening that a conservative nominee would be in for, ‘big trouble.’”¹⁶ An alternate version of this story had President Reagan inviting senior members of the Judiciary Committee to the White House to discuss potential nominees the weekend *before* his selection of Bork. In this account, Senator Biden was quoted as saying in a personal comment to the president that “big trouble” would result if Judge Bork was put forth. Biden released a statement on 26 June 1987 in which he affirmed that, “the nomination could turn on whether Powell’s replacement ‘would alter the balance of the court’ and that he [Biden] would ‘resist any efforts by this administration to do indirectly what it has failed to do in the Congress -- and that is impose an ideological agenda upon our jurisprudence.’”¹⁷ While McGuigan cites an article in the *Washington Post*, regarding his argument that Biden was politically-motivated to attack the nominee, that citation referring a media blitz by Biden was not confirmed in the senator’s public statements or remarks prior to Reagan’s announcement on 2 July 1987. In his opening statement at the beginning of the hearings on September 15, 1987, Chairman Biden confirmed the latter account when he remarked that, “As I made clear to the White House and the Attorney General *prior* to your selection, and as I told you privately, Judge Bork, as a matter of principle, I was and continue to be deeply troubled by some of your views. It would be less than honest, then or now, to pretend otherwise. (emphasis added)”¹⁸

McGuigan blamed the shoddy mistreatment of Judge Bork by senate Democrats, which he labeled as “mud-slinging,” as a politically-motivated tactic to pander to special interest groups opposed to Bork. McGuigan also argued that the many “libelous” distortions of Bork’s record by senators, and the pressure from these same special interests were responsible for the eventual failure of Bork’s confirmation. He added that his “side” in the political spectrum was not prepared to wage that fight at that point in time, further contributing to the sad outcome.¹⁹ Finally, he accused liberals of successfully

devising and employing “techniques for effective distortion...” The Democrats had been at it – collecting information on potential justices and devising strategies for blocking candidates – decades before the Republicans learned how to organize themselves into such an efficient politically effective engine.²⁰ McGuigan characterized the period following Justice Powell’s resignation in June 1987 to Justice Anthony Kennedy’s elevation to the Court in 1988 as “one of the most tragic eras in American history.”²¹

A contemporary of MacGuigan, Henry Paul Monaghan, the Harlan F. Stone Constitutional Law Professor at Columbia University, testified on behalf of Bork’s confirmation in September 1987. He commented on the judge’s “surpassing qualifications” for the bench. He argued at the time that the Senate had a constitutional imperative to affirm the president’s nominee based on Bork’s superior intelligence and preparation. Not quite six months later, however, the professor published an article in the *Harvard Law Review* questioning and reflecting upon his testimony in favor of Bork. He re-examined and questioned his assumptions during the process. To his surprise he found, “that no such argument is possible.”²² He found that Supreme Court confirmation hearings had been contentious all the way back to President Washington’s appointment of Judge Rutledge to succeed Chief Justice John Jay in 1795. Throughout the 19th Century presidential nominees had been rejected or delayed for a surprising variety of reasons including oppositional political views, the application of “senatorial courtesy,” and the lame-duck tactic of holding on to vacant seats until the next administration took over.²³ Monaghan described the profound impact on the federal government of the growth and increasing diversity of the country during the nineteenth century - different regions, differing opinions, competing economic systems, slavery and reconstruction, the formation of two major political parties, immigrants and, in response, the “no-nothings. All of these trends had a great impact on the federal government. As a result of this diversity, senators rightly interrogated court nominees on their personal beliefs, judicial ideologies and partisan political considerations.²⁴

In stark contrast to the views expressed in *Advise & Dissent*, Monaghan saw his version of a ‘sea change,’ in the Senate’s diminishing role from the late 19th Century and through most of the 20th Century, as the executive branch expanded its power and control at the expense of the other two branches of government. By the time of the New Deal, governmental power had successfully shifted from congress to the president. It became the executive’s prerogative to shape society, as well as the Supreme Court. Monaghan maintained that the consolidated power of the modern executive branch had enormous resources to garner support for a candidate, as well as power to discipline errant senators or, in return for political favors, nurture political operatives with perquisites that the Congress itself could not convey.²⁵ In his analysis and reflection, Monaghan could find “no significant affirmative constitutional compulsion [directing the Senate]...to confirm any presidential nominee.” As such, Senators were free to engage in any course of interrogation they deemed relevant and, as representatives of the people, were duty-bound to accept this heightened responsibility as a crucial check on executive power. Only they could assure that a justice’s opinions would align, at least to a certain degree, with the people’s representatives in Congress and thus more closely match the people’s needs and interests.²⁶

Political scientists Jeff Yates and William Gillespie found two major historical views represented in the advice and consent debate. In the first, the role of the Senate was limited in scope, focusing on qualifications and aspects of the candidate’s character, and definitely avoiding any political or ideological questions on issues which potential justices might face on the Court. The second opinion more closely matched that espoused by Professor Monaghan. Confirmation votes should rest on a broad scope of inquiry into the relative compatibility of the candidates’ political and ideological positions with those settled laws providing, for example, an expansion of the equal protection, due process, and civil rights in society.²⁷

Addressing the first view, arguing for a limited scope of inquiry, scholar Jeffrey K. Tullis argued that if senators avoided an in-depth dialogue with candidates on political and ideological questions it

would be akin to forcing sitting justices who have written precedent-setting opinions to recuse themselves from voting on similar cases in the future.²⁸ The sensible argument articulated here is that people develop their thoughts, beliefs, political affiliations, and ideologies over lifetimes of experience and reflection. To expect potential justices of the Supreme Court to leave these comprehensive identities at the door to the court room was not only un-realistic but also undesirable. In 1991 for example, many Americans were uncomfortable with the notion that a judge such as Supreme Court nominee Clarence Thomas, who was in law school during the *Roe v. Wade* debates in the Court, did not form *any* opinion, or *any* theory, or have *any* discussions about the case while he was studying the law. Even an immature and unsophisticated understanding of the issues at hand would have been much more readily accepted by Americans than none at all. Yet during the confirmation hearings Thomas emphatically denied ever forming an express opinion on the ruling, much less conversing with anyone - legal colleagues, politicians, his family or acquaintances - from the original date of the ruling in 1973 through the fall of 1991.

Part 2 - The Constitutional Debate

The initial debates about placing judges on the Supreme Court occurred during the Constitutional Convention held in Philadelphia from May 25 to September 17, 1787, and from the beginning the discussions were contentious. One side of the debate favored a strong executive while others had more faith in legislative bodies. These two arguments were mirrored along the same lines of debate at the Bork hearings 200 years later. On May 29th, 1787, Charles Pinckney (a convention delegate from South Carolina) put forth a draft of a proposed *Constitution* which contained the following provision:

The Senate shall have the sole and exclusive power to declare war; and to make treaties; and to appoint ambassadors and other ministers to foreign nations and judges of the Supreme Court.²⁹

This particular provision led to a variety of revisions, none of which gained sufficient support, and thus the issue was tabled until a later date, as was common for many provisions in various drafts. In July,

James Madison, representative from Virginia, proposed that the executive have the power to nominate judges who would be appointed to the court, unless two-thirds of the “second house” voted in opposition to the nominee thereby resulting in a concurrence between the legislative and executive branches.³⁰ Pinckney disagreed, arguing that the senate should make the decision because the executive was not equipped with the requisite knowledge of all of potentially qualified nominees. Representing Connecticut, Oliver Ellsworth favored nomination by the senate and confirmation by the executive, which could be overridden by two-thirds of the senate. Representative Gouveneur Morris of Pennsylvania countered that the executive would be in the best position of identifying qualified individuals for the court. Morris argued that “If the Executive can be safely trusted with the command of the army there can not [sic] surely be any reasonable ground of jealousy [by the people’s representatives] in the present case.”³¹ When Madison was challenged for requiring two-thirds ratification by the senate, he not only easily compromised on this provision, but went further to assert that the supreme court and the executive branches should together have the power to review, revise, and edit any law passed by the congress before it became settled law.³² The lengthy and sometimes contentious deliberations reflected contemporaneous understandings of political theory and the nature of power. As was expected, the delegates divided into two broad groups: those who were wary of the potential abuses of executive power, and those who considered legislative bodies “cabal-like” cauldrons promoting parochial self-interests.³³

On September 3, 1787, the language which is found in Article II, Section 2 of the approved *Constitution* was proposed, “[The President] shall have Power, by and with the Advice and Consent of the Senate...shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme [sic] Court ...”³⁴ This approved wording, however did not end the debate. During the ratification process of the *Constitution*, Alexander Hamilton joined the debate over Supreme Court nominations

writing as Publius in *The Federalist Papers*. He clarified, in paper number 66, his view of the respective roles of the executive and legislative branches when he wrote,

There will, of course, be no exertion of CHOICE on the part of the Senate. They may defeat one choice of the Executive, and oblige him to make another; but they cannot themselves CHOOSE... it could hardly happen, that the majority of the Senate would feel any other complacency towards the object of an appointment than such as the appearances of merit might inspire, and the proofs of the want of it destroy... So far as might concern the misbehavior of the Executive in perverting the instructions or contravening the views of the Senate, we need not be apprehensive of the want of a disposition in that body to punish the abuse of their confidence or to vindicate their own authority. We may thus far count upon their pride, if not upon their virtue.³⁵

By theorizing that Senators would be content with executive power controlling the decision, and that a self-righteous senate would organically reject any presidential abuse of power, Hamilton did not foresee the ideological and political splits between these two branches of government in determining who should serve on the third. By placing his faith in the power of a president, Hamilton assumed that an enhanced sense of duty and obligation was necessarily intrinsic in the executive branch. The highest ruler in the land, this sovereign, would not fall victim to distractions of competing factions or the diversity of opinions found in an assembly of politicians. In Hamilton's optimistic view, the president would focus simply on the merits of the individual and his ability to contribute to the common good by upholding and enforcing the rule of law in society.³⁶ The notion of 'public virtue' held important currency among the founding fathers in the 18th Century and Hamilton found that virtue in the duly elected president. He agreed with Madison's concept that, by gaining concurrence of the Senate on Supreme Court nominees, the legitimacy of the executive's decision would be enhanced. (Although in his view the senate's consent would be silent). Hamilton could not imagine a situation in which a president would subvert constitutional imperatives in an attempt to "pack" the Supreme Court with those justices whose radical political philosophies (right wing or left wing) mirrored his own. Nor was he able to imagine a president who flagrantly disregarded the rule of law and placed himself above it. Madison, conversely, was neither highly confident nor sufficiently optimistic to assume that the executive branch

would not devolve into the same type of absolutist monarchy as did the one ruled by King George III.

The genius of Madison’s contributions to the Constitution that resulted in numerous checks and equalizing balances sprung from his pessimistic view of human nature in its struggle between public virtue and personal vice.

Part 3 – Historical Precedents

“Advice and consent” was clearly identified throughout U. S. history as a specifically assigned, positive responsibility of the senate in approving Supreme Court nominees, and was clearly understood by the founding fathers, authors of the *Constitution*, and the judicial branch of the newly formed Supreme Court. The first challenge to a president’s nomination began in June 1795 when President Washington made a recess appointment of John Rutledge of South Carolina as chief justice of the court upon the retirement of John Jay. Weeks after the appointment, Rutledge committed a critical political *faux pas* by delivering an ill-timed speech in August declaring his vehement opposition to the Jay Treaty. Rutledge failed to consider the political fallout that would swirl around his nomination since the president firmly supported the treaty, and it had also earned the consent of the legislature. When the senate convened to consider Rutledge’s nomination, senators weighed not only Rutledge’s legal qualifications, but also his political opinions. The Federalist-controlled senate challenged Rutledge’s political judgment in both opposing the treaty (some even questioned his mental stability in taking this position), and in choosing to publicly reveal his position before the confirmation hearings began. Rutledge was rejected in December 1795.³⁷

Chief Justice of the Supreme Court, Roger Taney (1836-1864), notorious for his opinion in the *Dred Scott* case in 1857, clearly understood how political considerations were essential in seating justices on the court. He contended that politicians and legal scholars were wrong when they argued “...no consideration should be given to the views of the appointee on the subject of politics, taking

politics in its highest and philosophical sense as involving theories of human rights and the principles of government.”³⁸ Political considerations assured diversity on the court so that a variety of philosophies and opinions would be considered in the court’s deliberations. If both the president and a majority of Supreme Court justices shared the same political and ideological affinities, it would result in a diminishing role of the legislative branch making the government vulnerable to tyranny. Even President Theodore Roosevelt of “bully pulpit” fame, one of the earliest presidents who, primarily through foreign exploits and commitments, expanded and strengthened the role of the executive in relation to congress, modestly wrote in his *Autobiography*, “I was only one-half the appointing power...I nominated; but the Senate confirmed.”³⁹ In 1959, William Rehnquist wrote an article published in the *Harvard Law Review* in which he stressed the imperative of senate inquiry into the political, legal, and constitutional philosophies when interrogating supreme court nominees.

Until the Senate restores its practice of thoroughly informing itself of the judicial philosophy of a Supreme Court nominee before voting to confirm him, it will have a hard time convincing doubters that it could make effective use of any additional part in the selection process.⁴⁰

In this article Rehnquist criticized the judiciary committee for failing to ask pertinent and probative questions of recent supreme court nominees. He bemoaned the troubling lack of rigorous investigation of the political opinions and judicial philosophy of candidates, or even a comprehensive analysis of previous opinions and other writings available to the senators on the committee. Rehnquist may have rued the day he wrote this article. Twenty-seven years later, in 1986, he was thrust into a highly contentious and divisive confirmation hearing when Reagan appointed him as Chief Justice of the Supreme Court to replace Chief Justice Warren Burger. Rehnquist was harangued with relentless questioning over his pro-segregationist beliefs and in particular, a memo he wrote in 1952 as a legal clerk to Justice Robert Jackson, providing the justice with a rationale to rule in opposition to the *Brown v. Board* de-segregation case. Similar questions dogged Rehnquist’s original confirmation battle to the high court in 1971, but some writers, including the Nixon White House’s former councilor, John Dean,

argued that Rehnquist committed flat-out perjury during the 1986 hearings as a way to gain the appointment as chief justice and escape his controversial past.⁴¹

Part Four – Thurgood Marshall’s Confirmation Hearing

Twenty years before the Bork hearings, another judge was nominated to the high court by President Lyndon B. Johnson, who publicly announced his nominee on June 13, 1967. Thurgood Marshall had a long, storied, and very successful career in civil rights law, followed by government service as a judge on the U. S. Court of Appeals, and then as Solicitor General of the U.S. He was the first person of African American heritage to be elevated to this high position in government. In this role Marshall won 14 of the 19 cases (74%) he argued on behalf of the U.S. Government. Upon his nomination in 1967, the American Bar Association gave its highest rating to Judge Marshall’s candidacy, and several lawyers, legal scholars, and politicians supported him during the hearings. As with the Bork hearings, senators on the committee had more than ample time to examine Marshall’s writings, opinions, political beliefs, judicial philosophy, and his private background. One of the committee members, Senator Robert Byrd (D-WV) (who also sat on the committee during the Bork process) asked J. Edgar Hoover to have the FBI delve into Judge Marshall’s past to trying to find communist ties. The irony here is that of all African American leaders in the Civil Rights movement, Judge Marshall’s arguments for equality were based on his faith and his application of the power of the U.S. Constitution on crucial legal issues.

During the course of Senate Judiciary Committee hearings, many highly contentious, probative, and at times disrespectful, interrogations of the nominee ensued. The hearings were dominated by three powerful segregationist and conservative senators from the South: James. O. Eastland (D-MS), chair of the committee, Samuel Ervin, Jr. (D-NC), and Strom Thurmond (R-SC), each of whom opposed the candidate’s ascendancy to the high court. Senator Ervin’s line of attack was the recently decided

Miranda cases and the potentially alarming impact on the criminal justice system he perceived would follow. Senator Eastland allotted his time to question Marshall on the judge's political views, while Senator Thurmond's interrogation was comprised of a tedious examination of the origins of the 13th and 14th amendments to the Constitution.

Ervin's first line of inquiry, although lightly veiled in hypothetical and remotely historical terms, was directed towards the *Miranda* rulings of 1966 which expanded rights provided in the fifth amendment protecting individuals from self-incrimination when accused of a crime. Elements of this law also broadened the interpretation of the 14th Amendment's "equal protection clause," by promising legal representation to those indicted individuals who could not afford to hire a lawyer. Ervin prefaced his interrogatory by stating his firmly held belief that the Constitution imposed upon the senate the duty to determine the constitutional philosophy of the nominee. He lectured Marshall on the evils which had arisen in recent years from judicial activism and failures to adhere to the "original intent" of the framers.⁴² Marshall politely challenged Ervin's argument by countering that in his belief, the Constitution was a living document. Marshall found this definition from court opinions originally written in the 1880's which further articulated the framers' intentions as "a living document to be interpreted and applied as of the time that a particular factual situation came up." It was written precisely with broad strokes in order to account for societal and governmental changes over history: "You can't expect the court to apply the Constitution to facts in 1967 that weren't in existence when the Constitution was drafted," Marshall remarked.⁴³

In terms of the *Miranda* cases, Ervin held that the 5th amendment referred only to self-incriminating statements occurring during a court case itself, while voluntary comments before and during the criminal or civil proceedings were not protected by the Constitution. Marshall pointed out that this issue pivoted on the concept of a "voluntary" confession: "I tried a case in Oklahoma where the man 'voluntarily' confessed after he was beaten up for 6 days. He 'voluntarily' confessed." Marshall

further explained that these types of distinctions, while not defined in the *Constitution*, were those that judges most often faced, and thus the amendment should be interpreted in light of the facts in any specific situation. Decisions by judges must be made not only based on the words in the amendment, but also considering each case by itself, reviewing precedents that may pertain to the case.⁴⁴ Ervin continued to press his case for judicial restraint and he asked Marshall to take a public stand on *Miranda*-based cases that would likely come before the Supreme Court in the future. Marshall did not take the bait. He patiently explained that if he did make such a statement, he would be obligated to recuse himself from those cases. The following exchange ensued:

Ervin: If you have no opinions on what the Constitution means at this time, you ought not be confirmed...How can this committee or how can the Senate perform its duty and ascertain what your constitutional or judicial philosophy is without ascertaining what you think about the Constitution?

Marshall: Well, one way, you can look at my opinions.

Ervin: I know, but I do not have the time to read all of your opinions... I note that one of them is fifteen pages long!..Judge, how can the words, “no person shall be compelled in any criminal case to be a witness against himself,” apply to anything except testimony given in a court?

Marshall: I would say, Senator, that we know, you and I that you are talking about a matter which was in the *Miranda* cases, and there will be many more cases dealing with the *Miranda* rule and the use of confessions...

Ervin: I will ask you if every one of those cases which were litigated before the Supreme Court of the United States from June 15, 1790 down to the 13th day of June 1966 did not hold that these words had no possible application to voluntary confessions made outside of the court?

Marshall: For the same reason I cannot answer that question.⁴⁵

Despite the clarity of Marshall’s response to this line of inquiry, as well as his suggestion that the Senator from North Carolina (or members of his staff) could easily review the judge’s earlier opinions and rulings, Ervin continued to ask badgering questions of the Judge pertaining to the *Miranda* issue, and inserted overt criticisms of Marshall’s refusal to respond to his questions:

Frankly, I am sorry that this nominee will not do as all of us enjoy doing, speak for himself. I am disappointed that the nominee has a reluctance, and I believe I could even go far enough as to characterize it as an unwillingness, to answer any questions concerning the meaning of the Constitution which would reveal to the members of this committee and Senate what his constitutional or judicial philosophy is.⁴⁶

Ervin finished this area of questioning with a speech condemning those sitting justices who voted to uphold *Miranda*. He accused the justices of adding a clause to the language of the 5th amendment that

went far beyond original intent. The ramifications of this decision, in Ervin’s view, forever disrupted the *res judicata* tradition of finding a final resolution in criminal cases, not subject to appeal in the future.⁴⁷

Senator Eastland’s politically-driven questions were very brief and yet demonstrated his efforts to portray Marshall as a threat, indeed even a potential enemy of the state for his liberal (and perhaps communist?) beliefs at a highly significant and sensitive period in U.S. history. The following dialogue is typical of the exchange between the two:

Chairman [Eastland]: Do you think the Supreme Court is an instrument of social change?

Marshall: Do I think that the Supreme Court is undergoing a social change? No. Sir

Chairman: And you don’t think that a judge, a Justice of the Supreme Court, should be controlled by his own personal opinions...in rendering a decision?

Marshall: I don’t think any judicial officer should be...

Chairman: Vol. 11, No. 5, dated May 15, 1966 [of the *American Bar News*], gives some quotations from you at a speech at the University of Miami on Law Day, 1966. ...You are quoted in this article as having said that your concern was not with those ‘who resist any change in the status quo with fury,’ but those ‘whose criticism of recent Supreme Court doctrine stems from a more intellectual level.’ You are quoted as having stated that this, ‘intellectual or professional criticism reflects a profound element of misunderstanding. It reflects a refusal to accept a new concept of law, to shake free of the 19th century moorings and to view law, not as a set of abstract and socially unrelated commands of the sovereign, but as effective instruments of social policy.’”

Chairman ...Well, then, doesn’t that reflect that – isn’t the meaning of that that the U.S. Supreme Court is an instrument and should be an instrument of social change?

Marshall: I don’t think I was talking about the Supreme Court. I was talking about the people in general and especially the bar.⁴⁸

Eastland finished his line of investigation with questions about a dissenting opinion that Marshall had written in *People of New York v. Galamison Et Al*, (May 1964) in which Marshall stated, “First, peaceful protest, speech and petition, is a form of self-help not unknown during the era of Reconstruction.” This case involved a picket line at the Downstate Medical Center in Brooklyn, NY in 1963 by African American laborers who were demonstrating against unlawful and discriminating hiring practices by trade unions and building contractors. The defendants in this case were the demonstrators who were accused of disorderly conduct and resisting a public officer. These defendants were pleading with the court to relieve them of criminal prosecution. While the majority opinion expressed sympathy for the workers, it also said: “this [the court] is

not the proper forum to urge these matters; nor is the loftiness of defendants' motives or the justice of their cause before the court on this motion, however much the court may sympathize with and respect the rights of aggrieved minorities to seek and obtain full civil rights and equal employment opportunities.” the defendants were obviously not granted the relief from criminal prosecution.⁴⁹ Eastland asked Marshall during this discussion if Marshall quoted from a specific book in his opinion against the ruling, and this discourse ensued:

Chairman: Did you cite a book...by a man named Aptheker, *A Documentary History of the Negro People in the United States*?

Marshall: I think I did.

Chairman: Well, now, of course, *I don't want to leave the impression that you have ever been a Communist or anything like that*, but did you know that at the time you cited this work the author of the book, Herbert Aptheker, had been for many years an avowed Communist and was the leading Communist theoretician in the United States (emphasis added)?

Marshall: I positively did not know that.⁵⁰

Eastland's area of inquiry during this exchange was clearly intended to cast a shadow over Marshall's candidacy, by bringing up the specter of communism in 1967. Even though the red-bashing of the 1950's in the U.S. had receded, the Cold War struggle between the U.S. and the U.S.S.R. permeated American society and culture in 1967.

Thurmond's interrogation of Marshall took several days and was almost exclusively focused on attempting to demonstrate the nominee's lack of qualifications and his lack of knowledge of constitutional law, and in particular's an area of expertise – the thirteenth and fourteenth amendments. Only a few examples of this dialogue are needed to show Thurmond's tactics as well as his disdain for the candidate and his qualifications for the high court. Thurmond began by asserting his belief that the candidate should, naturally, be an expert on these two civil rights amendments, and as such, Marshall should be able to answer arcane, and in many cases obscure questions:

Thurmond: Turning to the provision of the 13th amendment forbidding involuntary servitude, are you familiar with any pre-1860 cases which interpreted this language?

Marshall: Well, Senator, I might say, frankly, I don't know of any case I had that involved the 13th amendment. My research on it would be very limited, on the 13th amendment.

Thurmond: Does the provision against involuntary servitude, in your view, abolish all compulsory labor for the benefit of a private person, and if not, what limitations would you read into this language and on what legal basis would you establish such limitation?

Marshall: If such a question came before me, I would research the background of the 13th amendment, and apply it to the facts. I haven't had the opportunity to do that.

Thurmond: Do you agree with the article.....that the provision against involuntary servitude in the 13th amendment prevents either Federal or State legislation which requires any person to render personal services to any other private person, whether the refusal to render such services is motivated by racial or religious discrimination or for any other reason, and if you do not agree with this view, why do you think that the provisions against involuntary servitude does not forbid legislation requiring personal services?

Marshall: I am not familiar with the article, and I am not at this time ready to give an opinion because I haven't researched it.

Thurmond: What kind of legislation would, in your estimation, be forbidden by the provision against involuntary servitude?⁵¹

Turning to the fourteenth amendment, an arrogant Thurmond scornfully upbraided the candidate, and reacted sarcastically towards a fellow committee member, for their lack of brilliance on a key constitutional point.

Thurmond: What constitutional difficulties did Representative John Bingham of Ohio see, or what difficulties do you see, in congressional enforcement of the privileges and immunities clause of article IV, section 2, through the necessary and proper clause of article 1, section 8?

Marshall: I don't understand the question.

Thurmond: What constitutional difficulties did Representative John Bingham of Ohio see, or what difficulties do you see, in congressional enforcement of the privileges and immunities clause of article IV, section 2, through the necessary and proper clause of article 1, section 8?

Marshall: I don't see that any ...

Senator E. Kennedy: Could we just have some further clarification so all of us can benefit? I really don't understand the question myself. I was just wondering if the Senator, so we could all benefit from both the question and response....

Thurmond: Well, I repeated the question twice. Would you like me to repeat it again?

Kennedy: I thought that rather than repeating the question maybe there was some other way that you could arrive at it.

Thurmond: I don't think I can make it any plainer, if you know the answer.

Kennedy – I see.

Thurmond – It is just a question of whether you know the answer.

Kennedy: I see. Could you tell us how the Solicitor is...

Thurmond: Well, I could tell you that article IV, section 2, did not set forth the powers vested in the United States. That's the answer.⁵²

The question which seemed to be obscure enough, was also intended to trick the candidate into an incorrect response.

The last thing that Eastland, Ervin, and Thurmond wanted in 1967 was an anti-segregation justice on the Supreme Court. The hearing occurred in the middle of the civil rights movement and the challenges and the tensions attending to the violence of whites against peaceful black protestors. Criticisms of Johnson’s nomination of Thurgood Marshall were rife throughout the media. Marshall was criticized as being easy on crime and criminals, a leftist-leaning liberal in his politics, not a particularly distinguished legal scholar, and unwilling to reveal his position on issues likely to come before the court in the future. In the words of Washington journalist, Joseph Kraft, Marshall qualified for the job only as “a Negro, not just any Negro, not even the best qualified Negro.”⁵³ Harkening back to the days of racial slavery and Jim Crow in the South, Marshall was repeatedly called “lazy,” as “they” all were. Eastland tried to plant a troubling seed by linking Marshall’s name with communism. Thurmond suddenly became an astute constitutional scholar revealing his vast knowledge of the origins, prior law, legislative debates, writings and precedents contained in constitutional issues since 1790. Ervin, of course, was primarily interested in knowing the candidate’s judicial philosophy, although he seemed to be the lazy one, unwilling to read Marshall’s writings – or even ask his staff do its homework, instead demanding that the nominee indicate how he would vote in future Supreme Court cases.

Part 5 – The Robert Bork Confirmation Hearings

Twenty years later, Ronald Reagan nominated Robert H. Bork to the court replacing retiring Justice Louis Powell. Bork’s name had been on Reagan’s short list since his first inaugural in 1981. The judge’s well-known and deeply conservative legal philosophy, and his hard-nosed opinions harshly criticizing several high court rulings of the Warren and Burger courts fused well with the president’s views. Reagan immediately “went public” to support his nominee (as defined by Johnson and Roberts in “Presidential Capital and the Supreme Court Confirmation Process”) with speeches and remarks

emphasizing Bork's brilliance as a legal and constitutional scholar, and his reputation as a fair-minded jurist. In his July 4, 1987 radio address to the nation Reagan said,

Certainly freedom is something I had in mind this week when I nominated Judge Robert Bork... no appellate judge in America has a finer record. Not a single one of his more than 100 majority opinions has ever been reversed by the Supreme Court. To maintain the independence of the judiciary, I hope that we can keep politics out of the confirmation process...⁵⁴

Reagan was obviously disingenuous in his comment about keeping politics out of the process. The president knew well before he announced the nomination that it would be highly political and controversial and would attract multitudes of politicians, legal scholars, and commentators on both sides. Reagan was willing to expend a tremendous amount of political capital with this nomination – he made at least 52 speeches and remarks – on behalf of this highly valued nominee. At stake for Reagan was his chance to pack the court with legal conservatives who would show judicial restraint in all areas, except those rulings in the Warren and Burger courts expanding personal freedoms and protections under the Constitution. Reagan hoped that a strong justice like Bork would find a way to dismantle these recent laws. These issues included the right to privacy found in the *Griswold v. State of Connecticut* precedent which in turn resulted in the *Roe v. Wade* decision; expansion of equal protection and due process rights, and protection against self-incrimination, found in the 5th and 14th amendments and articulated in the *Miranda* cases; and civil rights that guaranteed voting rights (freedom from poll taxes, for example); anti-discrimination legislation in employment, housing, and various other areas of American life. Reagan was not devoted to theoretical constructs of judicial philosophy. Cloaked in an aura of presidential power, he was interested only in removing government interference in individual freedom and to unleash corporate power from strangulating regulation. The purpose of the government from his perspective was to buttress military might as the world's greatest country, and to apply the vast power of the state to police criminals, indigents, and other lower forms of humanity.

Reagan's remarks in August 1987 to a group of law enforcement officers gathered in Los Angeles demonstrated his law and order theme:

Judge Bork believes that judges should not make the laws; their function is to interpret the laws based on the Constitution and precedent. It's time we reassert the fundamental principle of the purpose of criminal justice is to find the truth, not to coddle criminals.⁵⁵

Throughout Reagan's campaign for Bork he repeated the urgent need to place on the court a justice who would stand up for the rights of citizens, and in particular, the children of America against "ridiculous" decisions that allowed criminals to go free because of legal technicalities. Reagan's comments during and following the Bork hearings expressed his utter disdain for those senators who distorted the judge's record for purely partisan reasons. Even after it was clear that Bork would not receive the required number of votes for confirmation, Reagan refused to quit, "in the face of a lynch mob." In his final analysis, "the confirmation process became an ugly spectacle, marred by distortions and innuendos, and casting aside the normal rules of decency and honesty."⁵⁶ These unfounded attacks nonetheless fanned the flames of extreme rhetoric leading to a sharply divisive national conversation.

Journalist Jeffrey Rosen, in an article published in *The New Republic* in August, 2008, wrote his opinion of the hearings in 1987. His version was diametrically opposite to Reagan's analysis. Rosen had worked for the senate judiciary committee as an intern in the fall of 1987, and witnessed Senator Joe Biden's restraint during the hearings. The senator focused all questioning towards those fundamental issues central to the debate, "rather than demoniz[ing] him by conflating his personal and judicial views or trolling for private indiscretions."⁵⁷ Biden's welcome to Bork and opening statements on September 15th were certainly gracious, and laid the groundwork for a mutually respectful debate in the hours and days ahead. He noted that the confirmation process would be best served

...if we hear each other out and use this unique opportunity to educate ourselves and the American people about your record and what it may mean to the Supreme Court and to the future of this country we both love. Our respect for you, the majesty of our Constitution and the greatness of the American people require no less.⁵⁸

An early line of questioning by Biden focused on a Supreme Court ruling from 1948, *Shelley v. Kraemer*, a civil rights case in which the high court struck down a state's enforcement of a restrictive private covenant which kept citizens from owning property because of race. Relying on the 14th

amendment, the majority opinion held that while voluntary covenants among individuals were legal, using the force of the state to enforce these private covenants violated the equal protection clause. Bork had been very critical of this opinion in the past. Biden queried if the judge considered this one of the many rulings that the Supreme Court got wrong and that the judge would have no trouble in overturning, according to statements he made in January 1987 before the Federalist Society. Bork responded that, although he was opposed to racial covenants in the law, the court's 1948 decision broadened the civil rights provisions in the 14th amendment to a degree far beyond the rights articulated by the framers of the *Constitution*. Therefore the justices had over-reached their prerogative in this case, and should have found another way to strike down instances of racial discrimination.⁵⁹ At the same time, Bork backtracked from the idea of disturbing settled law, and overruling long-held precedents.

Biden and Bork then discussed the court's ruling in *Griswold v. Connecticut*, another supreme court opinion with which Bork disagreed. Biden noted that Bork had written critically about this decision beginning as far back as 1971 and as recently as July 1987. Both agreed that the Connecticut law was "nutty," but Bork, once again, disagreed with the author's opinion. He disapproved of how Justice William O. Douglas derived rights that were not textually available in the Constitution. Biden quoted from an article the judge had written in 1971 and a lively exchange followed:

Biden: you said that the right of married couples to have sexual relations without fear of unwanted children is no more worthy of constitutional protection by the courts than the right of public utilities to be free of pollution control laws. You argued that the utility company's right or gratification, I think you referred to it, to make money and the married couple's right or gratification to have sexual relations without fear of unwanted children, as "the cases are identical."

Bork: I was making the point that where the Constitution does not speak—there is no provision in the Constitution that applies to the case— then a judge may not say, 'I place a higher value upon a marital relationship than I do upon an economic freedom.' Only if the Constitution gives him some reasoning. Once the judge begins to say economic rights are more important than marital rights or vice versa, and if there is nothing in the Constitution, the judge is enforcing his own moral values, which I have objected to.

Biden: Then I think I do understand it, that is, that the economic gratification of a utility company is as worthy of as much protection as the sexual gratification of a married couple, because neither is mentioned in the Constitution.

It should be noted that, while this discussion was energetic, the tenor of the debate was calm and not at all contentious, unlike many of the interchanges between conservative senators and Thurgood Marshall in 1967.⁶⁰

While the largest majority of members on the judiciary committee asked questions relating to Bork's judicial philosophy and his opinions on constitutional law, Senator Howard Metzenbaum (D-OH) questioned Bork about the political motivations of the then solicitor general's role in firing special prosecutor Archibald Cox during the 'Saturday Night Massacre' on October 20, 1973. Metzenbaum recalled that, according to the terms regulating the role of the special prosecutor to investigate wrongdoing in the Watergate scandal, "which had the terms and force of the law," prohibited the White House from firing Cox, unless he was found guilty of "extraordinary improprieties." The senator further recalled that:

Metzenbaum: The court in *Nader v. Bork* stated, "The firing of Archibald Cox in the absence of a finding of extraordinary impropriety was in clear violation of an existing Justice Department regulation having the force of law and was, therefore, illegal." So when you say it was not, you are saying that the court's decision meant nothing... 'The Supreme Court,' said the court [in the *Nader v. Bork* opinion], has twice held that an executive department may not discharge one of its own officers in a manner inconsistent with its own regulation concerning such discharge."

Judge BORK: I did not say it meant nothing. I think it is wrong.⁶¹

A lengthy debate followed this exchange in which Bork argued that he was in essence constitutionally correct in following Nixon's executive order. Metzenbaum then spoke about the chilling effect Bork's actions in 1973 and his rationalizations of it could have on the judicial branch of the country if he were to become a justice of the supreme court:

...the thing that concerns me, Judge Bork, and I think probably concerns millions of Americans, is that you are up for confirmation to be a member of the highest court of the land; a court determined that your action was illegal; you disagree with that position. But I wonder whether or not every American may not say, "Well, I can commit an illegal act also and it is not so bad because a member of the Supreme Court of the United States committed an illegal act and he disagreed with it, and I disagree with the act that convicted me," or whatever, in connection with some particular matter in which an individual is involved.⁶²

By choosing which laws or regulations to abide by, and rejecting others, Bork could undermine the entire criminal and civil judicial systems and the rule of law in the country, which he repeatedly

argued, formed the basis of American society. Bork testified during this line of questioning that he played no part in the Saturday night massacre other than firing the then special prosecutor, and then ascending to the role of assistant attorney general following the resignations of Attorney General Elliot Richardson, and Assistant Attorney General, William Ruckelshaus. Nor did the judge participate, he said, in helping Nixon's preparations to defend the claim of executive privilege in refusing to release the White House tapes. At this point the hearings paused, as Metzenbaum distributed to the committee and the candidate correspondence from as early as August 1973 between Bork, White House Chief of Staff, Alexander Haig, and Bork's close friend and the Luce Professor of Jurisprudence, Charles L. Black, Jr. Professor Black had written an article which he sent to Bork, several days before it was published in the *New York Times* providing a constitutional rationale for upholding the claim of executive privilege in refusing to comply with Cox's request for the tapes.

On August 3, 1973 Bork forwarded Black's arguments to Haig who then sent them on to Nixon for his review with the comment that, "It is also significant that Bob Bork has reversed his originally skeptical attitude on our position." The correspondence showed how Bork dissembled at this point in the confirmation hearings, in defining his role when he, in essence, changed from being the attorney for the United States government, into a partisan representing the president's interests.⁶³ It has only been divulged very recently (in February 2013) that, at the time of the so-called massacre, Nixon promised Bork the next seat on the Supreme Court for carrying out the president's bidding.⁶⁴ Once again it should be noted that, while strongly disagreeing with Bork on his political motivations in August and October, 1973, Metzenbaum remained courteous and respectful towards the nominee.

Even when senators asked sensitive, even accusatory, questions no tempers flared and the discourse continued in an orderly, respectful manner. A good example was when Senator Paul Simon (D-IL), who had recently re-read the *Dred Scott* opinion authored by Justice Taney, remarked that Taney's argument that no one could read into the Constitution what is not there, sounded, "an awful lot

like Robert Bork.” Bork took that remark, “a little hard,” but went on to explain that the concept of due process in Taney’s time was so nebulous that Taney could justify his decision. Taney argued instead that the clause would be violated by taking a black slave from a white owner, on the grounds of economic and private property rights guaranteed in the Constitution.⁶⁵ Simon’s continuing concern about the Bork nomination remained in the judge’s strict constructionist approach to the language in the document, and particularly, in the 14th amendment. Simon believed that the court should not be rigid in its definition of liberty and that it must protect freedom against “substantial, arbitrary impositions and purposeless restraints.”⁶⁶

Throughout the hearings Bork’s testimony was much less consistent than his writings, opinions, and speeches, even recent ones. On numerous occasions he prevaricated in his responses to questioning, making statements such as, “Oh well, I was just trying to start a debate on this issue by stating a radical position,” and “If I don’t agree with law now, check back when I next encounter it.” He denied the implications of several of his writings because they were merely academic exercises, and suggested that “My views have changed,” on the freedom of speech, for example. Bork described several times how his understanding of the law, justice and the Constitution had evolved and grown over the many years as a professor and as a judicial representative.

When Bork was questioned by Senator Howell Heflin (R-AL) regarding his views on maintaining precedent-setting rulings and *stare decisis*, and how his position might affect decisions such as *Roe v. Wade*, Senator Thurmond interjected, “Mr. Chairman, it seems to me he is bordering now on a question asking him to express an opinion on a matter that may come before the Supreme Court and I would think that would be improper.” The rules for conducting confirmation hearings had apparently evolved in Senator Thurmond’s mind in the twenty years since the Marshall hearings when this exchange occurred:

Thurmond: On March 7, 1870, the framer of the equal protection clause said...that the equal protection clause required States to grant the equal protection of the law, not of its law, not of the law of the State, but of the law, the great law of the Republic...” ...Do you believe that this statement is reconcilable with

Supreme Court cases banning discrimination in State law, and if so, how would you reconcile this statement with decisions forbidding discrimination in State laws rendered since 1954?

Marshall: Well, Senator, I would respectfully request that I not be asked to comment on broad general principles of law apparently or allegedly decided by the Supreme Court period.

Thurmond: Well, probably you would not like for me to propound any question to you, but as an appointee by the President, I think as a Senator who has to advise and consent, I have a responsibility to do this.

Marshall: I appreciate that Senator, and I respectfully request that you appreciate my position of not prejudging lawsuits before I am sent them.⁶⁷

The tenor and types of questions asked of Bork by Thurmond, were also quite different in 1987, when each of the senator's queries began with a compliment on some aspect of Bork's qualifications and brilliance. The actual questions provided the nominee with an opportunity to expand upon the neutrality of his judicial philosophy, his strong record in civil rights cases, and his willingness to respect supreme court precedents as settled law. On speaking of the possibility of un-enumerated rights in the Constitution, Bork defended himself against critics who accused him of denying a broader notion of rights, such as privacy, and due process, with the following exchange:

Thurmond: Judge Bork, yesterday, in response to a question, you indicated that there are some rights that are not enumerated in the Constitution, but are recognized because of the structure of the Constitution and government. Could you give us an example of one of these.

BORK. Well, the right to travel, I think, Senator, was first derived—I have not re-read the case, recently, but I remember, it is in *Crandall v. Nevada*, a couple of years before the 14th amendment was ratified. Nevada was taxing people a dollar every time they left the State, and the Supreme Court struck down that tax in saying there was a right to travel without hindrance by the State, and it did so on structural reasoning about the nature of the Federal Union, and how you have to travel, and so forth.⁶⁸

Although Bork did not agree with those who found rights to privacy, due process, and equal protection in the Bill of Rights, he did acknowledge the freedom of citizens to travel around the country, a small and insignificant concession towards those who have dedicated themselves to pursue civil and personal rights for all American citizens.

When it was Senator Patrick Leahy's turn to query the nominee, he began by remarking that he and his staff, (unlike the seemingly lazy Senator Ervin in 1967) had spent the entire month of August 1987, up at his home in Vermont, studying Bork's writings, opinions, and speeches. Leahy had also

employed his staff to brief him on Bork's work, both written and spoken, over time. At the end of this grueling investigation into the nominee's history, Leahy confessed that he could not find any "growth" in Bork's philosophy over time, or even serious re-consideration of early views in the 1960's and 1970's. Leahy began with an article Bork had authored for the *Indiana Law Review* in 1971, entitled, "Neutral principles and Some First Amendment Problems." After confirming with Bork that this article formed the judge's most comprehensive articulation of his constitutional beliefs, Leahy addressed that section of the article in which Bork defined free speech. He argued that the freedom of speech guaranteed in the 1st amendment explicitly pertained to only political speech, not scientific, literary and/or other forms of expression which could include pornography or obscenity. In regard to this argument, Leahy noted how, as recent as 1986 Bork had remarked in front of a forum of the conservative interest group, the Federalist Society, at Stanford University, "I have been confirmed twice now, and I have had to eat that article page by page both times... that was a bit of hyperbole. But I have eaten selected paragraphs of that article. This is one right here that you point to that I guess I am going to eat again."⁶⁹ As this particular discussion ended Bork's contemporary view was unclear – in his discourse with Leahy, he equivocated his original position that the first amendment covered only political speech, but the only other kind of speech he could remember was his application of the first amendment protection of commercial speech in, for example, television advertisements promoting tobacco projects. Leahy then attempted a chronological history of the evolution of Bork's philosophy. Once again the judge vacillated, saying that he had first argued against the *Brandenburg* precedent in which anti-American speech that was not designed to, or was unlikely to incite people to engage in unlawful behaviors was protected by the first and fourteenth amendments. But depending on the circumstances Bork might or might not have, agreed with *Brandenburg*, depending on the interpretation of the following rambling caveat in response to Leahy asking whether or not he supported the opinion in his September 16, 1987 testimony:

Well, there is obviously a question of how much chance you are willing to take. Now, if you have speech advocating violence or forcible overthrow of the Government, it is possible to say we will take a chance and, unless the imminent danger of violence or something of that sort is here, we will protect the speech that is also possible to say, and at the time I was thinking about and had discussed with Bickel, the fact—relied upon by Holmes in his *Gitlow* opinion—the fact that we tend to think that some of these folks are insignificant and I suppose in America they are. But I was thinking about the fact that I knew of another nation where funny little men in raincoats, wearing mustaches, were standing on the corner advocating forcible overthrow and nobody took them seriously and we got a Nazi regime. I do not think that is a real problem in America, so I think we can afford to have a wide first amendment protection of the sort that *Brandenburg* supplies.

LEAHY. Well, let me go back to another question and obviously you are going to have a chance to see the notes and transcripts of this and if you thought you did not get a chance to answer something fully, naturally we will go back to it. But, have you ever before made a statement that you felt *Hess* and *Brandenburg* was right?

Judge BORK. Not in public.

Senator LEAHY. I would rather stick with *Brandenburg* because I had understood your view of *Brandenburg* differently than the way you had expressed it today.

Judge BORK. Well, I have had a different view of it from time to time, but I had a view as broad as *Brandenburg* before I wrote this article, when I was still teaching that course in constitutional theory with Bickel, I had an enormously broad view of the amendment.⁷⁰

Part 6 - Conclusion

If the Bork hearings in the fall 1987 signaled a radical departure from the “norm” in confirmation hearings up until that time, they were indeed very different from the contentious and heated arguments in the Rehnquist hearings for Chief Justice just a year before. While politics had entered the Bork process, it was primarily focused on on the judge’s behavior during the Saturday Night Massacre in 1973, when Bork illegally fired Special Prosecutor Archibald Cox, and his behavior in helping Nixon prove his right to use executive privilege to deprive the Watergate investigation of listening to tapes of Nixon’s role in the scandal.

The Supreme Court Confirmation Hearings on Robert H. Bork, were also very different than those held twenty years earlier for the candidate Thurgood Marshall. Everyone in both parties on the Senate Judiciary Committee who made statements and participated in the interrogation of Bork praised his brilliance as a legal scholar, his success as a judge and his vast knowledge of the Constitution and historical precedents. The Marshall hearings were in glaring contrast in 1967, as a current of overt

racism ran throughout the process and as the judge's intelligence, education and qualifications were questioned (as was his perceived "laziness"). The abstruse and irrelevant questioning of Senator Thurmond provided virtually no revelatory insight into Marshall's philosophy. Thurmond's biting tongue, "Did you understand the question," asked multiple times with contempt and sarcasm, ultimately failed to scare the unflappable Marshall. It was ironic that Eastland would try to apply the label of Marshall as a communist, since, of all the civil rights leaders from the 1940's onward, he was the one who stood tallest on the rule of law. When others counseled peaceful non-violent resistance, or later the need to take up arms in defense against the brutality of the state, Marshall knew that the Constitution itself could provide the people with their civil rights and freedoms, if applied with a clear and thorough understanding of the framers' intent. Ervin's attempts to determine the position Marshall would take if on the court on the myriad cases coming forward in light of the *Miranda* rulings, were frustrated in the same manner as were Thurmond's.

The Bork hearings were free from *ad hominum* attacks on the nominee's character. Despite urging from special interest groups, Biden refused to allow personal attacks on the candidate or his family to intrude upon the proceedings. Comity obtained in the hearing room throughout the several days of hearings and debates which followed, and convivial laughter was plentiful at certain points. Republican senators on the committee allowed Bork to expound his beliefs and rulings, with no issues of time constraints or limits being raised by anyone during the thirty hours of testimony. Senator Biden graciously allowed all of the judge's supporters to be heard and to testify, while he limited the number of left-leaning groups who vociferously opposed this nomination. Every Democratic senator of the committee asked fair questions, did not badger the candidate, said repeatedly said that if Bork needed anything – including the documents from which the senators culled their questions, that day's hearing would be suspended until his needs were met. If Bork did not recall something he had written or expressed publicly, the senators were content with moving on to another issue or question.

The Bork confirmation proceedings were long and at times tedious, but did not incite the media frenzy that occurred outside of the hearing room, often following Reagan’s rants against Democratic senators. While disagreements among the participants were, in some instances, profound, they rarely strayed into emotional outbursts, or slander, or misrepresentations or diabolical distortions of Bork’s record (Senator Edward Kennedy’s outburst the day Reagan nominated Bork notwithstanding). The concerns of primarily Democratic senators centered on what they believed to be an extreme view – a radical and highly ideological view of the Constitution. They were concerned that, despite the judge’s testimony to the contrary, he would advance an activist court in dismantling settled law in the areas of privacy rights, due process and equal protections, and civil rights. Democratic senators would not take a chance, given the inconsistency of statements Bork made during the hearings, compared to statements made in other forums. Several senators including Biden, Simon, and Leahy, argued during the debate that Bork was altering his deeply-held philosophy to appease the senate and win confirmation. They also believed that it was for these reasons that Reagan nominated Bork in the first place. Reagan’s rhetoric of accusing Democratic senators of forming a “lynch mob” against Bork, gave traction to extremists on the right who decided to alter political discourse in America by wantonly claiming, regardless of the truthfulness of these claims, that anyone who did not agree with their narrative was unpatriotic, anti-American, and subversive. Among his other accomplishments, Reagan hoped to leave a legacy on the court which would ultimately become like the Supreme Court is today: filled with conservative bench jurists with a scattering of moderates in the minority. Such a court has already ruled that corporations, associations, and even labor unions share the same freedom of speech protections as those granted to individual citizens in the first amendment of the Bill of Rights. In *Citizens United*, the court has broadened the rights found in the Constitution beyond what anyone could have imagined in 1987. Today the Senate does not have the imperial power that accrues to the executive branch of government, and it never has. Those political commentators who argued that the U. S. Republic was threatened because of

the ascendancy of legislative powers threatening those of the president, need only look to today's broken legislative branch to calm their fears.

¹ Sarah A. Binder and Forrest Maltzman, *Advice and Dissent: The Struggle to Shape the Federal Judiciary*, (Washington, D.C.: Brookings Institution Press). 2009. p. 1-3, *passim*. They write, "Although Senate parties reach periodic agreements to release their hostages, conflict over judicial selection continues to rise." (p. 1-2) Ms. Binder is a senior fellow in Governance Studies at the Brookings Institution. Dr. Maltzman is a professor of political science at George Washington University. For similar arguments, also see Bork, Robert H., *The Tempting of America: The Political Seduction of the Law*, New York, NY: The Free Press, A Division of Macmillan, Inc., 1990, in which he wrote, "In the clash of law and politics, the integrity of the law has already been seriously undermined, and the quality of its future remains very much in doubt." p. 3. Also, *Ninth Justice: The Fight for Bork*, by Patrick B. McGuigan, and Dawn M. Weyrick. (1990). In the magazine article, "We are still paying the price for the Borking of Bork," (*The New Republic*, December 19, 2012), Jeffrey Rosen, one of Joe Biden's young staffers during the Bork Hearings, recalled that, "Bork's record was distorted beyond recognition, and his name was transformed from a noun into a verb. The Borking of Bork was the beginning of the polarization of the confirmation process that has turned our courts into partisan war zones, resulting in more ideologically divided opinions and less intellectually adventurous nominees on the left and the right. It led to the rise of right-wing and left-wing judicial interest groups, established for the sole purpose of enforcing ideological purity and discouraging nominees who have shown any hint of intellectual creativity or risk-taking. And it had obvious costs for Bork." It is interesting to note that four years before the December 2012 article in *TNR*, Rosen wrote an op-ed column for the same magazine (August 27, 2008), defending Senator Biden during the Bork hearings as the Senator who rejected ad hominem attacks on the candidate. Rosen praised the chairman of the committee for fairness and restraint he showed in fending off pressures from the left-leaning interest groups.

² Patrick J. Leahy (D-Vermont), *Washington Post*, March 15, 2002, page A-01, as quoted in Timothy Johnson & Jason Roberts, "Presidential Capital and the Supreme Court Confirmation Process." *The Journal of Politics*, Vol. 66, No. 3 (Aug., 2004) pp.663-683, accessed on 2/21/2013 from <http://jstor.org/stable/3449736>.

³ Henry Paul Monaghan, "The Confirmation Process: Law or Politics." *Harvard Law Review*, Vol. 101, No. 6 (Apr 1988), p. 1205, accessed on 2/19/2013, from <http://www.jstor.org/stable/1341492>. When this article was published Professor Monaghan was the Harlan Fiske Stone Professor of Constitutional Law at Columbia University School of Law.

⁴ Laurence Tribe, "Forward" in Senator Paul Simon, *Advice and Consent: Clarence Thomas, Robert Bork, and the Intriguing History of the Supreme Court's Nomination Battles*. (Washington, DC: National Press Books, 1992) p. 17.

⁵ <http://www.c-spanvideo.org/program/994-2>, accessed on February 11, 2013.

⁶ Congressional Record: Proceedings and Debates of the 100th Congress, First Session, Vol. 133 – Part 20, October 13, 1987 to October 21, 1987 Washington, DC: Government Printing Office, Pages 27341 to 28796, accessed on April 19, 2012 from: <http://www.loc.gov/law/find/nominations/bork/debates.pdf>.

⁷ Lee Epstein, René Lindstädt, Jeffrey A., Segal, and Chad Westerland, "The Changing Dynamics of Senate Voting on Supreme Court Nominees," *The Journal of Politics*, Vol. 68, No. 2, (May 2006), p. 296 accessed on 2/19/2013, from <http://www.jstor.org/stable/4639841>

⁸ *Ibid*, p. 306.

⁹ *Ibid*, p. 297.

¹⁰ Johnson and Roberts, pp. 663-664.

¹¹ Richard M. Nixon, Letter to Senator Albert B. Saxbe (R-OH April 1, 1970), in Richard Nixon: "Exchange of Letters With Senator William B. Saxbe on the Nomination of Judge G. Harrold Carswell to the Supreme Court.," April 1, 1970. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. <http://www.presidency.ucsb.edu/ws/?pid=2931>, accessed on 3/18/2013. Also quoted in a footnote in Johnson and Roberts, p. 664. This statement, written during the unsuccessful nomination hearings of candidate Judge G. Harrold Carswell, articulated Nixon's belief that the president had the sole constitutional power to nominate justices for the Supreme Court, regardless of attempts by those who wished to inject their "subjective" opinions to thwart "the one person entrusted by the Constitution with the power of appointment. The question arises whether I, as President of the United States, shall be accorded the same right of choice in naming Supreme Court Justices which has been freely accorded to my predecessors of both parties."

¹² Johnson and Roberts, p. 672.

¹³ *Ibid*, p. 680.

¹⁴ *Ibid*, p. 679

¹⁵ Patrick B. McGuigan and Dawn M. Weyrick, *Ninth Justice: The Fight for Bork*. (Washington, DC: Free Congress Research and Education Foundation. 1990.) p.xi. In the preface to this book McGuigan noted that he assigned his co-author, Dawn Weyrick, the task of completing an accurate chronology of events from June – November 1987. Commentary, claims, analysis, and opinions in the book were McGuigan's.

¹⁶ *Ibid*, p. 5.

¹⁷ "Justice Powell Resigns, Was Supreme Court's Pivotal Vote Successor's Confirmation Faces Delay." *Washington Post*, June 27, 1987, p A1.

¹⁸ <http://www.c-spanvideo.org/program/994-2>, September 15, 1987, accessed on 11 Feb 2013..

¹⁹ *Ibid*, p. x-xi.

²⁰ *Ibid*, p. 208.

²¹ *Ibid*, p. 207.

²² Monaghan, p.1202

²³ *Ibid*, p. 1202.

²⁴ *Ibid*, p. 1206.

²⁵ *Ibid*, p. 1209.

²⁶ *Ibid*, p. 1203.

²⁷ Jeff Yates and William Gillespie, “Supreme Court Power Play: Assessing the Appropriate Role of the Senate in the confirmation Process, 58 Wash. & Lee L. Rev. 1053 (2001). Accessed from [http://scholarlycommons.law.wlu.edu/wllr/vol58/iss on 3/7/2013](http://scholarlycommons.law.wlu.edu/wllr/vol58/iss%20on%203/7/2013). p. 1055.

²⁸ *Ibid*, p. 1057.

²⁹ James Madison, *Journal of the Federal Convention*, edited by E. H. Scott, (Chicago: Scott Foresman & Co., 1898. from [http://books.google.com/books?id=gs6FAAAAMAAJ&printsec=frontcover&dq=inauthor:%22United+States.+Constitutional Convention%22&hl=en&sa=X&ei=sldgUdaHOeWq2QXQIICABg&ved=0CE0Q6AEwBA#v=onepage&q&f=false](http://books.google.com/books?id=gs6FAAAAMAAJ&printsec=frontcover&dq=inauthor:%22United+States.+Constitutional+Convention%22&hl=en&sa=X&ei=sldgUdaHOeWq2QXQIICABg&ved=0CE0Q6AEwBA#v=onepage&q&f=false), accessed on 6 April 2013. p. 69. In his will, Madison provided that he wanted his widow to sell this journal to the government for \$1,200, to assist in her support. After receiving a letter from Mrs. Madison in Nov 1836, President Jackson recommended that Congress authorize a payment of \$30,000 for the Journal, and it was reported that a joint library committee of the Congress approved this authorization in Jan 1837. Preface, p. 4.

³⁰ *Ibid*, p. 407

³¹ *Ibid*, p. 407-408

³² *Ibid*, p. 531.

³³ *Ibid*, p. 407. Representative Rudolph preferred that the executive branch be responsible for appointing justices, noting that, in his experience, “...Appointments by the Legislatures [sic] have generally resulted from cabal, from personal regard, or some other consideration than a title derived from the proper qualifications.” p. 407.

³⁴ *The Constitution of the United States with Index, and The Declaration of Independence*. National Center for Constitutional Studies (Malta, ID) 2010. p. 11.

³⁵ Publius, “Objections to the Power of the Senate To Set as a Court for Impeachments Further Considered From the New York Packet.” Tuesday, March 11, 1788. Avalon project, Yale University, http://avalon.law.yale.edu/18th_century/fed66.asp.

³⁶ Publius, “The Executive Department.” From the New York Packet. Tuesday, March 11, 1788. Avalon project, Yale University, http://avalon.law.yale.edu/18th_century/fed76.asp.

³⁷ 1787-1800: December 15, 1795, Chief Justice Nomination Rejected found at http://www.senate.gov/artandhistory/history/minute/A_Chief_Justice_Rejected.htm, accessed on April 15, 2013. The political nature of the confirmation hearings of Rutledge are briefly described at “Highlights of Past Supreme Court Nominees,” posted on May 26, 2009 on http://www.pbs.org/newshour/updates/law/jan-june09/scotusnominees_05-26.html, accessed on May 10, 2013.

³⁸ Charles Warren, *The Supreme Court in United States History, 1836-1918*. (Boston: Little, Brown, 1935.) Vol. 2, pp. 4-5. Quoted from Paul Simon, *Advice & Consent: Clarence Thomas, Robert Bork, and the Intriguing History of the Supreme Court’s Nomination Battles*, Washington, DC: National Press Books, 1992. p.36.

³⁹ Theodore Roosevelt. *An Autobiography*. (New York, 1913) p. 358, as quoted in Arthur M. Schlesinger, Jr., *The Imperial Presidency*. (New York: Houghlin Mifflin, 1973) p. 245.

⁴⁰ William H. Rehnquist, “The Making of a Supreme Court Justice.” *Harvard Law Record*, October 8, 1959. Vol. 29. No. 2. as quoted in Simon, p. 37.

⁴¹ “September 26, 1986: Rehnquist Becomes Chief Justice; Misled Congress in Confirmation Hearings,” found at http://www.historycommons.org/context.jsp?item=civilliberties_243, accessed on 24 April, 2013.

⁴² “Nomination of Thurgood Marshall” *Hearings before the Committee on the Judiciary, United States Senate*. Ninetieth Congress, first session, on nomination of Thurgood Marshall, of New York, to be an Associate Justice of the Supreme Court of the United States. (Washington: Government Printing Office), p. 49.

⁴³ *Ibid*, p. 173.

⁴⁴ *Ibid*, p. 53

⁴⁵ *Ibid*, p. 53-54

⁴⁶ *Ibid*, p. 64

⁴⁷ *Ibid*, p. 84

⁴⁸ *Ibid*, p. 159 – 160.

⁴⁹ PEOPLE STATE NEW YORK v. MILTON GALAMISON ET AL. (03/30/64), SUPREME COURT OF NEW YORK, CRIMINAL TERM, KINGS COUNTY, March 30, 1964. Accessed on 23 April, 2013. http://ny.findacase.com/research/wfrmDocViewer.aspx/xq/fac.19640330_0041000.NY.htm/qx.

⁵⁰ *Ibid*, p. 168.

⁵¹ *Ibid*, p. 162

⁵² *Ibid*, p. 164

⁵³ Quoted in, Juan Williams, *Thurgood Marshall: American Revolutionary*, (New York: Three Rivers Press, 1998). p. 9.

⁵⁴ Ronald Reagan, “Radio Address to the Nation on the Supreme Court Nomination of Robert H. Bork and the Economic Bill of Rights,” July 4, 1987, accessed from http://www.reagan.utexas.edu/search/speeches/speech_srch.html on 15 March 2013.

⁵⁵ Ronald Reagan, “Remarks on the Supreme Court Nomination of Robert H. Bork to Law Enforcement Officials in Los Angeles, California” August 28, 1987. http://www.reagan.utexas.edu/search/speeches/speech_srch.html on 15 March 2013.

⁵⁶ Ronald Reagan, “Address to the Nation on the Supreme Court Nomination of Robert H. Bork,” October 14, 1987, , accessed from http://www.reagan.utexas.edu/search/speeches/speech_srch.html on 15 March 2013.

⁵⁷ Jeffrey Rosen, “The Myth of Biden v. Bork.” *The New Republic*, August 27, 2008.

⁵⁸ Bork Nomination Hearings, Day 1, Part 1, Sept 15, 1987, <http://www.c-spanvideo.org/program/994-2>, accessed on February 11, 2013.

⁵⁹ *Ibid*,

⁶⁰ *Ibid*,

⁶¹ *Ibid*, Day 1, Part 2

⁶² *Ibid*,

⁶³ Hearings of the Committee of the Judiciary, United States Senate, 100th Congress, first session on, “The Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States. September 15, 16, 17, 18, 19, 21, 22, 23, 25, 28, 29 and 30, 1987, Part 1 of 5 Parts, Serial No. J-100-64. (Washington: U.S. Government Printing Office, 1989.) pp. 194 – 228, includes copies of correspondence . Accessed on 13 April 2013 from <http://www.loc.gov/law/find/nominations/bork/hearing-pt1.pdf>.

⁶⁴ Richard Ben-Veniste, “Revisionist History on Watergate.” *Washington Post*, February 25, 2013. Mr. Ben-Veniste, a Washington lawyer, and former chief of the Watergate Task Force of the Watergate Special Prosecutor’s Office, commented on the posthumously published memoir, *Saving Justice: Watergate, the Saturday Night Massacre, and Other Adventures of a Solicitor General*(2013), by Judge Bork.

⁶⁵ Hearings on the Committee, 100th Congress, pp. 314-315.

⁶⁶ *Ibid*, p. 315.

⁶⁷ “Nomination of Thurgood Marshall.” p. 166.

⁶⁸ “Nomination of Robert H. Bork.” p. 335

⁶⁹ *Ibid*, p.269.

⁷⁰ *Ibid*, p. 274-76

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