

The Role of Special Interest Groups in the Supreme Court Nomination of Robert Bork

*By William G. Myers III**

On July 1, 1987, President Reagan announced his nomination of Judge Robert Heron Bork for the position vacated by retired Associate Supreme Court Justice Lewis Powell. On October 23, 1987, the United States Senate voted not to confirm the nomination by a vote of forty-two yeas to fifty-eight nays.¹ The presiding officer ordered the notification of the President,² thus concluding the extended debate on the nomination of Judge Bork. This Article examines the extraordinary activities of special interest groups during the Bork nomination, including the initial attack by the opposition and followed by the responsive efforts of Bork's supporters.

Article II, Section 2, Clause 2 of the Constitution states that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court . . ."³ Throughout the hearings in the Senate Committee on the Judiciary and the debate on the Senate floor, as well as in the media and among the citizenry in general, a good deal of discussion took place regarding the proper role of the Senate in providing its "advice and consent" and whether it adequately fulfilled that duty. The influence exerted by special interest groups could not be denied. Many Senators considered the degree of influence to be unprecedented in a Supreme Court nomination. Before considering that influence and its effect on the nomination, a brief review of previous Supreme Court nominees will demonstrate why the

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1. 133 CONG. REC. S15,011 (daily ed. Oct. 23, 1987).

2. *Id.*

3. U.S. CONST. art. II, § 2, cl. 2.

in-depth debate surrounding Bork's nomination ranks high as one of the most controversial and rancorous confirmation proceedings in history.

I. The Nomination Setting

The Senate had received 143 Supreme Court nominees up to and including President Reagan's nomination of Robert Bork. Prior to the Bork nomination, the Senate had refused to confirm twenty-seven nominees. Twenty-two of those twenty-seven rejections occurred during the eighteenth or nineteenth century. In the twentieth century, prior to the Bork nomination, the Senate had voted down three Supreme Court nominations, filibustered the Fortas nomination as Chief Justice until it was withdrawn by the President, and did not conclude action on a fifth nomination, that of Homer Thornberry in 1968.⁴ Not since the nomination of Clement Haynesworth and G. Harrold Carswell in November 1969 and April 1970, respectively, had a nominee to the Supreme Court been rejected. With the exception of the Thornberry nomination by President Johnson (which was withdrawn simultaneously with the Fortas nomination), Robert Bork was only the fifth nominee to be rejected in this century.

The Judiciary Committee hearings on Judge Bork were extraordinary. The amount of testimony by Judge Bork before the Committee was unprecedented for a Supreme Court nominee.⁵ Judge Bork testified for thirty hours over the course of five days. Another seven days were spent considering the testimony of 111 other witnesses.⁶ The hearings were held in the Russell Senate Office Building Caucus Room, the site of both the Iran-Contra hearings earlier in the session and the Watergate hearings in the early 1970s. Television and radio carried live a good deal of the testimony of Judge Bork. Press corps representing all media attended the hearings. Before them paraded an impressive array of witnesses both supporting and opposing the nomination, including former President Gerald Ford, former Chief Justice Warren Burger, seven former United States Attorneys General, current and former Congressmen, numerous law school professors and deans, former White House Counsel Lloyd Cutler, and a variety of representatives of interest groups.⁷

Judge Bork's mental ability and "resume" for the job were not in

4. G. WHITE, *AMERICAN JUDICIAL TRADITION* 424-27 (1988).

5. *Nomination of Robert H. Bork to be an Associate Justice of the United States Supreme Court, Report of the Committee on the Judiciary, United States Senate, together with Additional, Minority, and Supplemental Views*, S. EXEC. REP. NO. 7, 100th Cong., 1st Sess. 215 (1987).

6. *Id.* at 2.

7. *Id.* at 100.

question.⁸ Nor was there any question raised by the senators during the course of the hearings about Judge Bork's personal dealings, which were revealed to the Judiciary Committee following the mandatory background investigation by the Federal Bureau of Investigation. Instead, the hearings were mostly consumed by inquiry into Judge Bork's judicial philosophy.

II. The Interest Groups at Work

One of the major factors separating this nomination from previous nominations was the effort that interest groups exerted to influence the outcome of the Senate's vote. The involvement of interest groups in the legislative process of this country is commonplace. Such groups attempt to influence every branch of government, seeking increased attention and assistance for their particular causes. It should not come as a surprise that this activity extends to presidential appointments of every nature and especially Supreme Court nominations.

Interest group participation in the nominations process varies with the post to be filled and the nominee for that post. This is true whether the post is a federal judgeship, cabinet department office, or independent agency office. Depending on the type of position to be filled by presidential appointment, some interest groups have statutory access to the process. This has included nominations by the President for membership on the Railroad Retirement Board, the National Academy of Sciences, the National Association of State Universities and Land Grant Colleges, the Coal Mine Safety Board of Review, and the Federal National Mortgage Association.⁹ This statutory intervention of interest groups does not apply, of course, to nomination for the Supreme Court. The only interest group that comes close to this kind of involvement is the American Bar Association (ABA). The ABA, as a special interest group for lawyers, has played an increasingly important role in nominations for the federal judiciary. It has been standard practice since 1945 for the ABA to evaluate nominees for the Supreme Court.¹⁰

The ABA Standing Committee on Federal Judiciary investigated and evaluated Judge Bork on his professional competence, judicial temperament, and integrity. The ABA committee did not review the Judge's

8. *See generally id.* at 217 (Phi Beta Kappa graduate of the University of Chicago; managing editor of the law review at the University of Chicago Law School; Order of the Coif; partner in a large national law firm; Yale Law School professor; Solicitor General of the United States; judge on the United States Court of Appeals for the District of Columbia Circuit).

9. G. MACKENZIE, *THE POLITICS OF PRESIDENTIAL APPOINTMENTS* 206 (1981).

10. *Id.*

political or ideological philosophy except to the extent that it might bear on judicial temperament or integrity.¹¹ When the ABA issued its 1981 report on the nomination of Robert Bork to sit on the United States Court of Appeals for the District of Columbia Circuit, it unanimously provided the Judiciary Committee with its highest approval rating for federal circuit or district court nominees, that of "exceptionally well qualified." Seven years later, after reviewing Judge Bork for the Supreme Court nomination, the ABA again provided its highest approval rating for Supreme Court nominees of "well qualified."¹²

Many interest groups have offered their opinions on previous nominees to the Supreme Court. Because a nominee is usually accorded a presumption of confirmation by virtue of the President's selection, the media certainly and the public generally pay closer attention when interest groups oppose the nomination. The Bork nomination was not unique when it drew the attention of interest groups. However, the sophistication and the intensity of the opposition by numerous and varied interest groups was new.

Parallels can be drawn to the experience of previous nominees, both successful and unsuccessful, in this century. Labor unions often have spoken out in opposition to Supreme Court nominees, including the nomination of Horace Lurton in 1909 and Mahlon Pitney in 1912.¹³ Additionally, organized labor and the NAACP opposed the confirmation of John Parker in 1930, Clement Haynsworth in 1969, and G. Harrold Carswell in 1970.¹⁴ Conservative interest groups have opposed nominees such as Louis Brandeis in 1916, Thurgood Marshall in 1967, and Sandra

11. Letter from Harold R. Tyler, Jr., to Senator Joseph R. Biden, Jr., (Sept. 21, 1987), reprinted in *Hearings Before the Committee on the Judiciary, United States Senate, One Hundredth Congress, First Session, on the Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States*, 100th Cong., 1st. Sess. 1228-34 (1987) [hereinafter *Hearings*].

12. *Id.* at 1233. More than a little controversy arose out of the ABA report on the nomination. This was the first time the ABA had a less than unanimous vote for the "well qualified" evaluation of a Supreme Court nominee. Ten members of the ABA committee voted for the "well qualified" evaluation. One committee member voted "not opposed" and four committee members voted "not qualified." *Id.* at 1184. This was deemed highly significant by the Bork opponents because no Supreme Court nominee had ever received a single "not qualified" vote from the ABA Committee and then gone on to confirmation by the Senate. See generally *Report, supra* note 5, at 4. The proponents of the nomination charged the ABA committee with violating its own rules forbidding consideration of political or ideological philosophy. These Senators maintained that there was no justification for the ABA committee's departure from its unanimous 1981 rating, especially following Judge Bork's five and one-half years of service on the Circuit Court of Appeals bench. *Id.* at 221-22.

13. L. BAUM, *THE SUPREME COURT* 33 (2d ed. 1985).

14. *Id.*

Day O'Connor as recently as 1981.¹⁵ The nomination of Justice Antonin Scalia generated opposition from the National Organization for Women, the AFL-CIO, the Americans for Democratic Action, and the Leadership Conference on Civil Rights.¹⁶

Review of a handful of these twentieth century nominees will place the interest group activity surrounding the Bork nomination in context. Louis D. Brandeis was nominated by Democratic President Woodrow Wilson in 1916. His nomination was approved by the Democratic-controlled Senate following a straight party line vote in the Judiciary Committee, which forwarded the nomination to the Senate on a vote of ten-to-eight.¹⁷ The nomination was opposed by powerful members of the Boston Bar with whom Brandeis practiced law. He had gained a prominent reputation for his representation of socially and economically disadvantaged clients while shunning the establishment. As a result, the legal community in Boston questioned his capacity for judicial temperament and his ethics in specific cases in which he was involved.¹⁸ His enemies were quite willing to come to the Senate to testify against him. These Bostonian lawyers were not, however, a well-organized interest group as we have come to know such groups today. In fact, organized labor supported the nomination and had been consulted by President Wilson prior to its submission to the Senate.¹⁹ Brandeis himself believed the opposition was fueled by anti-Semitism and a perception that he was too radical to possess judicial temperament.²⁰ Following the Judiciary Committee recommendation in favor of the nomination, the full Senate voted without debate to confirm. Only one Democrat voted against the nomination and only three Republicans voted for it.²¹

The nomination of federal Judge John J. Parker to the Supreme Court by President Hoover in 1930 provides another example of the influence that interest groups historically have wielded in the nominations process. Like Judge Bork, Judge Parker was nominated for elevation to the Supreme Court from the Circuit Court of Appeals. Like Judge Bork, Judge Parker was opposed in his nomination by well-organized interest groups and was attacked for specific case opinions and for statements made prior to becoming a judge. Specifically, Parker was opposed by

15. *Id.* at 34.

16. *Nomination of Justice Antonin Scalia: Hearings Before the Senate Committee on the Judiciary*, 99th Cong., 2nd Sess. at 169, 171, 173, 178, 184, 203, 205 (1986).

17. L. PAPER, BRANDEIS 238 (1983).

18. *Id.* at 227.

19. *Id.* at 233.

20. P. STRUM, LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE 293 (1984).

21. A. LIEF, BRANDEIS: THE PERSONAL HISTORY OF AN AMERICAN IDEAL 394 (1971).

organized labor based on a decision he wrote on behalf of a unanimous court three years prior to his Supreme Court nomination. He was opposed by the NAACP for statements he made during an unsuccessful campaign for Governor of North Carolina ten years prior to the nomination. As a result, Parker was defeated on a Senate vote of 41 nays to 39 yeas.²²

While on the federal bench, Judge Parker wrote 184 opinions. His decision in *International Organization, United Mine Workers of America v. Red Jacket Consolidated Coal and Coke Co.*²³ created much hostility among labor. Judge Parker affirmed in part an injunction that had been issued by the lower court against violence and other unlawful conduct by a miners' union in West Virginia. The enjoined union activity included attempts by union officials to persuade nonunion miners to break so-called "yellow-dog" contracts, contracts in which the employee agrees not to join a labor union as a condition of continued employment.²⁴ Parker believed his opinion for the unanimous court adhered to the decision of the Supreme Court in a previous case as well as previous decisions of the federal circuit court.²⁵ The union appealed Parker's decision but the Supreme Court denied the writ of certiorari, to the great surprise of the United Mine Workers of America attorneys.²⁶ When Parker was nominated for the Supreme Court, the American Federation of Labor sought its vindication by opposing the nomination on the basis of Parker's decision in *Red Jacket*. During the appellate process, the yellow dog contract issue had been considered secondary to the issue of alleged conspiracy activities of the union in violation of the Sherman Act.²⁷ The contract issue, however, became labor's best tool for generating opposition during the confirmation process.

As a gubernatorial candidate, Parker had made a statement ten years prior to his Supreme Court nomination. Commenting on blacks who had not exercised the right to vote, he stated that "[t]he negro as a class does not desire to enter politics. The Republican Party of North

22. DICTIONARY OF AMERICAN BIOGRAPHY 494 (J. Garraty ed. 1980).

23. 18 F.2d 839 (1927).

24. *John J. Parker: Senior Circuit Judge: Fourth Circuit*, 32 A.B.A. J. 856, 858 (1946).

25. Fish, *Red Jacket Revisited: The Case That Unraveled John J. Parker's Supreme Court Appointment*, 5 L. & HIST. REV. 50, 84 (1987); *Hitchman Coal and Coke Co. v. Mitchell*, 245 U.S. 229 (1917); *Bittner v. West Virginia-Pittsburgh Coal Co.*, 15 F.2d 652 (4th Cir. 1926); *Mitchell v. Hitchman Coal and Coke Co.*, 214 F. 685 (4th Cir. 1914); *Kinloch Tel. Co. v. Local Union No. 2*, 275 F. 241 (8th Cir. 1921); *Montgomery v. Pacific Elec. Ry. Co.*, 293 F. 680 (9th Cir. 1923).

26. *Id.* at 98-99.

27. *Id.* at 82.

Carolina does not desire him to do so.”²⁸ Consequently, the NAACP led a grass roots lobbying campaign against the nomination.²⁹ Decisions from the judge during his five years on the bench prior to the nomination had not evidenced racial prejudice.³⁰ Parker defended himself, writing that the interpretation of his 1920 statement as anti-black was “wholly unjustified.”³¹ According to contemporaneous observers, nearly all of those opposed to the nomination came to regret their position and recognize their error.³²

Thurgood Marshall was opposed by conservative groups during his confirmation hearings in 1967. Their most powerful spokesman in the Senate was Senator Strom Thurmond of South Carolina. Senator Thurmond questioned the nominee on his knowledge and understanding of Reconstruction era history and the post-Civil War amendments to the Constitution.³³ The NAACP, on the other hand, spoke out in favor of the nomination.³⁴ Marshall was confirmed overwhelmingly by a vote of 69 to 11 despite criticism that the nominee was too liberal and unqualified for the post. Ten of the eleven “nay” votes were cast by Senators from the deep South.

Justice Lewis Powell retired with the praise of many Americans for his exemplary service on the bench. The Chairman of the Judiciary Committee called his retirement a “major loss to the court and the nation.”³⁵ During the time of his confirmation hearings, however, interest groups criticized Powell. The Congressional Black Caucus opposed his nomination in the belief that he was too closely allied with segregationists.³⁶ The National Organization for Women and the National Lawyers’

28. DICTIONARY, *supra* note 22, at 494.

29. *Id.*

30. *Id.* Parker remained on the federal bench following his nomination defeat. He subsequently wrote the majority opinion in *Briggs v. Elliot*, 98 F. Supp. 529 (E.D.S.C. 1951), which applied the “separate but equal” doctrine, *Plessy v. Ferguson*, 163 U.S. 537 (1896), later struck down by the Supreme Court in *Brown v. Board of Education of Topeka, Kansas*, 347 U.S. 483 (1954). Parker accepted the *Brown* reversal as the law and followed it. Additionally, during his judicial career he rendered decisions giving blacks the right to participate in South Carolina primaries; holding unconstitutional a Virginia ordinance forbidding blacks from owning property in white neighborhoods; and upholding lower court desegregation rulings. See *The Washington Post and Times Herald*, Mar. 18, 1958, at B2, col 1.

31. *N.Y. Times*, Mar. 18, 1958, at 29, col. 1.

32. *Parker, supra* note 24, at 858.

33. J. MacKenzie, *Thurgood Marshall*, in 5 *THE JUSTICES OF THE UNITED STATES SUPREME COURT: THEIR LIVES AND MAJOR OPINIONS* 386 (L. Friedman ed. 1978).

34. See, e.g., *N.Y. Times*, June 22, 1967, at 38, col. 4 (letter to the editor by Robert L. Carter, General Counsel, National Association for the Advancement of Colored People).

35. Press statement of Sen. Joseph R. Biden, Jr., undated.

36. *Nominations of William H. Rehnquist and Lewis F. Powell, Jr.: Hearings Before the Senate Committee on the Judiciary*, 92nd Cong., 1st Sess. at 380 (1971).

Guild also opposed the Powell nomination.³⁷ Congressman John Conyers of Michigan led the opposition of the Congressional Black Caucus. He argued that Powell was unqualified based on his record as President of the Richmond, Virginia, school board and as a member of the Virginia State Board of Education. Conyers also cited Powell's membership on the board of directors of corporations that were allegedly implicated in racial discrimination and Powell's membership in segregated clubs in Richmond.³⁸ The Richmond chapter of the NAACP joined Conyers in opposition. However, the national NAACP did not oppose the nomination on the belief that Powell's record on race was moderate.

What surprised many Senators and other observers of the Bork nomination was the level of effort expended by the interest groups. As just described, organized opposition to and support for confirmation of Supreme Court justices is not new. The Bork nomination, however, galvanized groups into a nationwide campaign that utilized all modern methods of political campaigning to create opposition or support in the home states of the various Senators. These methods included newspaper advertisements, television ads, mass mailing campaigns, enlistment of prominent public figures to endorse or discredit the nomination, letters to newspaper editors and editorials, public opinion polls, public rallies and protests, bumper stickers, lapel buttons, petitions, charges, and countercharges—all intended to influence the vote of the Senators on the nomination. Both supporters and opponents of the nomination perceived that this nominee would be helpful or harmful to the particular organized groups' interests.

III. A Question of Balance

What was it about the Bork nomination that generated such fervor among interest groups? The answer lies in the basic nature of interest groups and how they are able to achieve their agenda. Each of the three branches of government presents an opportunity for an interest group to accomplish its goals. Like water searching for the path of least resistance, interest groups will seek the path of least governmental resistance. If the organizations are unable to fulfill their agenda through legislation or the executive branch then they will focus their efforts on litigation that may provide a favorable judgment. The conventional wisdom of lobbyists holds that chances of obtaining a favorable judgment increase when judicial nominees are confirmed who are sympathetic, either through ju-

37. *Id.* at 424, 433, 456, 459.

38. 117 CONG. REC. 41,641 (1971) (statement of Rep. Conyers).

dicial philosophy or political philosophy, to the causes of the group. Conversely, if the nominee is perceived as antithetical to the interest group then that group may mount an effort to prevent the confirmation. This is especially true for Supreme Court nominees, given the finality of the Court's rulings.

Not only was Judge Bork seen by the opposition as less likely to render sympathetic decisions,³⁹ he was also perceived to be replacing a Justice who had been an important "swing vote" on the Court. This perception supported the notion that the successor to Lewis Powell would not "merely" cast one of the nine votes on decisions, but in fact hold the deciding vote in five-to-four decisions on perhaps a number of important social issues coming before the Court in the years ahead.

Shortly following the resignation of Justice Powell, Senate Judiciary Committee Chairman Joseph Biden issued a statement, calling the resignation a "major loss to the Court and the nation. . . . [Justice Powell] understood the meaning of civil rights and liberties."⁴⁰ Biden expressed the hope that President Reagan would nominate a replacement "in the mold of Lewis Powell."⁴¹ He called Powell a "decisive vote in a host of decisions."⁴² The theme that Justice Powell had been a crucial swing vote would be raised often during the course of the nomination. Many Senators wanted a nominee who would be an ideological approximation of Justice Powell, on the theory that the Court had reached a delicate ideological balance. The idea that Judge Bork was replacing the swing vote electrified the interest groups into an historic display of political pressure.

Both the opponents and proponents of the nomination immediately began to make public pronouncements. On the same day that the President announced the nomination, Senator Edward Kennedy of Massachu-

39. For example, Bork was denounced as an opponent to the generalized right of privacy because of his opinion in *Dronenburg v. Zech*, 714 F.2d 1388 (D.C. Cir. 1984) where he wrote that it was "impossible to conclude that a right to homosexual conduct" is included within the Supreme Court's definition of the right to privacy. *Id.* at 1396. In another case, Judge Bork was attacked for his decision for a unanimous court in *Oil, Chemical and Atomic Workers v. American Cyanamid Co.*, 741 F.2d 444 (D.C. Cir. 1984). Bork wrote for the court that an employer had not created a hazard, as defined by the Occupational and Health Safety Act, when the company policy refused to allow women to work in the lead pigment department unless the women were beyond childbearing age or sterile. The employer was concerned about danger to potential fetuses in women exposed to that department. Opponents to the nomination used the case to label Bork as insensitive to women, at best, and in favor of forced sterilization, at worst.

40. Press statement of Sen. Joseph R. Biden, Jr., undated.

41. *Id.*

42. *Id.*

setts took the Senate floor and made the following choleric remarks about the nomination:

Robert Bork's America is a land in which women would be forced into back-alley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens' doors in midnight raids, schoolchildren could not be taught about evolution, writers and artists would be censored at the whim of government, and the doors of the Federal courts would be shut on the fingers of millions of citizens for whom the judiciary is often the only protector of the individual rights that are the heart of our democracy.⁴³

Senator Metzenbaum did not hesitate to voice his displeasure with the nomination, including his opening statement on the first day of hearings in the Judiciary Committee. Senator Metzenbaum stated, "Now it is clear that the President wants to revise the Constitution through his appointments to the Supreme Court."⁴⁴ Metzenbaum also raised the "preservation of balance" theme in his opening remarks by stating that "[t]he confirmation of this nominee is likely to tip the Court radically on key constitutional issues. . . . Those who know Robert Bork know he is not Lewis Powell, nor I suspect, would he claim to be."⁴⁵

The White House tried but failed to divert attention away from the notion that Judge Bork would be the "swing vote" on the Supreme Court bench. An early attempt was the distribution in July 1987 of a briefing paper on the nomination. Within that document, circulated to Senators, was a section dealing with the issue of balance on the Supreme Court. It argued that the balance theory, as it was called, was an inappropriate consideration, because it was purely result-oriented in its assumption that judges are always predictable in their opinions.⁴⁶

The White House briefing paper also argued that if "judges . . . were to confine themselves to interpreting the law as given to them by statute or Constitution, rather than injecting their own personal predilections, there would be no need to worry about 'balance on the Court.'"⁴⁷ The document summarized Judge Bork's appointment by stating that he would not change any balance on the Court because his decisions while on the court of appeals were "thoroughly in the mainstream," citing as evidence that Judge Bork had voted in the majority ninety-four percent of the time.⁴⁸

43. 133 CONG. REC. S9188 (daily ed. July 1, 1987).

44. *Hearings*, *supra* note 11, at 44.

45. *Id.*

46. Materials on Judge Robert H. Bork supplied by the White House (July 30, 1987), *see also Hearings*, *supra* note 11, at 1651.

47. *Id.*

48. *Id.*

The next salvo in the balance debate was fired by Senator Biden as Chairman of the Senate Judiciary Committee. Senator Biden agreed that there was no constitutionally required philosophical balance on the Supreme Court. He asserted, however, that President Reagan had attempted to “remake the Supreme Court in his own image” (echoing the statements of Senator Metzenbaum).⁴⁹ Senator Biden asserted that the direction of the Supreme Court was at stake with the nomination of Judge Bork. Each Senator had both a right and constitutional duty to consider Judge Bork’s judicial philosophy and then to consider whether that philosophy would be a desirable addition to the Court.⁵⁰ Senator Biden described Justice Powell as a “moderate conservative” who often cast the swing vote during the term preceding his resignation.⁵¹ Senator Biden declared that the public was well aware that Justice Powell had been the swing vote. He referred to the comments of conservative group leaders such as the Moral Majority’s Reverend Jerry Falwell, who stated that the Bork nomination “may be our last chance to influence this most important body.”⁵²

In addition to Reverend Falwell, other prominent conservatives were quick to support the nomination based on their own perception of the importance of the Powell vacancy. On the day after the nomination announcement, Pat McGuigan, representative of the conservative Free Congress Foundation, stated that the Bork nomination “means that we have a chance . . . for the restoration of the rule of law in the American system.”⁵³ On that same day, conservative activist and fund raiser Richard Viguerie remarked, “Conservatives have waited over 30 years for this day This is the most exciting news for conservatives since President Reagan’s reelection.”⁵⁴ Similarly, Daniel Popeo, founder of the Washington Legal Foundation, stated “[w]e have the opportunity now to roll back 30 years of social and political activism by the Supreme Court.”⁵⁵ Conservatives made similar comments long before the nomination was announced. Former Reagan justice department official and legal scholar Bruce Fein told the press in October 1985, two years prior to the conclusion of the Bork nomination, “It became evident after the first [Reagan]

49. Response Prepared to White House Analysis of Judge Bork’s Record, at the request of Senator Joseph Biden, Chairman of the Senate Committee on the Judiciary, at 10 (September 2, 1987), *reprinted in Hearings, supra* note 11, at 1651.

50. *Id.* at 11.

51. *Id.*

52. *Id.* at 12.

53. USA Today, July 2, 1987, at 2A, col. 6.

54. Washington Post, July 2, 1987, at A17, col. 3.

55. *Id.* at col. 5.

term that there was no way to make legislative gains in many areas of social and civil rights. The president has to do it by changing the jurisprudence.”⁵⁶

The interest groups opposing the nominee also developed the concept of balance as an important tool in grabbing the attention of their constituencies and Senators. The acting Executive Director of the People for the American Way, for example, stated in a letter to Senators that Justice Lewis Powell “played a key role in forging a consensus on the Court” and that one of the Senate’s fundamental functions in the nominations process was to “prevent partisan, ideological court packing by a President determined to remake the Supreme Court to mirror his views.”⁵⁷ The AFL-CIO noted on the day that President Reagan announced his nominee that “on many of the most sensitive issues before the Court, Justice Powell played a pivotal role.”⁵⁸ The Leadership Conference on Civil Rights, considered by many to be the leader of the lobbyists against Bork, issued a statement within hours of the President’s announcement, that the confirmation of Robert Bork would dramatically alter the balance of the Supreme Court.⁵⁹ Ralph Nader’s Public Citizen issued its report on the record of Judge Bork with a cover letter stating that an examination of the Bork record was warranted “in this important nomination to a single ‘swing’ seat on the Court.”⁶⁰

The newspaper advertisements run by various organizations also devoted space to the balance issue. The National Abortion Rights Action League stated in its newspaper advertisement that if Bork took a seat on the Court, the “[f]air-minded, deliberate, balanced Supreme Court we’re all familiar with will be a thing of the past. A right-wing 5-4 majority will prevail for decades.”⁶¹ Planned Parenthood emphatically stated in its advertisement that “[r]etired Justice Powell was the pivot but right-winger Bork would throw the Court off balance.”⁶² The specter of presidential court-packing was reiterated effectively by the opposition groups. It helped raise the profile of the issue and raise contributions at the same time.

56. Press & McDaniel, *Judging the Judges*, Newsweek, Oct. 14, 1985, at 73.

57. Letter from Jim Scarborough to Senator Alan Simpson (July 13, 1987).

58. Mailgram from Lane Kirkland to AFL-CIO Affiliated National and International Unions (July 1, 1987).

59. Statement of Benjamin L. Hooks, Chairperson, and Ralph G. Neas, Executive Director, Leadership Conference on Civil Rights (July 1, 1987).

60. Letter of Joan Claybrook to Sen. Alan Simpson (Aug. 6, 1987).

61. N.Y. Times, Sept. 13, 1987, at E7.

62. *Id.*, Sept. 14, 1987, at B9.

Both the supporters and detractors of the nominee had within their ranks those who would resort to the most sensational phrase to entice both monetary and philosophical support for their cause. The wire services carried stories that groups supporting and opposing the Bork nomination planned to spend millions of dollars.⁶³ Within one week of the announcement of the nomination, the Executive Director of the People for the American Way indicated that he intended to raise at least one million dollars.⁶⁴ The National Organization for Women stated it would be spending thousands.⁶⁵ The National Federation of Business and Professional Women's Clubs dedicated one third of its public policy budget of \$250,000 to defeat the nominee.⁶⁶ The chief lobbyist for the NAACP stated it could mobilize 12,000 volunteers "in a matter of hours."⁶⁷ The Executive Director of the American Civil Liberties Union Foundation sent a Western Union priority letter on August 31, 1987, including statements such as, "DETAILED RESEARCH REVEALS BORK FAR MORE DANGEROUS THAN PREVIOUSLY BELIEVED. . . . WE RISK NOTHING SHORT OF WRECKING THE ENTIRE BILL OF RIGHTS. . . . HIS CONFIRMATION WOULD THREATEN OUR SYSTEM OF GOVERNMENT. . . . TIME IS SHORT. . . . URGE YOU TO RUSH EMERGENCY CONTRIBUTION AT ONCE."⁶⁸ On the other hand, the conservative Concerned Women for America activated phone banks and sent out letters to its 500,000-plus membership, urging support for the nomination through a letter writing campaign to Senators.⁶⁹ The organization "We the People," established specifically to support the Bork nomination, sought to raise \$2 million in sixty days.⁷⁰ Citizens for Decency Through Law issued a statement that it had borrowed \$140,000 and requested contributions to "[h]elp us defray our educational and media costs in this campaign to seat an upstanding individual—Judge Robert Bork—in the nation's highest court. . . . Your gift will block the efforts of the liberals who have had too much influence for too long."⁷¹ The Reverend Jerry Falwell sent out a fundraising letter stating, "I am issuing the most important 'call-to-arms' in the history of the Moral Majority. . . . President Reagan has chosen Judge Robert Bork . . . [who is] a pivotal person in getting the Supreme Court back on

63. Chicago Daily Law Bulletin, July 6, 1987, at 1.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. Business reply letter from the ACLU Foundation (Aug. 31, 1987).

69. Washington Post, July 7, 1987, at A4, col. 2.

70. 133 CONG. REC. S14,724 (daily ed. Oct. 21, 1987).

71. *Id.*

course. . . . I need your gift of \$50.00 or \$25.00 immediately. Time is short."⁷²

IV. Bork's Judicial Philosophy

Given the perception that Justice Powell was a crucial "swing" voter, interest groups were particularly interested in reviewing the next nominee's history of writings, speeches, court opinions, and any other documents or statements that would indicate how the Powell replacement would exercise that vote. Judge Bork went on record as early as 1971 as strongly opposed to the judicial philosophy and decisions of the Supreme Court under then-Chief Justice Earl Warren.⁷³ During Senate floor debate, Senator Biden responded to Senator Armstrong of Colorado who, in Senator Biden's words, had raised the issue of the "astonishing onslaught"⁷⁴ against Judge Bork. As Senator Biden stated in his response:

So the reason why there was this astonishing onslaught is everybody understood what is at stake here. This, in a sense, is a referendum on: Do we like what the Court did the last 30 years? Or do we dislike it?

I would respectfully suggest that the vast majority of American people, liberal and conservative alike, say: We like what the Court did. Oh, we disagree with pieces but we do not want to turn back.⁷⁵

As a general rule, those Senators and interest groups who politically and philosophically approved of the decisions of the Warren Court opposed the nominee. Those interest groups that did not approve of the Warren Court era joined ranks with like-minded Senators in support of Judge Bork.

The opposition interest groups were successful in their efforts to defeat the nomination because of their extraordinary effort in tandem with certain Senators. Together they forged an image of Bork that was repulsive to other Senators and their constituents. Senator Kennedy was a primary player in this aspect of the nomination. He described to the *Boston Globe* how he coordinated these efforts in an interview that took place just a few days after a majority of the Senators had announced their intention to vote against the nominee. Kennedy's tactics included his opening statement,⁷⁶ which he intended to be "stark and direct so as to

72. 133 CONG. REC. S14,825 (daily ed. Oct. 22, 1987) (statement of Sen. DeConcini).

73. Bork, *We Suddenly Feel that Law is Vulnerable*, 84 FORTUNE 115-17 (1971).

74. 133 CONG. REC. S14,720 (daily ed. Oct. 21, 1987) (statement of Sen. Biden).

75. *Id.*

76. See *supra* note 43 and accompanying text.

sound the alarm and hold people in their places until we could get material together.”⁷⁷ Kennedy also described his meeting with Senators Biden, Metzenbaum, and Cranston to define the strategy. It included delay of the hearings until after the August recess in order to organize the opposition. This core group then went to work on undecided Senators. Senator Kennedy began making phone calls to individuals and organizations to enlist their aid in fighting the nomination. For instance, he called every one of the thirty executive members of the AFL-CIO, urging their support in defeating the nomination.⁷⁸ The interest groups were responsive to the call.

After sounding the alarm, the opposition packaged Bork’s judicial philosophy in a manner readily transferable to thirty second television spots, full page newspaper advertisements, and the brief moments available on nightly news programs. The result was widespread concern throughout America. This was due in part to the reality that full explanation of complex constitutional principles, crafted from years of precedent and debate, does not lend itself to brief news and advertisement explanation. Consequently Bork’s writings and opinions were reduced to easily consumed slogans and headlines.

Several large lobbying organizations on both sides of the nomination excelled at this craft. The skill of the opponents, however, surpassed that of the pro-Bork forces.⁷⁹ For instance, the People For The American Way Action Fund ran a full page advertisement in the *New York Times* entitled “Robert Bork vs. The People.”⁸⁰ The advertisement analyzed several of Judge Bork’s opinions, using phrases such as “Sterilizing workers,” “No privacy,” “Big business is always right,” and “Turn back the clock on civil rights?”⁸¹ Bork’s supporters charged People for the American Way and others with playing fast and loose with the facts and law of decisions and articles written by Judge Bork, but the advertisements had effectively reached their intended audience.⁸²

77. Boston Globe, Oct. 11, 1987, at 1, col. 6.

78. *Id.* at 22, col. 5.

79. See Sullivan, *The Bork Screw*, NEW REPUBLIC, Oct. 19, 1987, at 14. Sullivan states that a “serious case” can be made against Judge Bork but that the “liberals get the prize for hype, even if it’s only because the conservatives gave themselves the ridiculous handicap of defending an innocuous moderate.”

80. N.Y. Times, Sept. 15, 1987, at A21.

81. *Id.*

82. The focus on specific cases authored by Judge Bork for a majority on the court of appeals was analogous to the efforts of the American Federation of Labor in the Parker nomination. Attention was drawn to specific parts of an opinion without particular inquiry into the underlying legal support for the decision. Judge Parker and Judge Bork were then characterized as bad choices for the Court because the decision was contrary to the position advocated by the interest group.

Pro-Bork forces made an effort to take the offensive by producing their own attention-grabbing slogans. Some of these efforts were bounded only by the limits of the imagination. One organization known as Free the Court hired an airplane to fly over the Iowa State Fair with a banner denouncing "Bork Bashers" and "liberal lap dogs."⁸³ The National Conservative Political Action Committee (NCPAC) presented short leashes to anti-Bork "stupid dog" Senators allied with "the looney left."⁸⁴ NCPAC also presented choke chains to certain Senators whom it labeled as having been "jerked around by radical special interest groups."⁸⁵ Advertisements were also used by Bork's supporters. "We the People" took out a full page ad in *USA Today* entitled "The assassination of Judge Robert Bork: How politics stink and you lose."⁸⁶ The advertisement attacked "stunning use of propaganda" by "special interest groups and ambitious politicians." It then went on to attack the personal character of four Senate Judiciary Committee Democrats.⁸⁷

The Senate proponents of Judge Bork failed from the outset to match the opponents' rhetorical intensity, and the nomination lapsed into a defensive posture. Little time was left for an offensive push to state affirmatively the qualifications of the candidate. Rather, the Senators supporting the nomination were relegated to the task of "crying foul" and telling other Senators and the public that he was not as bad as some were saying.

The actions of both opponents and proponents blurred the distinction between the judicial philosophy and political philosophy of the nominee. Judge Bork affirmed the propriety of reviewing his judicial philosophy during the hearings.⁸⁸ It is important to draw a distinction, however, between inquiry into judicial philosophy and inquiry into political philosophy. Judicial philosophy may or may not reflect the political philosophy of the nominee or the majority of Americans at the time of the nomination. It is a primary duty of a judge to apply dispassionately the laws and the Constitution to the facts of the case before him or her without reference to personal political persuasions. The nomination failed, in part, because Judge Bork's judicial philosophy, as defined by his

83. 133 CONG. REC. S14,725 (daily ed. Oct. 21, 1987).

84. *Washington Times*, Oct. 9, 1987, at A6, col. 1.

85. *Id.*

86. *USA Today*, Oct. 6, 1987, at 9.

87. *Id.* The advertisement accused Senator Biden of lying and plagiarism. It also noted Senator Kennedy's involvement in Chappaquiddick and his expulsion from Harvard for cheating; Senator Metzenbaum's realization of "great wealth by just making a few phone calls"; and Senator Leahy's leaking of national security information during his tenure on the Senate Intelligence Committee.

88. *Hearings, supra* note 11, at 105.

opponents, did not have sufficient popular appeal. In other words, Bork's judicial philosophy did not adequately reflect the political philosophy of many of the Senators who voted against him.⁸⁹

Certainly there was no incentive for interest groups on either side of the nomination to clarify the distinction between judicial philosophy and political philosophy. To have explained this distinction would have been an admission by the groups that a judge's duty is to interpret the law without reference to personal, political philosophy. This in turn would have been an admission that a judge could thus become unpredictable in deciding cases, at least as measured in terms of allegiance to one or another political philosophy. Consequently, interest groups on both sides of the nomination fed the notion that Judge Bork could be counted on—for good or bad—to take specific, consistent political positions in rendering his decisions. This underlying, often unstated presumption was the foundation of the campaigns waged by special interest groups. For instance, a statement that it was up to President Reagan to change the Court in order to make conservative gains in social and civil rights issues, outside of the legislature, presumes that a majority of the Justices would adhere to a conservative political philosophy and that philosophy, in turn, would be converted consistently into conservative majority opinions.⁹⁰ Similarly, a statement by civil rights activists that Bork's confirmation would "jeopardize the civil-rights achievements of the past 30 years" also presumes an unyielding approach to decision making without reference to underlying facts or changes in statutory or constitutional law.⁹¹ This presumed nexus between political and judicial philosophy by the presumption of predictable judgment in line with that philosophy is what led interest groups to mount a classic political campaign strategy in support of or in opposition to the "candidate," starting with the mobilization of grass-roots support.⁹² In fact, the high court rulings often frustrate these interest group attempts at prediction, due to the tenuous and often faulty equation between judicial and political philosophy.⁹³ Perhaps the best recent example of failed expectations occurred in *Texas v. Johnson*.⁹⁴ The case involved the public burning of an American flag as a

89. Former Attorney General Herbert Brownell warned that requiring a Supreme Court nominee to conform to the Senate's prevailing political ideology sends the clear signal that the Court should decide constitutional issues not on judicial and legal bases but rather upon political bases. *Hearings, supra* note 11, at 3840.

90. *See supra* text accompanying note 56.

91. *See supra* text accompanying note 54.

92. *See supra* text accompanying note 69.

93. *See Taylor, Rehnquist's Court: Tuning Out the White House*, N.Y. Times, Sept. 11, 1988 (Magazine), at 38-41.

94. *Texas v. Johnson*, 109 S. Ct. 2533 (1989).

means of political protest. The supposedly conservative Supreme Court held that the conviction of the flag burner pursuant to Texas law violated the First Amendment—a decision roundly criticized by conservative members of Congress and the President. The five Justices in the majority formed an unpredictable coalition, consisting of “liberal” Justices Brennan, Marshall, and Blackmun and “conservative” Justices Scalia and Kennedy. The decision brought on a storm of political rhetoric as members of the House and Senate lined up to espouse their patriotic fervor and their disgust for any decision that would protect a flag burner under the First Amendment. President Bush called for a constitutional amendment to reverse the decision. Many members of Congress were caught in the uncomfortable position of trying to reconcile the majority opinion of the Supreme Court with the political need to decry the decision. It would have been unlikely that either conservative or liberal interest groups would have predicted such a decision by the Court given its perceived political balance at the time. The decision exemplifies the lack of predictability in judicial opinions, the lack of a nexus between judicial philosophy and political philosophy, and the inability of interest groups to admit this flaw in their prognostications when seeking financial and membership support.

V. The Denouement

By October 8, 1987, it was clear that the opponents to the nomination had sufficient votes to defeat it. The Senate adjourned on that day for the Columbus Day weekend. Fifty-three Senators had already declared opposition to the confirmation. Thirty-six had announced support.⁹⁵ On that same day, Judge Bork issued a statement⁹⁶ calling the use of national political campaign tactics during the confirmation process not only disturbing but dangerous. He expressed concern regarding the impact on the impartiality of the judiciary if it is required to comply with national political ideals and the chilling effect such compliance would have on judicial deliberations. He also was concerned about the erosion of public confidence in the impartiality of the courts and the danger to the independence of the judiciary. President Reagan quoted Judge Bork's concerns with absolute approval during a television address delivered just five days later. Yet, in that same address, President Reagan, after condemning the impact of political campaign tactics on his nomi-

95. Cohodas & Willen, *Angry, Defiant Bork Insists on Senate Debate*, 45 CONG. Q. WEEKLY REP. 2435, 2436 (Oct. 10, 1987).

96. Robert Bork, statement delivered at the White House (Oct. 9, 1987), *reprinted in* N.Y. Times, Oct. 10, 1987, at 13, col. 1.

nee, concluded with a request to the audience that they let their Senators know "that the confirmation process must never again be compromised with high pressure politics."⁹⁷ In effect, President Reagan asked Americans to put political pressure on their Senators with this message: Don't bow to political pressure when voting on the Bork nomination.

The White House was ineffective in its handling of key portions of the Bork nomination and this also played into the hands of the opposing interest groups. Howard Baker acknowledged the White House knew that Bork's nomination would be controversial, but it was caught off guard by the intensity of the advertising campaign waged by the opponents.⁹⁸

Many considered the White House timing of the announcement of Judge Bork as the nominee to be a crucial error. It afforded the opposing Senators time to work in coalition with opposition interest groups over the long August recess, before the first day of hearings had commenced. President Reagan spent much of the recess on vacation in California and failed to match the fervor of the opposition. In essence, the White House seemed only lukewarm toward the nomination. It departed from the "high ground" of judicial independence from political influence by making some effort to "politic" on behalf of Bork, but it failed to expend enough energy to meet the efforts of the opposition.

A. B. Culvahouse, Jr., counsel to President Reagan, acknowledged that part of the error lay with the White House strategy. He noted the long delay in the hearings and the time provided to the opponents to mount their campaign.⁹⁹ Culvahouse admitted that the White House did not think the process would become as politically oriented as it did. He indicated that had the White House realized this sooner than perhaps the confirmation battle would have been fought out on "raw political terms"—with a different result.¹⁰⁰

Conclusion

We will not know whether this combination of events leading to defeat for the nominee will be repeated until the Senate finds itself in similar circumstances. Those circumstances did not occur with the nomination of Justice Kennedy. The Senate Judiciary Committee received the President's nomination of then-Judge Kennedy on November 30,

97. Presidential Television Address to the Nation, 23 WEEKLY COMP. PRES. DOC. 1171, 1173 (Oct. 19, 1987).

98. N.Y. Times, Oct. 8, 1987, at A1, col. 2.

99. Quade, *The President is His Only Client*, BARRISTER, Spring 1988, at 34.

100. *Id.*

1987.¹⁰¹ He was confirmed by a vote of ninety-seven to zero on February 3, 1988.¹⁰² The Senators who had rejected the Bork nomination were willing to vote unanimously in favor of the Kennedy nomination. The Senate Judiciary Committee apparently was ready to move more quickly on the Kennedy nomination. In fact, some interest groups complained that they were unable to prepare adequately for the hearings or analyze the Kennedy judicial record of service on the Ninth Circuit Court of Appeals. Additionally, Justice Kennedy did not leave a trail of nonjudicial writings which had provided so much fodder for the opponents to the Bork nomination. Justice Kennedy had published very little outside of his judicial opinions and had given only a few speeches.

Critics have speculated since the conclusion of the Bork hearings that fundamental changes are necessary in the Senate process of advice and consent. A ten-member Task Force on Judicial Selection established by the Twentieth Century Fund and headed by former Democratic New York Governor Hugh Carey made recommendations to prevent future influence upon judicial nominations by an overt political process. The Task Force concluded that "nominees ought not to be associated with some special interest group's political agenda. . . . For that is at war with the Constitution and the tradition of judicial independence."¹⁰³

Part of the problem occurs when the Senate is required to set aside its political nature and enter into "executive session" to consider the nomination of an individual for a federal judgeship. Pursuant to Senate rules, the Senate leaves legislative session and enters executive session when considering a presidential nomination.¹⁰⁴ The reality is that many of the normal political biases in Senate debate on legislation are maintained and exercised during the executive session consideration of Supreme Court nominations. The interest groups in opposition to the Bork nomination were more successful than proponents in engaging the attention of the constituents of many Senators. Through the use of campaign tactics—calls, letters, rallies, and the like—these interest groups and their constituents reminded Senators that they were politically opposed to the Bork nomination and therefore the Senators should also be

101. *Nomination of Justice Anthony M. Kennedy to be an Associate Justice of the United States Supreme Court, Report of the Committee on the Judiciary, United States Senate, together with Additional and Supplemental Views*, S. EXEC. REP. NO. 13, 100th Cong., 2d Sess. 2 (1988).

102. 134 CONG. REC. S516 (daily ed. Feb. 3, 1988).

103. David M. O'Brien, *Judicial Roulette*, Report of the Twentieth Century Fund Task Force on Judicial Selection 106 (1988) (background paper). *But see id.* at 98 (interest groups should continue to have the opportunity to fully involve themselves in the hearings of the Senate Judiciary Committee on judicial nominees).

104. Standing Rules of the Senate, Rule XXXI (1984).

opposed. As a result, a sufficient number of undecided Senators answered the political call when exercising their duties in executive session. Votes against Judge Bork were cast accordingly.

The only certainty seems to be that interest-group campaigning for or against nominees will continue in the future. Opposition groups have been successful in the Parker, Haynsworth, Carswell, and Bork nominations and were nearly successful in the Brandeis nomination. Interest groups have every incentive to continue to raise their voices in the hope of persuading Senators to cast nomination votes in accordance with the agenda of the particular group. When a group or coalition of groups can influence the nomination outcome, it may be one less obstacle they have to face in the course of litigation. This, however, assumes that the Supreme Court Justices can be relied upon consistently to apply political philosophies to their decision making. That debate has gone on since the beginning of the Court and will no doubt continue. Yet, there is evidence to suggest that Justices are far more independent of their nominating President's party and politics than some would believe.¹⁰⁵

Popular election of Supreme Court Justices would be contrary to the Constitution.¹⁰⁶ The efforts of the interest groups, however, in the Bork nomination and others, informed Senators that many Americans were supporting or opposing the nomination. This support or opposition was, in turn, generated by the work of the interest groups in forging a certain image of the nominee. Thus, the interest groups have been successful in achieving indirectly that which they would have been prohibited from doing had they sought a direct election. This raises a compelling argument against senatorial collusion with interest groups in reviewing the qualifications of Supreme Court nominees—an argument that is not likely to be persuasive to most Senators. If a Senator were to ignore the advice of constituents and interest groups on such matters, he might properly fulfill his constitutional duty but he would face possible retribution in the next election. Nor are special interest groups likely to reduce their attempts to influence Senators regarding important Presidential nominations. We are left then with the somewhat unsettling reliance on Senators to understand the dual responsibility imposed by the Constitution—to act as a legislative branch, properly answering to the political desires of their constituents, while still maintaining the ability to review dispassionately and apolitically the qualifications of Supreme Court nominees in executive session on the Senate floor.

105. See *supra* note 93 and accompanying text.

106. See *supra* note 3 and accompanying text.

