

January 1988

Advice and Consent on Trial: The Case of Robert H. Bork

William G. Myers III

Follow this and additional works at: <https://digitalcommons.du.edu/dlr>

Recommended Citation

William G. Myers, III, Advice and Consent on Trial: The Case of Robert H. Bork, 66 Denv. U. L. Rev. 1 (1988).

This Article is brought to you for free and open access by the Denver Law Review at Digital Commons @ DU. It has been accepted for inclusion in Denver Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu, dig-commons@du.edu.

Advice and Consent on Trial: The Case of Robert H. Bork

ADVICE AND CONSENT ON TRIAL: THE CASE OF ROBERT H. BORK

WILLIAM G. MYERS, III*

With the conclusion of rollcall vote number 348, the United States Senate voted not to confirm the nomination of Robert H. Bork to be an Associate Justice of the United States Supreme Court. The vote was forty-eight yeas to fifty-eight nays.¹ The presiding officer ordered the notification of the President and thus the extended debate on the nomination of Robert Bork came to its predestined conclusion.² This article examines the fulfillment of the Senate's constitutional duty of advice and consent with regard to Judge Bork's nomination. Many of the senators on both sides of the issue agreed that this debate was the most lengthy and involved discussion of any Supreme Court nominee in history. It likely will rank high as one of the most controversial and rancorous confirmation proceedings. Throughout the hearings in the Judiciary Committee and the debate on the floor of the Senate, as well as in the popular press 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. Much of the debate focused on the judicial philosophy of the nominee. This article will also examine the judicial philosophy of Judge Bork, what conclusions may be drawn, and what questions have been raised with respect to the process of advice and consent, as illustrated by this nomination.

I. THE HISTORY OF THE SENATE IN PROVIDING ADVICE AND CONSENT

Several historical coincidences converged during the nomination of Judge Robert Bork to be an associate justice to the Supreme Court of the United States. Of minor interest, these Senate debates ensued during the centennial Congress. Of greater note was that the bicentennial of the Constitution of the United States was celebrated during the course of the Judiciary Committee hearings. This fact was not lost upon the senators or witnesses appearing before the Committee. The nomination served as a magnificent course in constitutional history and the role of the Supreme Court in our nation.

* Legislative Counsel to United States Senator Alan K. Simpson (R-Wyo); A.B. 1977, College of William and Mary; J.D. 1981, University of Denver; Member of the Colorado, Wyoming and District of Columbia Bars. This article represents the author's reflections following the Senate consideration of the nomination of Robert H. Bork to become an Associate Justice of the United States Supreme Court, and the author's participation in that process. The opinions expressed herein are solely those of the author.

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

2. *Id.*

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 The Senate had received 143 Supreme Court nominations 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 these occurring during the eighteenth or nineteenth century. In the twentieth century, prior to the Bork nomination, the Senate rejected three Supreme Court nominations outright, filibustered a fourth nomination until it was withdrawn by the President, and declined to take action on a fifth nomination—that of Homer Thornberry in 1968.⁴ Not since the nominations of Clement Haynsworth and G. Harrold Carswell in November 1969 and April 1970, respectively, has a nominee to the Supreme Court been rejected.

With the exception of the Thornberry nomination by President Johnson, which was withdrawn prior to the conclusion of the hearings, Robert Bork is only the fifth nominee to be rejected in the twentieth century. The first nominee rejected in this century was that of President Hoover's in 1930, John J. Parker, the Chief Judge of the Fourth Circuit Court of Appeals. Parker was rejected by a vote of thirty-nine to forty-one⁵, based partially on the ground that he was a racist. The charge of racism arose from the position taken by Judge Parker when he ran for public office in South Carolina in 1920, at which time he said that blacks should not be allowed to vote. As it turned out, Judge Parker remained on the circuit court, and in a remarkable 1947 case, ruled that South Carolina must eliminate all-white primaries, thus advancing voting rights for blacks.⁶

Following the rejection of Judge Parker, the next Senate vote for rejection came with President Nixon's Supreme Court nominations of Clement Haynsworth in 1969 and G. Harrold Carswell in 1970.⁷ The legal profession considered Haynsworth to have questionable mental ability. There were also charges that he had been a racist and there were questions that were raised about his conduct which, although not criminal, showed certain character flaws and indiscretions. After Haynsworth's rejection, Carswell's name was sent up by President Nixon. Carswell was considered to have even weaker legal ability than Haynsworth and his personal dealings were even more questionable. He, too,

3. U.S. *Const.* art. II, § 2, cl. 2. The Constitution was adopted by a convention of the states on September 17, 1787, and was subsequently ratified by the several states, with ratification having been completed on June 21, 1788.

4. Congressional Research Service Report For Congress, No. 87-761 GOV at 1-2 (Sept. 14, 1987).

5. *Id.* at 1 n.3.

6. *Hearings before the Committee on 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*, (Committee Print Draft) 100th Cong., 1st Sess., pt. 2, at 1054 (1987) [hereinafter *Hearings*] (statement of Forrest McDonald, Professor, University of Alabama).

7. Congressional Research Service, *supra* note 4, at 1 n.3.

was rejected.⁸

The next rejection, that of Abe Fortas, was peculiar. President Johnson nominated Fortas to ascend from Associate Justice to Chief Justice as replacement for Earl Warren. However, at the time of the nomination, Chief Justice Warren had not yet resigned and a portion of the Senate was offended by the sitting Chief Justice who had agreed to resign if the President nominated Associate Justice Fortas for the position. As a result, the Senate engaged in a filibuster over the nomination and eventually President Johnson withdrew the nomination without a vote.⁹

The Bork nomination was clearly different from any of these previous twentieth century rejections. There was no question during the hearings or Senate debate whether Judge Bork had the mental ability or qualifications as a legal scholar. Indeed, his qualifications were unassailable. Nor was there any question as to Judge Bork's personal dealings. No inquiry by senators during the extended Judiciary Committee hearings touched upon the mandatory investigation of Judge Bork by the Federal Bureau of Investigation.

On July 1, 1987, President Reagan announced his nomination of Judge Robert Bork for the position vacated by retiring Associate Justice Lewis Powell. Debate quickly ensued on the floor of the Senate as to what their proper role would be in providing advice and consent on the nomination. Each side in the debate looked to the early history of the Constitution and to the Framers to determine what role the Senate should play. Senator Joseph Biden of Delaware was one of the primary participants in this debate. As Chairman of the Senate Judiciary Committee, he assumed a key role in the review of the Bork nomination.¹⁰

During debate on the Senate floor, Senator Biden argued that the Framers intended that the Senate take the very broadest view possible in discharging its duty to provide advice and consent.¹¹ Senator Biden noted that the first Supreme Court nominee to be rejected was John Rutledge, President Washington's nominee, in 1795. Biden stated that the rejection was based specifically on political grounds due to Rutledge's opposition to the Jay Treaty of 1794.¹² Senator Biden's claim that the delegates to the Constitutional Convention intended the Senate to play a broad role in the appointment of judges did not go unchallenged. Senator Orrin Hatch, the second ranking Republican on the Judiciary Committee, responded. The Senator stated on the floor that the Constitutional Convention vested the nomination powers exclusively

8. *Hearings*, *supra* note 6, pt. 2, at 1054-55 (testimony of Forrest McDonald).

9. *Id.* at 1055.

10. Increased scrutiny was placed upon Senator Biden during the initial investigatory phase of the nomination as well as during the Judiciary Committee hearings. Not only did attention focus upon Senator Biden in his capacity as chairman of the committee, but he also had announced his candidacy for the 1988 presidential election. During the course of the Judiciary hearings, allegations surfaced regarding Senator Biden's law school record and plagiarism. As a result, during the pendency of the hearings Senator Biden withdrew his candidacy for the Presidency.

11. 133 *Cong. Rec.* S10,523 (daily ed. July 23, 1987).

12. *Id.* at S10,525.

with the President, specifically rejecting any notion that the Senate should play a role in nominating justices.¹³ Senator Hatch, reading the 1787 debates, concluded that "ideological inquisitions and inquiries" of the nominee by the Senate were without historical foundation.¹⁴

With this debate between Senators Biden and Hatch, occurring forty-six days prior to the start of the Judiciary Committee hearings, the stage was set for a nomination drama that would pit opposing historical analyses and conclusions against each other. In many ways, this initial exchange illustrated the positions that would be taken on the proper senatorial inquiry into Supreme Court judicial philosophy. The opponents to the nomination would conclude that the nominee should have an expansive view of the Constitution and federal statutes just as the Framers had an expansive view of the proper inquiry of the nominee. The proponents of the nomination would conclude that a Supreme Court Justice should have a more confined and historically bound view of the Constitution and federal statutes just as, they believed, the Framers had intended a Senate review of the nominee that would not inquire extensively into the nominee's judicial philosophies.

II. THE BORK NOMINATION

On June 26, 1987, Associate Justice Lewis F. Powell, Jr. issued a statement that he had elected to retire from the Court. This announcement came after fifteen and one half years of service on the Supreme Court bench. Justice Powell's reasons for his decision were his age of seventy-nine years, that he had not intended to serve for more than ten years, and because his health had not been "robust."¹⁵

Shortly following the resignation of Justice Powell, Senate Judiciary Committee Chairman Biden issued a one page statement, calling the resignation a "major loss to the Court and the nation . . . [Justice Powell] understood the meaning of civil rights and liberties."¹⁶ He called Powell a "decisive vote in a host of decisions,"¹⁷ and expressed the hope that President Reagan would nominate a replacement "in the mold of Lewis Powell."¹⁸ The theme that Justice Powell had been a crucial swing vote would be raised time and again 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 some delicate balance in its ideological makeup and any new associate justice should maintain that balance. A good deal of debate was stirred by this concept. Though outside the scope of this article, the debate over "balance" remained a point of contention throughout the nomination.

13. 133 *Cong. Rec.* S10,878 (daily ed. July 30, 1987).

14. *Id.* at S10,880.

15. Printed statement of Lewis F. Powell, Jr., June 26, 1987, provided by the Supreme Court Press Office.

16. Press statement of Senator Joseph R. Biden, Jr., undated.

17. *Id.*

18. *Id.*

The President announced on July 1, 1987, that he intended to nominate Robert Heron Bork as Powell's replacement. Although the nomination was not officially received by the Judiciary Committee until July 7, 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 Massachusetts took to the Senate floor and made the following vitriolic 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 or [sic] 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.¹⁹

Senator Metzenbaum indicated his displeasure with the nomination on several instances, including his opening statement on the first day of hearings in the Judiciary Committee. The Senator stated: "Now it is clear that the President wants to revise the Constitution through his appointments to the Supreme Court."²⁰ Senator 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."²¹ The Senator cited what he believed was the position of Judge Bork on several substantive issues such as voting rights, Watergate, and privacy. While other members of the opposition may not have spoken in such passionate terms, the message was repeated in many fora and in many forms. For instance, in an exchange between Senator Simon and Judge Bork in the Committee hearings, Senator Simon told Judge Bork that he had read the infamous *Dred Scott*²² decision and that the majority opinion by Justice Taney "sounded an awful lot like Robert Bork"²³ Justice Taney believed it improper to read into the Constitution clauses that were not found there and consequently the Court denied free blacks the right to become citizens. Judge Bork took exception to Senator Simon's characterization that he was "an awful lot like" Justice Taney; however, Simon had made his point.

The proponents of Judge Bork failed from the outset to match the opponents' rhetorical intensity and the nomination was immediately put on the defensive. Both the nominee and his supporters in the Senate were put in a position of denying or explaining away the charges made

19. 133 *Cong. Rec.* S9,188 (daily ed. July 1, 1987).

20. *Hearings, supra* note 6, pt. 1, at 27.

21. *Id.* at 28.

22. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

23. *Hearings, supra* note 6, pt. 1, at 291.

by the opponents. Little time was left for an offensive push to state affirmatively the qualifications of the candidate. Rather, many of his proponents were relegated to the task of telling other senators and the public that he wasn't as bad as some were saying. For example, in an exchange between Senator Metzenbaum and former Attorney General William French Smith, Senator Metzenbaum asked Mr. Smith to explain why so many people seemed to be afraid of Judge Bork. In response, Mr. Smith indicated that to the extent that those fears existed, it was due in large part to the "misrepresentations," "distortions," and "propaganda" that the opponents had circulated from July 1 forward.²⁴

Who then was this man nominated by the President to take the seat of Justice Powell? He certainly seemed to have the perfect resume for the job.²⁵ Indeed, no one seriously challenged Judge Bork's qualifications to be an associate justice based upon his previous experiences. The overwhelming issue of the hearing testimony and the floor debate centered on Judge Bork's judicial philosophy and his understanding of the role of Supreme Court justices when interpreting the Constitution, statutes, and case law.

The Judiciary Committee hearings on Judge Bork were, in their own right, extraordinary. The amount of testimony by Judge Bork before the Committee was unprecedented for a Supreme Court nominee.²⁶ Judge Bork testified for thirty hours over the course of five days. Another seven days were spent considering the testimony of 111 other witnesses.²⁷ 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 1970's. The major television networks and radio carried much of Judge Bork's testimony live. A large press corps representing all media attended the hearings. Before the Committee paraded an impressive array of witnesses both supporting and opposing the nomination, including former President Gerald Ford, former Chief Justice Warren Burger, seven former attorneys general, present and former congressmen, numerous law school professors and deans, former White House Counsel, Lloyd Cutler, and a variety of representatives of interested groups.

Judge Bork's testimony before the Committee was extensive. The Judge offered his opinion on a number of Constitutional issues and Supreme Court decisions. His responsiveness to questions was praised by many members of the Committee and was without parallel to other

24. *Hearings*, *supra* note 6, pt. 1, at 859.

25. See generally 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 VIEW. S. EXEC. REP. No. 7, 100th Cong., 1st Sess. 217 (1987) [hereinafter *Report*] (Phi Beta Kappa graduate from University of Chicago, Managing Editor of law review at University of Chicago Law School, Order of the Coif, partner in 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).

26. *Report*, *supra* note 25, at 215.

27. *Id.* at 2.

recent Supreme Court nominations. During his nomination, Justice Scalia often invoked the position that it would be improper to make statements about specific cases or fact patterns since that case or factual situation could potentially come before the court following his confirmation.²⁸ Similarly, Justice Rehnquist refused to answer certain questions which he believed might come before him after the hearings on his nomination to be Chief Justice.²⁹ Judge Bork did not *always* answer the questions put to him. For instance, he declined to answer Senator Heflin's questions on how the Judge would apply *stare decisis* to the decision in *Roe v. Wade*.³⁰ But, as a general statement, Judge Bork spoke freely on many matters. He apparently believed it inappropriate to decline to discuss the issues before the Committee after having put so many of his thoughts in the form of articles, speeches or opinions. Paradoxically, after providing so many hours of testimony, many of the Judge's statements under oath were not given full credibility by the opponents to the nomination. For example, some senators insisted on describing Judge Bork in terms of his positions taken over two decades ago which he had subsequently repudiated, rather than accepting his sworn testimony from the hearings. Former Attorney General Elliot Richardson commented on this, noting that many of the opponents continued their assault on the candidate as though he had not testified or that he had testified in a manner undeserving of credibility.³¹

Judge Bork's open-ended testimony forged a double-edged sword. The testimony revealed the Judge's opinions on many important constitutional issues. Those senators who chose to read his entire testimony, prior to a vote on the nominee, had 656 pages of direct evidence available. At the same time, page after page of testimony provided opponents with a bountiful source of citations from which to characterize Judge Bork's opinions in a manner most useful to their cause. A good example of this latter phenomenon was the criticism leveled at Judge Bork for his response to Senator Simpson's question as to why Judge Bork wished to be an associate justice of the Supreme Court. Bork provided two answers to the question. The first answer was that the experience would be "an intellectual feast."³² This was the answer emphasized by some senators hoping to make a point that Judge Bork wished to ascend to the Supreme Court merely to satisfy his own intellectual desires. This implication survived because of the convenient omission of Judge Bork's second answer to the question wherein he stated, "[o]ur Constitutional structure is the most important thing this nation has and I would like to help maintain it and be remembered for

28. See Hearings before the Committee on the Judiciary, United States Senate, on the Nomination of Judge Antonin Scalia, to be Associate Justice of the Supreme Court of the United States, 99th Cong., 2d Sess. 37, 57, 58 (1986).

29. See Hearings before the Committee on the Judiciary, United States Senate, on the Nomination of Justice William Hubbs Rehnquist to be Chief Justice of the United States, 99th Cong., 2d Sess. 179, 189 (1986).

30. *Hearings, supra* note 6, pt. 1, at 267.

31. *Hearings, supra* note 6, pt. 3, at 1681.

32. *Hearings, supra* note 6, pt. 1, at 720.

that."³³

III. JUDGE BORK'S JUDICIAL PHILOSOPHY

The primary issue of the nomination was whether the Judge's judicial philosophy was acceptable to the majority of the 100 senators. Virtually every discussion—whether it was on an esoteric point of constitutional law, a law review article written by the judge, a decision handed down by him while on the court of appeals, or any other matter in the hearing—could eventually be brought back to this focus on judicial philosophy. As Chairman Biden said in his opening statement, the nomination was about more than Judge Bork as an individual. It required the Committee and the full Senate to pass judgement on Judge Bork's philosophy and whether that philosophy was "an appropriate one at this time in our history."³⁴ In his opening remarks, the Judge acknowledged the accuracy of Chairman Biden's statement. Judge Bork then went on to set forth his judicial philosophy. It is worthy of quotation at length, in order to understand the Judge's position on this key issue as well as the reason for both opposition to and support for the nominee. The judicial philosophy of Judge Bork is, in part, as follows:

The judge's authority derives entirely from the fact that he is applying the law and not his personal values. That is why the American public accepts the decisions of its courts, accepts even decisions that nullify the laws of the majority of the electorate or of their representatives voted for.

The judge, to deserve that trust and that authority, must be every bit as governed by law as is the Congress, the President, the state governors and legislatures, and the American people. . . .

How should a judge go about finding the law? The only legitimate way, in my opinion, is by attempting to discern what those who made the law intended. The intentions of the lawmakers govern whether the lawmakers are the Congress of the United States enacting a statute or whether they are those who ratified our Constitution and its various amendments. . . .

Where the words are general, as is the case with some of the most profound protections of our liberties—in the Bill of Rights and in the Civil War Amendments—the task is far more complex. It is to find the principle or value that was intended to be protected and to see that it is protected.

As I wrote in an opinion for our court, the judge's responsibility 'is to discern how the Framers' values, defined in the context of the world they knew, apply in the world we know.'

If a judge abandons intention as his guide, there is no law available to him and he begins to legislate a social agenda for the American people. That goes well beyond his legitimate power. . . .

33. *Id.*

34. *Hearings, supra* note 6, pt. 1, at 66.

The past, however, includes not only the intentions of those who first made the law, it also includes those past judges who interpreted it and applied it in prior cases. That is why a judge must have great respect for precedence

Times come, of course, when even a venerable precedent can and should be overruled. The primary example of a proper overruling is *Brown* against Board of Education, the case which outlawed racial segregation accomplished by Government action. . . .

I can put the matter no better than I did in an opinion on my present court. Speaking of a judge's duty, I wrote: 'The important thing, the ultimate consideration, is the constitutional freedom that is given into our keeping. A judge who refuses to see new threats to an established constitutional value and hence provides a crabbed interpretation that robs a provision of its full, fair and reasonable meaning, fails in his judicial duty. That duty, I repeat, is to ensure that the powers and freedoms the Framers specified are made effective in today's circumstances.'

But I should add to that passage that when a judge goes beyond this and reads entirely new values into the Constitution, values the Framers and the ratifiers did not put there, he deprives the people of their liberty. That liberty, which the Constitution clearly envisions, is the liberty of the people to set their own social agenda through the processes of democracy. . . .

It is simply a philosophy of judging which gives the Constitution a full and fair interpretation but, where the Constitution is silent, leaves the policy struggles to the Congress, the President, the legislatures and executives of the fifty states, and to the American people.³⁵

This philosophy of judging—known variously as “original intent,” “positivism,” “judicial restraint,” “interpretivism” or “strict construction”—had been Judge Bork's philosophy for the past sixteen years. The Judge indicated in testimony that he had no intention of moving from this philosophy if confirmed by the Senate.³⁶ One of Judge Bork's earliest statements setting forth this judicial philosophy is found in an article he wrote for *Fortune* magazine in 1971.³⁷ There, Judge (then professor) Bork argued that the Court under Chief Justice Earl Warren, with its proclivity toward social change through Supreme Court opinion, had “damaged” and “created disrespect” for the law by blurring the line between judges and the legislatures.³⁸ Bork wrote that the Warren Court had caused great harm to the prestige of the law by confusing the theory of law with the power which the court held and used to produce results it liked without any anchor in the Constitution or statutes.³⁹

35. *Hearings*, *supra* note 6, pt. 1, 75-77.

36. *Hearings*, *supra* note 6, at 1, at 418.

37. Bork, *We suddenly Feel That Law is Vulnerable*, *FORTUNE*, Dec. 1971, at 115.

38. *Id.* at 116.

39. *Id.*

Thus, to rephrase the ideological battle waged during the confirmation hearings: Did the majority of the Senate believe that the next associate justice should embrace the expansive, judicially active approach of the Warren Court; or, should the nominee assume a more conservative approach by drawing a clear distinction between the role of the judiciary and the legislature in creating new legal rights and setting the social agenda?

Some senators who supported the nomination believed that the extensive discussion and debate over judicial philosophy was inappropriate; that, while judicial philosophy is important, it is only one aspect to be considered in confirming a nominee. A key proponent of this approach was the Ranking Minority Member on the Committee, Senator Strom Thurmond of South Carolina. Senator Thurmond believed that the proper qualifications for a nominee included integrity, knowledge and understanding of the law, compassion, judicial temperament, and an understanding of our system of government and its separation of powers.⁴⁰ For Senator Thurmond, a candidate's judicial philosophy could be properly considered but it should not be the sole criteria for rejecting or confirming a nominee.⁴¹ Yet, with the acknowledgment by Judge Bork that the hearings were "in large measure a discussion of judicial philosophy,"⁴² little attempt was made by senators on the Committee to steer the line of questioning away from this central issue.

The hearings on Judge Bork's judicial philosophy quickly departed from general theories of constitutional law. The opponents to the nomination concentrated on specific issues when they believed Judge Bork's philosophy was contrary to that desired by the majority of Americans. Ironically, Judge Bork's philosophy provides much greater assurance than do opposing "activists" philosophies that the power of the legislature will not be infringed upon by the courts. Put simply, where the constitution or statutes do not speak of a particular right, Judge Bork would not create a right through judicial power but would instead refer the matter into the hands of the executive and the legislature for consideration pursuant to the political processes and the will of the majority as expressed by their elected representatives. One might logically conclude that the senators who were to vote on the nomination would embrace such an approach, thereby furthering the separation of powers between the Judiciary and the Congress, with deference to the Congress where the Constitution or the statutes are silent. This, however, was not borne out by the committee and floor votes. For reasons which will be discussed below, senators in opposition to the nomination worked closely with each other and outside interest groups to create an image of Bork's judicial philosophy which was readily transferable to thirty-second television ads, full page newspaper ads, and the brief moments available on the nightly news. These media packaged issues fostered

40. *Hearings*, *supra* note 6, pt. 1, at 18.

41. *Hearings*, *supra* note 6, at 19.

42. *Hearings*, *supra* note 6, at 75.

widespread concern throughout the American citizenry over this nominee. This was due in part to the reality that full explanation of complex constitutional principles, crafted from years of precedent and debate, do not lend themselves to brief news and ad copy explanation. Consequently Bork's writings and opinions were reduced to slogans and buzz words. For example, as a Yale law professor, Judge Bork often criticized Supreme Court decisions. These criticisms were reduced to writing in a number of powerful articles published in both law reviews and popular magazines. Opponents to the nomination would seize upon this professorial criticism of Supreme Court decisions and infer that "Justice" Bork would adopt a similar approach toward established Supreme Court precedent. Senator Thurmond addressed this by asking Judge Bork how he would draw the distinction between his writings as a professor and his responsibilities as a Supreme Court Justice. Judge Bork responded that, as a professor, he was encouraged to engage in "theoretical discussion" and he chose to attack Supreme Court decisions which he believed were inadequately explained by existing constitutional and statutory principles. He went on to note that in the classroom, nobody is injured, while in the courtroom someone always loses. Thus, a judge must engage a much more cautious approach to the legal principles at stake than would a professor when writing or delivering speeches.⁴³ This explanation of his regard for precedent was reduced by opponents to declarations that Judge Bork had no respect for Supreme Court decisions.

IV. ISSUES FRAMING THE DEBATE

Certain constitutional issues quickly became central themes for discussion of Bork's judicial philosophy during the Judiciary Committee hearings and in subsequent floor debates. As with any trial, the issues were presented in dramatically opposing fashion by the two sides on the nomination. Each had its own interpretation as to how Judge Bork, as an associate justice, would address these issues.⁴⁴

The approach taken by the opposition senators on the judicial philosophy of Judge Bork can be illustrated by comparing the statements of some of these senators with the testimony of Judge Bork in the hearings. For instance, Senator Metzenbaum, in his opening statement, stated that "Judge Bork categorically rejects any Constitutional right of privacy."⁴⁵ This contrasts rather markedly with Judge Bork's testimony the next day. In response to a question by Senator Simpson, Judge Bork affirmed that privacy is protected under the Constitution but that there are some limits to that right.⁴⁶ For instance, there is a limit on the right

43. *Hearings, supra* note 6, pt. 1, at 101.

44. Senator Simpson set forth a list of issues which encompassed a majority of the debate, including: sterilization, big business, equal protection for women and minorities, civil rights, the role of precedent, sexual harassment, voting rights, Watergate, the right of privacy, Congress versus the President, freedom of speech, and others. *See* 133 CONG. REC. S14,855 (daily ed. Oct. 22, 1987) (statement of Senator Simpson).

45. *Hearings, supra* note 6, pt. 1, at 28.

46. *Hearings, supra* note 6, at 217.

of privacy if one is engaging in a private use of illegal drugs or if one is privately engaging in incest. Clearly, the right of privacy does not extend to these matters. Yet, the attempt to place limits on the right of privacy was criticized as extinguishing all rights of privacy. Judge Bork specifically stated in his testimony that "no civilized person wants to live in a society without a lot of privacy in it. And the Framers, in fact, of the Constitution protected privacy in a variety of ways."⁴⁷ Judge Bork then went on to cite the right of privacy in the first amendment which protects free exercise of religion and freedom of speech; the right of privacy of membership lists and associations which are necessary to make that right of free speech effective; the right of privacy in one's home and office as protected by the fourth amendment prohibition against unreasonable searches and seizures; and the right of privacy against self incrimination as protected by the fifth amendment.⁴⁸

The issue of the right of privacy arose most often in the context of Judge Bork's criticisms of *Griswold v. Connecticut*⁴⁹ and *Roe v. Wade*.⁵⁰ He criticized the reasoning employed in these decisions and the court's failure to adequately define a constitutional right of privacy. Although joined by many legal scholars as well as the dissenting justices in those cases, Judge Bork's criticism of the cases continued to earn him condemnation through blanket statements that he found no right of privacy in the Constitution. That theme was carried through to the end. Thus, what began with Senator Metzenbaum's opening statement that Bork rejected any constitutional right of privacy ended with a similar statement from the Committee report that, pursuant to Judge Bork's views, "[t]here would be no right to privacy."⁵¹ This type of unwavering declaration from commencement to conclusion of the hearings, without regard to the intervening testimony of Judge Bork, occurred repeatedly on numerous issues during the hearings. Opposition senators were not alone in their effort to reduce some of Judge Bork's decisions on the court of appeals to sensational declarations conveniently packaged for the media. Several large lobbying organizations on both sides of the nomination excelled in reducing Judge Bork's articles or decisions to emotion laden, bold type phrases. The skill of the opponents, however, surpassed that of the pro-Bork forces. 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."⁵² The ad set forth its analysis of Judge Bork's views with such phrases as "Sterilizing workers," "No privacy," "Big business is always right," "Turn back the clock on civil rights?"⁵³ The explanatory ad copy of the People For The American Way ad regarding "Sterilizing workers" is worthy of further

47. *Id.*

48. *Id.*

49. 381 U.S. 479 (1965).

50. 410 U.S. 113 (1973).

51. *Report, supra* note 6, at 97.

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

53. *Id.*

examination. This ad ran on the day the hearings commenced. It characterized a decision written by Judge Bork in *Oil, Chemical & Atomic Workers International Union v. American Cyanamid*.⁵⁴ The advertisement reduced the opinion of the court to an eighty-three word description as follows:

A major chemical company was pumping so much lead into the workplace that female employees who became pregnant were risking having babies with birth defects. Instead of cleaning up the air, the company ordered all women workers to be sterilized or lose their jobs. When the union took the company to court, Judge Bork ruled in favor of the company. Five women underwent surgical sterilization. Within months, the company closed the dangerous part of the plant. And the sterilized women lost their jobs.⁵⁵

On the fourth day of hearings, Senator Metzenbaum picked up on this issue of "sterilizing workers" when he told the Judge that the *American Cyanamid* decision was "shocking."⁵⁶ Senator Metzenbaum further stated "I cannot understand how you as a jurist could put women to the choice of work or be sterilized . . ."⁵⁷

Judge Bork fully explained the decision for Senator Metzenbaum. The ad in the *New York Times* and the statements of Senator Metzenbaum both implied that the decision of Judge Bork in the *American Cyanamid* case subsequently led to sterilization of women. The less than sensational reality was that the five women who underwent voluntary sterilization did so in 1978, four years before Judge Bork was even on the court of appeals bench. It is also important to note that Judge Bork never "endorsed" or "approved of" the employer's policy of requiring women to undergo sterilization as a condition of employment.⁵⁸ If the full opinion were to be distilled into a few paragraphs within this article the author would be guilty of the same tactics used by the ad campaign. The opinion of Judge Bork speaks for itself. It should be emphasized, however, that Judge Bork was not alone in his decision. He wrote for an unanimous panel including Justice, then Judge, Scalia and Senior District Judge Williams. The unanimous court affirmed the decision of the Occupational Safety and Health Review Commission which had affirmed the decision of the Administrative Law Judge. The Secretary of Labor, foregoing his right, did not challenge the Review Commission's decision.⁵⁹

When the chemical company was unable to reduce the lead levels in its lead pigment department, it adopted a policy that only sterile women

54. 741 F.2d 444 (D.C. Cir. 1984).

55. N.Y. Times, *supra* note 52.

56. Hearings, *supra* note 6, pt. 1, at 47.

57. *Id.*

58. Letter from Robert H. Bork to Senator Joseph R. Biden, Jr. (October 5, 1987) (submitted by the nominee to the Chairman of the Committee in response to questions from Senator Robert C. Byrd dated October 1, 1987, regarding the *American Cyanamid* decision).

59. *Oil, Chem. and Atomic Workers v. American Cyanamid*, 741 F.2d 444, 445 (D.C. Cir. 1984).

or women past childbearing age would be employed in the department. The chemical company informed the women in this part of the plant that the unhappy choices were: (1) loss of employment, (2) transfer to lower paying jobs, or (3) voluntary sterilization.⁶⁰ It was this third alternative that brought about the litigation. Had the chemical company fired the women employees in that portion of the plant or transferred them to lower paying jobs, the case would not have arisen. As Judge Bork stated in his opinion, the women were "thus faced with a distressing choice. Some chose sterilization, some did not."⁶¹

Other examples of playing fast and loose with the facts and law of decisions and articles of Judge Bork could easily constitute a separate article. However, as illustrated by the right of privacy issue and the *American Cyanamid* decision, the point needs no further elucidation.

Having illustrated the zeal of the opposition among some senators and public interest groups, the question follows: What generated this opposition? The answer once again leads back to the judicial philosophy of Judge Bork versus that of his opponents. Judge Bork had gone on record as early as 1971 as strongly opposed to the judicial philosophy and consequent decisions of the Supreme Court under then-Chief Justice Earl Warren.⁶² Senator Biden addressed the question of "why the opposition?" During Senate floor debate, he responded to Senator Armstrong of Colorado who, in Senator Biden's words, had raised the issue of the "astonishing onslaught"⁶³ 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 thirty 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.⁶⁴

Those senators who politically and philosophically approved of the decisions of the activist Warren Court thus opposed the nominee. Those interest groups which believed their causes had been treated kindly by the Warren Court era joined ranks with like-minded senators.

It could not be seriously argued that interest groups have not been involved in persuading senators in previous Supreme Court nominations. Clearly they have.⁶⁵ The interesting point is the degree of participation. This nomination saw massive advertising and mailing campaigns mounted by numerous interest groups who had a common

60. *Id.*

61. *Id.*

62. Bork, *supra* note 37.

63. 133 CONG. REC. S14,720 (daily ed. Oct. 21, 1987).

64. *Id.*

65. *Accord* G. CALVIN MACKENZIE, *THE POLITICS OF PRESIDENTIAL APPOINTMENTS* 206 (1981).

belief that Judge Bork would overturn or slow the "progress," as defined by these groups, of the Warren and Burger Courts. As the nomination progressed and more and more senators announced an intention to vote against the nominee, interest groups supporting the nominee increased their efforts along similar lines. This enormous campaign on each side was a departure from previous Supreme Court nominations. It has been suggested that overt, expensive lobbying efforts were held in check in previous nominations because such efforts seemed inappropriate for a judicial position which is, at least theoretically, non-political.⁶⁶

Both the supporters and detractors of the nominee had zealots within their ranks who would resort to the most sensational phrase to elicit both monetary and philosophical support for their cause. For example, the Moral Majority issued a fundraising letter from its leader, Reverend Jerry Falwell, wherein he stated: "I am issuing the most important 'call-to-arms' in the history of the Moral Majority . . . President Reagan has chosen Judge Robert Bork . . . a pivotal person in getting the Supreme Court back on course . . . I need your gift of \$50.00 or \$25.00 immediately. Time is short."⁶⁷ At the opposite end of the spectrum were the efforts of the American Civil Liberties Union Foundation. Its executive director 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 It was this peculiar blend of both responsible and irresponsible definition of the issues by both sides which called out for a more objective standard upon which to review the nominee.

V. DEFINING ADVICE AND CONSENT

The brief statement in article II of the Constitution, which requires the Senate's advice and consent to the President's nomination, provides no guidance on how to fulfill that duty. As noted above, senators differ on the intent of the framers of the Constitution as to the role which the Senate should play in fulfilling this duty. As a consequence, the Senate

66. L. BAUM, *THE SUPREME COURT* 33 (2nd ed. 1985).

67. 133 CONG. REC. S14,825 (daily ed. Oct. 22, 1987).

68. Business reply letter from ACLU Foundation (Aug. 31, 1987). It was suggested during Senate floor debate that the ACLU had more to gain from the rejection of the Bork nomination than other public interest groups. Senator Simpson cited an article in *Legal Times* for the proposition that the ACLU stood to gain from an eight member Supreme Court because it had six cases pending before the court, five of which it had won in the lower court. Any four to four tie vote on the Supreme Court would affirm the lower court decision. 133 CONG. REC. S14,847 (daily ed. Oct. 22, 1987). One of the six ACLU cases pending before the court was *Abourezk v. Reagan*, 785 F.2d 1043 (D.C. Cir. 1986). Subsequent to Senator Simpson's comments, the Supreme Court affirmed the judgment below in the *Abourezk v. Reagan* case by an equally divided court, thus fulfilling the prophecy as to that case. *Reagan v. Abourezk*, 108 S.Ct. 252 (1987).

struggles anew with each Supreme Court nomination regarding how to adequately provide advice and consent. Inevitably, there is conflict on what is required. One might think that, after 200 years of Senate business, a more defined and predictable approach would have been developed, especially with respect to advising and consenting on the nomination of a Supreme Court Justice. But this has not been the case.

The Senate is caught in an institutional dilemma. If the Senate is too assertive in its review of a Presidential nominee, then criticism will inevitably follow that it is an unjust interference with the right of the President to nominate those whom the President believes most appropriate for the position. If, on the other hand, the Senate acts as a mere "rubber stamp" of the Presidential nominee, then it is criticized for failing to perform its constitutional duty of responsible advice and consent.⁶⁹ The rubber stamp objection was conspicuously absent during the exhaustive review of the Bork nomination. However, this particular nomination was not the norm for Supreme Court candidates. Associate Justice Byron White was confirmed by the Senate twelve days after the President announced his nomination.⁷⁰ Similarly, Associate Justice John Paul Stevens was confirmed by the Senate nineteen days after the announcement of the President of his nomination.⁷¹ Generally, the more controversial nominations have taken longer, including ninety-seven days for the Senate rejection of the Abe Fortas nomination to be Chief Justice in 1968 and ninety-five days for final rejection of the Haynsworth nomination.⁷²

The balance of this section of the article will set forth criteria of advice and consent according to various commentators. Senator Mitch McConnell of Kentucky addressed the Senate on several occasions to discuss his analysis of the appropriate criteria for advice and consent. These discussions were rooted in Senator McConnell's involvement as a legislative assistant to Kentucky Senator Marlow Cook during the Senate consideration of the nominations of Clement Haynsworth and G. Harold Carswell.⁷³ The McConnell criteria included: (1) judicial competence, (2) sufficient level of achievement or distinction, (3) judicial temperament, (4) no violation of existing standards of ethical conduct, and (5) a clean record in the judge's life off the bench.⁷⁴ Senator Biden, on the other hand, reviewed the history of the confirmation process and concluded that the Senate has preferred to ask three questions regarding Supreme Court nominations. Those questions, according to the Senator, include: (1) does the nominee have the intellectual capacity,

69. MACKENZIE, *supra* note 65, at 186-87. See also COMMON CAUSE, *THE SENATE RUBBER STAMP MACHINE: A COMMON CAUSE STUDY OF THE U.S. SENATE'S CONFIRMATION PROCESS IV* (1977).

70. CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS, No. 87-576 GOV, at 15 (July 7, 1987).

71. *Id.*

72. *Id.*

73. McConnell, *Haynsworth and Carswell: A New Senate Standard of Excellence*, 59 Ky. L.J. 7 (1970).

74. *Id.* at 33.

competence and judicial temperament required for a Supreme Court Justice; (2) is the nominee of good moral character and free of conflicts of interest; and (3) would the nominee faithfully uphold the Constitution.⁷⁵

The issue may be approached negatively by examining the primary reasons for refusal to consent to a nomination. Four primary reasons may be presented, including: (1) opposition to the nominating President rather than the nominee, (2) lack of qualifications, (3) senatorial courtesy (when a nominee runs afoul of one particular Senator and the rest of the Senate chooses to side with or not oppose the senator's position), and (4) ideological opposition to the candidate.⁷⁶

During the hearings, many opinions were expressed by senators and witnesses—both pro and con—about the nominee without any attempt to define an underlying principle or standard of advice and consent. In virtually every instance, the speaker would express views on the nomination, sometimes in highly complex legal terms, but with no relation to a standard or objective criteria. Consequently, every opinion was allowed. No witness was cut off because his or her statement was considered outside of the scope of proper inquiry. A notable exception to this wide ranging, open-ended discussion was the testimony of Professor Daniel Meador of the University of Virginia Law School. Professor Meador highlighted the problem when he said: “[i]t seems to me important that there be some kind of reasonably objective standards which can guide senators in a principled way, and that can apply whatever the political configurations may be.”⁷⁷ The standards set forth by Professor Meador included: (1) whether the nominee is supported by a “substantial array” of lawyers and legal scholars from across the geographic and legal spectrum of the United States; (2) whether the nominee's approach to legal doctrine and constitutional interpretation has substantial support among the legal community; and (3) when the nominee is currently a judge on a lower court, whether the judge has been a “lone wolf, an eccentric continual dissenter with very little company among his judicial colleagues.”⁷⁸ Professor Meador's criteria could be summarized by asking whether the nominee is a “mainstream” jurist in his current judicial position, among lawyers throughout the country and in his approach to interpreting the Constitution.

The criteria of the American Bar Association (“ABA”) and Judge Bork himself also deserve consideration. The ABA has played an increasingly important role in controversial nominations for the federal judiciary. While the ABA has no official capacity and the Senate Judiciary Committee does not have to entertain its opinions, the ABA is rou-

75. 133 CONG. REC. S10,527 (daily ed. July 23, 1987).

76. 133 CONG. REC. S10,881-82 (daily ed. July 30, 1987) (statement of Senator Orrin Hatch). For a similar analysis of the controversial nominations, see CONGRESSIONAL QUARTERLY'S GUIDE TO CONGRESS 101 (3rd ed. 1982).

77. *Hearings*, *supra* note 6, pt. 2 at 996.

78. *Hearings*, *supra* note 6, pt. 1 at 996-97 (Professor Meador believed that the judge was qualified pursuant to these criteria).

tinely allowed to testify regarding its review of the nominee's fitness for the bench. This is due largely to the ABA's pervasiveness and reputation in the legal community at large. According to the report submitted by the American Bar Association Standing Committee on Federal Judiciary regarding the Bork nomination, the committee based its investigation and evaluation of the judge upon his professional competence, judicial temperament and integrity.⁷⁹ The ABA committee did not review the judge's political or ideological philosophy except to the extent that it might bear on judicial temperament or integrity. Judge Bork expressed his criteria for advice and consent in response to a question from Senator Grassley of Iowa. Judge Bork reiterated the ABA standards and added that it was appropriate to review a nominee's judicial philosophy.⁸⁰ By including judicial philosophy, Bork did not intend for each senator to make a decision based upon specific issues which may be of importance to that particular senator. Rather, the Senate as a whole should assure itself that the philosophy of the candidate was a "respectable one," worthy of representation on the high court.⁸¹ Again, these criteria could be examined by asking whether the nominee's judicial philosophy is within the mainstream, worthy of representation on the Court.

If one accepts a definition of criteria for advice and consent as some combination of the ABA criteria plus a review of judicial philosophy—with an eye toward whether the nominee is within the mainstream of judicial thought—then the next logical step would be the application of these criteria to Robert Bork. As to the ABA criteria of competence, temperament and integrity, there was little disagreement among senators and witnesses that Judge Bork was more than adequately qualified. When the ABA issued its 1981 report on the nomination of Robert Bork to sit on the District of Columbia Circuit, it unanimously provided the Judiciary Committee with its highest approval rating, that of "exceptionally well qualified."⁸² Again, in 1987, after reviewing Judge Bork for this nomination, the ABA provided its highest approval rating available for a Supreme Court nominee,—“well qualified.”

Putting aside then the issues of competence, temperament and in-

79. Letter from Harold L. Tyler, Jr., to Senator Joseph R. Biden, Jr. (Sept. 21, 1987), reprinted in *Hearings*, *supra* note 6, pt. 1, at 954-60.

80. *Hearings*, *supra* note 6, pt. 1 at 235.

81. *Id.*

82. Letter from Harold R. Tyler, Jr., *supra* note 79, at 6. More than a little controversy arose out the ABA report on the nomination. This was the first time the ABA had a less than unanimous vote for the "well qualified" evaluation. 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." *Hearings*, *supra* note 6, pt. 1, at 902. This was deemed highly significant by the opponents because no Supreme Court nominee had ever received a single "not qualified" evaluation from the ABA committee and then gone on to confirmation by the Senate. *Report*, *supra* note 25 at 4. The proponents of the nominee charged the ABA committee with violating its own rules prohibiting consideration of political or ideological philosophy. These Senators maintained that there was no justification for the ABA committee's departure from its unanimous 1981 ratings, especially following Bork's five and one-half years of service on the circuit court of appeals bench. *Report*, *supra* note 25 at 221-22.

tegrity, the inquiry is narrowed. Was Judge Bork in the mainstream of judicial philosophy?

As with every other issue involved in this nomination, senators disagreed on whether Judge Bork was truly a "mainstream" jurist. There was even disagreement on what was meant by this often used phrase. These differences are clearly reflected in the vastly divergent majority and minority views printed in the committee report.⁸³ There were, however, statements by witnesses and others interested in the nomination which seemed both credible and compelling in their praise of Judge Bork as a mainstream jurist—albeit on the conservative side of that stream. Of particular interest to Bork supporters were statements from former and sitting justices on the Court. In today's judicial climate, current and former justices refrain from speaking on such matters: when they do speak, it is newsworthy. But, this current reluctance to talk has not always been the case. Sitting members of the Supreme Court have played active roles in nominations for many years. In this century, as of 1985, justices have sought to influence Supreme Court nominations on sixty-five separate occasions.⁸⁴

Following the July 1 announcement by the President of his nominee, Justice John Paul Stevens went on public record that he regarded Judge Bork as "very well qualified" and "one who will be a very welcome addition to the Court."⁸⁵ Former Chief Justice Burger testified before the Judiciary Committee in favor of the nomination. In response to the suggestion that Judge Bork was not in the mainstream of jurists, Chief Justice Burger said: "[i]t would astonish me to think that he is an extremist any more than I am an extremist."⁸⁶ Chief Justice Burger added that in the last fifty years he had not seen a Supreme Court nominee whom he thought better qualified than Robert Bork.⁸⁷ Senator Thurmond further emphasized the point by noting that, while on the court of appeals bench, Judge Bork had written over 100 majority opinions and had joined the majority in almost 300 additional cases, bringing his total of majority opinions, authored or joined, to over 400. None of those opinions had been reversed by the Supreme Court.⁸⁸ Of course, only a small percentage of those decisions were appealed to the Supreme Court. Chief Justice Burger further commented that the denial of certiorari in one or two cases meant little but the fact that none of over 400 cases had been overturned by the Supreme Court had "real significance."⁸⁹

In determining whether Bork meets the criteria for a mainstream

83. *Report, supra* note 25.

84. BAUM, *supra* note 66, at 35.

85. Address by Justice John Paul Stevens, Eighth Circuit Judicial Conference (July, 1987), *reprinted in* Legal Times, Aug. 10, 1987, at 15.

86. *Hearings, supra* note 6, pt. 2, at 701.

87. *Hearings, supra* note 6, pt. 2, at 707.

88. *Hearings, supra* note 6, pt. 2, at 700-01.

89. *Hearings, supra* note 6, pt. 2, at 700. Since the confirmation hearings, Judge Bork has been reversed in part by the Supreme Court. *See* *Boos v. Barry*, 108 S.Ct. 1157 (1988), *rev'g* *Finzer v. Barry*, 798 F.2d 1450 (D.C. Cir. 1986).

jurist, it is useful to compare his tenure with that of Justice Scalia who served simultaneously with Judge Bork on the District of Columbia Circuit Court of Appeals. One might confidently assert that Justice Scalia was within the mainstream on that court since his Supreme Court nomination was confirmed unanimously by the Senate. Bork and Scalia shared four years of service on the District of Columbia Circuit. They sat together in eighty-six cases. In eight-four of those eighty-six cases, or in ninety-eight percent of the time, they agreed on the decision.⁹⁰ Yet, Bork was labeled an extremist, while Scalia must have been a mainstream jurist, worthy of unanimous Senate support. This cannot be reconciled. Similarly, Justice Powell was praised, following his retirement, for being a moderate on the Court who was often a swing vote on key decisions.⁹¹ While on the bench, Justice Powell had ten occasions to review the opinions of Judge Bork on appeal. In nine of those ten cases, Justice Powell agreed with the position taken by Judge Bork.⁹² Consequently, if Justice Powell was a moderate, well within the mainstream of the Court, and he agreed with Judge Bork's opinions in nine out of ten instances, it logically follows that Judge Bork, as to those cases, was within an acceptable range of Supreme Court jurisprudence. It has been argued that these statistics are essentially meaningless because Judge Bork was confined, as a lower court judge, to follow Supreme Court precedents and that many of his cases on the circuit court arose out of non-ideological cases which are rarely suited to Supreme Court review. This does not, however, explain the favorable comparison to Justice Scalia's tenure on the court of appeals.

In addition to the comments of and comparisons to former and current Supreme Court Justices, seven former attorneys general testified during the hearings. Six of the seven favored the nomination.⁹³ None of these impressive witnesses or statistics were adequate, in the final analysis, to sway a sufficient number of senators in Bork's favor. Possible reasons for this reality are discussed in the next section.

VI. FOR THE OPPONENTS, TOO MUCH OF A BAD THING

Judge Bork was well qualified for his nomination based upon the ABA criteria. Additionally, as shown above, there is some reasonable basis to conclude that Judge Bork was within the mainstream of judicial philosophy represented on the Supreme Court—a philosophy that had been confirmed the previous year by unanimous Senate approval of Justice Scalia. Apparently, the opponents to the nomination believed that

90. *Report, supra* note 25, at 236.

91. *See, e.g., supra* note 16.

92. *Hearings, supra* note 6, pt. 1, at 31 (opening statement of Senator Simpson).

93. *Report, supra* note 25, at 101, 109, 112 Nicholas Katzenbach testified against Judge Bork: Edward Levi, William Rogers, William French Smith, Elliott Richardson, Griffin Bell, and Herbert Brownell testified in favor of the nomination. Mr. Brownell was Attorney General under president Eisenhower and testified that he had seen no candidate for the Supreme Court with better or more extensive experience. *Hearings, supra* note 6, pt. 3, at 2,347.

the addition of Judge Bork to the nine-member Court would have created an intolerable degree of acceptance for the philosophy of interpretivism. Judge Bork's definition of interpretivism can be summarized by his statement that this philosophy gives the Constitution "a full and fair interpretation, but where the Constitution is silent, leaves a policy struggle to the Congress, the President, the legislature and executives of the fifty states, and to the American people."⁹⁴ Judge Bork exemplified this philosophy while on the court of appeals bench in his concurring opinion in *Ollman v. Evans*.⁹⁵ He wrote:

Judges given stewardship of a constitutional provision—such as the first amendment—whose core is known but whose outer reach and contours are ill-defined, face the never-ending task of discerning the meaning of the provision from one case to the next. . . . In a case like this, it is a task of the judge in this generation to discern how the framers' values, defined in the context of the world they knew, apply to the world we know.⁹⁶

Perhaps if Rehnquist had not been elevated to Chief Justice, or if O'Connor and Scalia had not been added as Associate Justices, the concern of the opponents would not have reached the heights witnessed during the Bork proceedings. Should the Senate consider the overall tenor of the Supreme Court, assuming confirmation, when deciding how to vote on an individual nominee? If the answer is yes, then in this instance, was the majority of the Senate well founded in determining that too much judicial restraint, or "interpretivism" would be a bad thing? A review of our constitutional system of separation of powers, Supreme Court decisions, and alternative judicial philosophies suggests that it was not. As noted in the minority report of the Judiciary Committee, both James Madison and Thomas Jefferson expressed concerns about a non-interpretivist approach to judicial reasoning.⁹⁷ The minority views quote Jefferson as stating, "I had rather ask an enlargement of power from the nation, where it is found necessary, than to assume it by a [judicial] construction which would make our powers boundless."⁹⁸ The proper role of the judiciary within the newly formed constitutional system of government in the United States was discussed by Alexander Hamilton in the revered series, *The Federalist*. Hamilton's *The Federalist No. 78* was published on May 28, 1788, approximately eight months following adoption of the Constitution and less than one month prior to its ratification. He wrote:

It can be of no weight to say, that the courts on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature The court must de-

94. *Hearings*, *supra* note 6, pt. 1 at 77.

95. 750 F.2d 970 (D.C. Cir. 1984).

96. *Id.* at 995.

97. *Report*, *supra* note 25, at 235 (quoting letter from T. Jefferson to Wilson C. Nicholas (Sept. 7, 1803)), *Collected in* 10 THE WORKS OF THOMAS JEFFERSON 10-11 (P. FORD ed. 1904-05) (as quoted in G. HASKINS & H. JOHNSON, HISTORY OF THE SUPREME COURT OF THE UNITED STATES 148 (1981) (Oliver Wendell Holmes Devise)).

98. *Id.*

clare the sense of the law; and if they should be disposed to exercise *will* instead of *judgment*, the consequence would equally be the substitution of their pleasure to that of the legislative body.⁹⁹

Hamilton's statements in *The Federalist No. 78* have been repeated often by prominent jurists. Judge Bork, during the nomination, was merely the most recent and more visible proponent of that philosophy, labeled as "interpretivism." Interpretivism may be further defined as a principle of judging which relies on the express statements of the Constitution or those principles or values which can be fairly shown to be intended to be included within the core of the constitutional provision under review.¹⁰⁰

It is important to note that interpretivism does not require a timid approach to judging or protecting constitutionally guaranteed rights. As Judge Bork stated in the *Ollman* decision, a judge who fails to detect threats to established constitutional principles fails in his duty by providing a "crabbed interpretation that robs a provision of its full, fair and reasonable meaning."¹⁰¹ Judge Bork affirmed his opinion in *Ollman* during the hearings by noting that if the Constitution mandates social change then the Court should be active in bringing out that social change. He cited the case of *Brown v. Board of Education* as a perfect example of that duty.¹⁰² Thus, interpretivism is not synonymous with judicial restraint and may require judicial activism if mandated by the Constitution. Judge Bork would label noninterpretivist judicial philosophy as "judicial imperialism."¹⁰³

Rarely during the Judiciary Committee hearings did the questioning of Judge Bork clarify this basic conflict between interpretivism and noninterpretivism. The best explanation of these opposing philosophies came about during an exchange between very conservative Senator Gordon Humphrey of New Hampshire and very liberal former Congresswoman Barbara Jordan of Texas. Although unable to agree on anything else, these two did mutually conclude that the issue was whether the Supreme Court should act, through the extension of rights and protections, when the legislative and executive branches refused to do so. Ms. Jordan thought it should—viewing the Supreme Court as "the last lifeline" when the legislature and the executive branch failed to provide a sufficient remedy for some perceived injustice. Senator Humphrey reached the opposite result—that where the Constitution and the intent of the framers did not provide a remedy for an alleged harm, then the aggrieved person should appeal to the legislature as the best way to fashion a remedy through laws, in concurrence with the will

99. THE FEDERALIST No. 78, at 526 (A. Hamilton) (J. Cooke ed. 1961).

100. *Hearings, supra* note 6, pt. 1, at 75-77 (statement of Judge Bork). *Accord*, Wallace, *Interpreting the Constitution: The Case for Judicial Restraint*, 71 JUDICATURE 81, 82 (1987).

101. *Ollman v. Evans*, 750 F.2d 970, 996 (D.C. Cir. 1984) (Bork, J., concurring).

102. *Hearings, supra* note 6, pt. 1, at 237.

103. *Hearings, supra* note 6, at 427.

of the people as expressed through their elected representatives.¹⁰⁴

Senator Biden restated the philosophical dichotomy differently. In opposition to the interpretivist philosophy of Alexander Hamilton, Judge Bork, and others, Senator Biden stated early and often that the rights provided to Americans flow not from the Constitution, not from the Bill of Rights, and not by statute but rather because we "exist."¹⁰⁵ Senator Biden expressed this position in his opening statement on the first day of the hearings. He continued this theme to the end, including it in his final floor statement moments before the rollcall vote on the nomination.¹⁰⁶ It is the antithesis of interpretivism. When Biden stated that he has certain rights just because he exists and that those rights have "nothing to do with whether the state or the Constitution acknowledges I have those rights,"¹⁰⁷ he was accurate in one sense, because he was speaking of unalienable rights. Of course, the certain unalienable rights with which we as Americans believe we are endowed arise not from the Constitution, but from the Declaration of Independence. Therefore, Senator Biden apparently derived much of his constitutional philosophy not from the text of the Constitution, but rather from the Declaration of Independence.

Of concern to Judge Bork and others who have adopted the interpretivist approach to constitutional construction is that Senator Biden's philosophy is bounded only by what Senator Biden subjectively believes his unalienable rights to be, in addition to those enumerated in the Declaration of Independence. The problem with this approach is obvious. There is no objective standard upon which to judge what unenumerated, unalienable rights we have. That judgment requires the expression of each individual and is perfectly suited to the legislative process and the ballot box. It is, however, inherently unworkable in a judicial context. Each party coming before the court would have to surmise in advance what the particular judge or justice believed were their unalienable rights. Without a written constitution in which to anchor these rights, then the best litigants could hope for, whether in police court or before the Supreme Court, would be the judicial equivalent to the benevolent dictator. This is particularly true in Supreme Court cases where the justices have a life tenure. Except for the most outrageous conduct, the justices are not subject to impeachment and are, therefore, empowered with the ability to dictate interpretations of the law from which there is no judicial appeal. Whether the mandates handed down by the Court are considered "benevolent" would depend on whether one put the question to the prevailing or the losing party. There would surely be no predictability. The same point was made by Alexander Hamilton almost 200 years ago when he stated: "[c]onsiderate men of

104. *Hearings, supra* note 6, pt. 1, at 794-98.

105. *Hearings, supra* note 6, pt. 1, at 68; *see also Hearings, supra* note 6, pt. 1, at 729 and pt. 3, at 1632 for additional statements by Senator Biden which set forth his theory of rights.

106. 133 CONG. REC. S15,008-09 (daily ed. Oct. 23, 1987).

107. *Hearings, supra* note 6, pt. 1, at 729.

every description ought to prize whatever will tend to beget or fortify [integrity and moderation of the judiciary] . . . in the courts; as no man can be sure that he may not be tomorrow the victim of a spirit of injustice, by which he may be a gainer today."¹⁰⁸

Senator Biden did not rely solely on the Declaration of Independence for the source of his unalienable rights and constitutional theory. He and others looked to the ninth amendment to the Constitution which simply states, "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."¹⁰⁹ Judge Bork's explanation of the ninth amendment did not satisfy his opponents. He noted that no Supreme Court had relied upon the ninth amendment except for the *Griswold v. Connecticut*¹¹⁰ concurring opinion by Justice Goldberg. The ninth amendment, according to Judge Bork, seemed most plausibly intended to establish that the federal Bill of Rights would not be construed to deny rights retained by the citizens in their state constitutions.¹¹¹ In his dissent in the *Griswold* case, Justice Hugo Black took exception to Justice Goldberg's use of the ninth amendment as authority to strike down state legislation which violated the "collective conscience" of the people. Black rejected the position that the ninth amendment provided open-ended powers to the Supreme Court to invalidate legislation found to be contrary to the morality of the Court existing at the time of judgment.¹¹²

As stated above, the real danger with an expansive, noninterpretivist approach to constitute theory is that "no man can be sure that he may not be tomorrow the victim of a spirit of injustice, by which he may be a gainer today."¹¹³ In more concrete terms, there is no assurance that a decision by a Supreme Court which has cut its anchor line to the Constitution will, with any predictability, benefit the republic. As Bork noted during the hearings, the *Dred Scott*¹¹⁴ decision was perhaps the first time the doctrine of substantive due process had been used by the Supreme Court. Chief Justice Taney used the due process clause to produce what is now considered a disastrous decision and, according to Bork, helped lead to the Civil War.¹¹⁵ Similarly, substantive due process was used by the Supreme Court to nullify a series of economic and social legislation. Perhaps the best known decision was *Lochner v. New York*¹¹⁶ where the court invalidated New York laws limiting the number of hours that a baker could work per week.¹¹⁷ There are indications that

108. THE FEDERALIST No. 78, *supra* note 99, at 528.

109. U.S. CONST. amend. ix.

110. *Griswold v. Connecticut*, 381 U.S. 479, 518-19 (1965).

111. *Hearings, supra* note 6, pt. 1, at 103.

112. *Griswold*, 381 U.S. at 518-19.

113. THE FEDERALIST No. 78, *supra* note 99.

114. *Dred Scott*, 60 U.S. (19 How.) 393 (1857).

115. *Hearings, supra* note 6, pt. 1, at 291.

116. 198 U.S. 45 (1905).

117. *Report, supra* note 25, at 230 (citing *Coppage v. Kansas*, 236 U.S. 1 (1915) and *Adkins v. Children's Hospital*, 261 U.S. 525 (1923) as additional cases exemplifying the use of substantive due process to strike down progressive social legislation).

the Supreme Court has started to retreat from the generalized right of privacy set forth in the *Griswold* and *Roe v. Wade*¹¹⁸ cases, thus affirming a need to base decisions in a neutral reading of the Constitution without substituting the personal moral values of the justices.¹¹⁹ In the *Bowers v. Hardwick*¹²⁰ decision, Justice White wrote for the majority stating: "[t]he Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution."¹²¹ This is no more than an acceptance of the principles laid down in *Marbury v. Madison*¹²² and its holding that, "[t]he government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."¹²³ Whenever the Supreme Court departs from the laws, as embodied by the Constitution and the statutes, and supplants the individual morals of the justices to furnish a remedy because that justice merely "exists," then the laws no longer form the basis for the remedy and the judiciary has become a government of men.

VII. CONCLUSIONS ON THE PROCESS AND QUESTIONS FOR THE FUTURE

Because there is no established standard by which to judge the Senate's role in providing advice and consent on the Bork nomination, it is impossible to state definitively whether the Senate properly fulfilled that role. It may be useful to reflect on what has been added to or detracted from the process, whether that is good or bad, and what—if any—effect it might have on future Supreme Court nominations. As previously noted, Judge Bork agreed that inquiry into judicial philosophy was appropriate. 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 times, depending upon the individual judge or judicial nominee under review. This article has asserted that Judge Bork's judicial philosophy was well within the parameters of acceptable constitutional theory, worthy of representation on the Supreme Court. This nomination failed, however, because Judge Bork's judicial philosophy, *as defined by his opponents*, did not have sufficient popular appeal. In other words, it did not adequately reflect the political philosophy of the senators who voted against it. In this instance, political philosophy might be defined as judicial philosophy with mass appeal.

Is it improper for a senator to vote against a Supreme Court nominee whose judicial philosophy, although within the mainstream of legal

118. *Roe v. Wade*, 410 U.S. 113 (1973).

119. See *Bowers v. Hardwick*, 106 S. Ct. 2841 (1986) (ruling that there is no constitutional right of privacy to engage in homosexual conduct).

120. 478 U.S. 186 (1986).

121. *Id.* at 2846.

122. 5 U.S. (1 Cranch) 137 (1803).

123. *Id.* at 163.

thought, happens to be, for that senator, on the opposite end of the philosophical spectrum? Asked differently, should a Supreme Court nominee be confirmed if he or she is shown to have proper integrity, judicial temperament, professional competence, and ideological support in the Constitution, even though his or her ideology is not compatible with the political ideology of the majority of the senators? There are compelling policy reasons to answer those questions in the affirmative. Those reasons include: (1) the strong prospect of retribution when "the shoe is on the other foot," (when the opponents of the nomination no longer have the votes to support their ideology and they are faced with confirmation of a nominee based on a new majority ideology that was previously in the minority); (2) even though a nominee may seem to hold a particular political ideology at the time of the vote on confirmation, that nominee is often unpredictable once he or she is confirmed, with respect to decisions rendered from the bench on specific cases; (3) a senator's own ideology may change on an issue in the future; (4) one justice cannot, without the concurrence of four other justices, form a majority and thus any nominee has a limited capacity to cause "harm" based on ideological grounds.¹²⁴

Similar concerns were expressed by witnesses during the hearings regarding misdirected emphasis on the political acceptability of the nominee. Former Attorney General Griffin Bell commented on the various public opinion polls which were conducted during the confirmation hearings. Attorney General Bell noted the increasing proclivity of Congress in recent times to make decisions based upon polls or popular referenda. He noted the Committee's obligation to the country to use its best judgment, notwithstanding what the polls might say.¹²⁵ Former Attorney General Herbert Brownell voiced similar concerns. Requiring a Supreme Court nominee to conform to the Senate's prevailing political ideology, he believed, would send the clear signal that the Court should decide constitutional issues not on judicial and legal bases but rather upon political bases.¹²⁶ It is not likely that a senator would openly argue that the Supreme Court should reflect the political whims of a country—even though that may form the basis of a confirmation vote. Of course, life tenure helps forestall a politicized judiciary. Moreover, the Congress and the Presidency were established specifically to reflect the political will of the country. The judiciary must check and balance the sometimes tyrannical power of the majority. That majority is represented by the political process but has, in certain cases, no right under our Constitution and statutes to suppress the rights of the minority.¹²⁷

124. 133 CONG. REC. S14,817 (daily ed. Oct. 22, 1987) (statement of Senator McConnell, citing a 1983 law review article by Richard D. Friedman printed in the *Cardozo Law Review*).

125. *Hearings*, *supra* note 6, pt. 3, at 1368.

126. *Hearings*, *supra* note 6, at 2,345.

127. *See, e.g.*, 133 CONG. REC. S14,718 (daily ed. Oct. 21, 1987) (statement of Senator Armstrong).

Separating politics from judicial nominations is a difficult task for senators and presidents. If one is to require of senators that they put aside political philosophy when reviewing the judicial philosophy of a Supreme Court nominee, then perhaps the same expectation should be placed upon the President when he or she selects a nominee. By October 9, 1987, it was clear that the opponents to the nomination had a sufficient number of 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 and thirty-six had announced support.¹²⁸ On that same day, Judge Bork issued a statement. He questioned the use of national political campaign tactics during the confirmation process because of the impact on the impartiality of the judiciary if it is required to comply with national political ideals, noting 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.¹²⁹ President Reagan quoted Judge Bork's concerns with absolute approval during a televised address delivered just five days later. Yet, in that same address, President Reagan, again condemning the impact of political campaign tactics on his nomination, 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."¹³⁰ In effect, President Reagan was asking Americans to put political pressure on their senators with this message: don't bow to political pressure when voting on the Bork nomination.

In addition to Judge Bork's October ninth comments regarding the chilling effect on judicial deliberations, it is worth noting that this nomination process may have a chilling effect on those who aspire to be future Supreme Court nominees. Judge Bork was questioned repeatedly regarding articles which he had written over twenty years ago and which he had long since rebuked as to their conclusions. He was interrogated regarding informal speeches and statements made in the normal give and take of questions and answers. His judicial opinions, solicitor's briefs, professorial statements and writings were intently scrutinized for evidence of this or that premise, depending upon the conclusion a senator was trying to draw. Anyone who might desire a federal judiciary nomination may be dissuaded from expressing judicial philosophies or academic theories outside of the currently accepted norm.¹³¹ In any event, such individuals would do well to heed the advice of Judge Bork as expressed in the *Ollman*¹³² decision. Statements may be uttered

128. Cohodas and Willen, *Angry, Defiant Bork Insists on Senate Debate*, 45 CONG. Q. WEEKLY REP. 2,435, 2,436 (Oct. 10, 1987).

129. R. Bork, statement delivered at the White House (Oct. 9, 1987), reprinted in N.Y. Times, Oct. 10, 1987, at 13.

130. Presidential television address to the nation, 23 WEEKLY COMP. PRES. DOC. 1171 (Oct. 19, 1987).

131. The author has considered this during the preparation of this article, wondering whether some of the opinions herein may one day come back to haunt him.

132. 750 F.2d 970 (D.C. Cir. 1984).

about an individual which meet the legal standard for actual malice; namely, reckless disregard for the truth of the matter asserted. However, if those statements are made in the political arena, they may well be recognized as merely rhetorical hyperbole and must be endured by the individual.¹³³ To quote from the case: "[w]here politics and ideas about politics contend, there is a first amendment arena. The individual who deliberately enters that arena must expect that the debate will sometimes be rough and personal."¹³⁴ Such was the experience of Judge Bork. The fact that a judicial nominee is not a political person, as was the appellant in the *Ollman* case, will make little difference once the nomination enters the jurisdiction of the United States Senate. It is a political body. It should attempt to express non-political opinions regarding the non-political judicial branch but, in fact, it is rarely capable of doing so.

It is also disturbing that the Senate had effectively rejected the nomination of Robert Bork before it had officially proceeded to consideration of the nomination. The Senate entered executive session to consider the nomination on October 21, 1987. However, as mentioned previously, enough senators had declared their opposition to the confirmation by October ninth to assure its defeat, barring a change in a publicly announced position of at least three of the opposing senators. It is an essential and common occurrence within the Senate for members on both sides of an issue to take head counts in order to determine what legislative matters may be passed or rejected prior to an actual vote. This method of legislative fortune telling was applied to the Bork nomination. As a consequence, the floor debate on the nomination had no effect other than to allow opponents and proponents to publicly air their positions. There was no practical opportunity for senators to persuade or be persuaded, pro or con, by the exchange of ideas on the Senate floor. By October ninth, two weeks before the final vote, only eleven senators remained uncommitted.¹³⁵ Senator Arlen Specter of Pennsylvania, the only Republican in the Judiciary Committee voting against the nominee, made the same point. He noted the Senate's self-aggrandizing appellation of the "greatest deliberative body in the world" and how that title had a rather hollow ring when the deliberations had no practical effect on the confirmation process. As Senator Specter said, departure from open floor debate on the nomination raised questions about the relevance and significance of the debate and the fulfillment of the Senate's role in providing advice and consent.¹³⁶

The Senate's handling of the Bork nomination raises some very serious concerns. These concerns are not specific to Judge Bork, himself, and his brand of judicial philosophy. After all, judges of his ilk have been confirmed for the federal judiciary previously and will no doubt be

133. *Id.* at 1005.

134. *Id.* at 1002.

135. Cohodas and Willen, *supra* note 128, at 2436.

136. 133 CONG. REC. S14,668 (daily ed. Oct. 21, 1987).

represented by future nominees as well. There should be great concern, however, when the Senate is incapable of setting aside its political considerations in reviewing the judicial qualifications of a nominee. There should be concern when that, in turn, results in distortion of the nominee's judicial philosophy in order to make him or her appear to be what he or she is not, thereby "justifying" the opposition. There should be concern when the testimony of a nominee is disregarded in order to conveniently focus upon previous statements—perhaps decades old—which the nominee no longer holds. There should be concern that the Senate has no objective criteria which it can apply to one of its most important constitutional duties. There should be concern when the majority of the Senate believes that legislative power should be surrendered to the judiciary with the hope that the judiciary will benevolently exercise those powers. There should be concern when the independence of the judiciary must be compromised in order to satisfy the political whims of the Congress or the President. There should be concern when professors, lawyers, judges, or individuals who aspire to the judiciary are chilled from exploring every legal theory, even though it may be considered novel or extreme, because they are concerned about the political ramifications on their careers. And there should be concern when the Senate is unable to engage in meaningful debate over the nomination of the President because the outcome has been prejudged sufficiently to either confirm or reject the nominee. Many of these concerns fade when the President, the majority of senators, and the nominee are in accord on basic political beliefs; but when that is not the case, such as during the Bork nomination, then the foibles and imperfections of the process are exposed. This exposure provides the Senate with the opportunity to plot a new course, take a new tact. The alternative is to miss the moment and continue on a course which will inevitably deny this country of qualified and powerful voices on the Supreme Court bench.

