APPENDIX V

THE BORK CONFIRMATION BATTLE: A CASE STUDY*

PARAMETERS OF THE CONTROVERSY

The swirling controversy surrounding the nomination of Judge Robert Heron Bork to the U.S. Supreme Court has emanations throughout the landscape of American politics. The Bork controversy indicates clearly that the nomination and confirmation process is sensitive to both institutional and societal pressures, e.g., from the Senate, the president, organized interests, and public opinion. The nomination commanded attention and engendered controversy, and not without reason. Because retiring Supreme Court Justice Lewis Powell had been a “swing vote,” especially in abortion, privacy, church-state, and affirmative action decisions, the incoming justice stood to tip the balance of a closely divided court and play a major role in shaping the general direction of the Court for years to come.

This potential for redirection spurred the concerns of Blacks and numerous civil rights groups. They feared that the “conservative” Judge Bork would move the Court in directions harmful to their interests. And their concern was well founded, given Judge Bork’s overall record, including his prolific scholarly writings as well as his decisional stances as a member of the federal appellate bench.

The concern of Blacks and civil rights interests, however, went much deeper. These groups remain acutely aware of the pivotal role that the Supreme Court can and has played-through the landmark *Brown v. Board of Education* and other decisions—in the fight to overcome racial segregation and discrimination. Newspaper columnist Carl Rowan stated succinctly why many Blacks were opposed to the Bork nomination: “The overriding reality is that when this nation was caught up in racial conflict a quarter of a century ago, whenever the constitution chips were on the line, Robert Bork came down on the wrong side.” Thus for Blacks and their allies, President Reagan’s nomination of Judge Bork was no less than a call to arms, a call that in the end rallied sufficient forces to keep Judge Bork off the Supreme Court.

SEEDS OF CONFLICT

On June 26, 1987, Justice Lewis Powell announced the end to his sixteen-year tenure on the U.S. Supreme Court. Associate Justice Powell was a centrist; he had been the swing vote in several cases of special significance to black Americans. Five days after Justice Powell’s resignation, on July 1, President Reagan nominated Court of Appeals Judge Robert H. Bork.

At first glance, giving deference to objective criteria, sixty-year old Judge Bork appeared more than well qualified. Receiving his J.D. from the University of Chicago in 1953, Bork had two successful private practices, Chicago, 1955-1962, and


But President Reagan had chosen Judge Bork for reasons beyond objective qualifications. Even a cursory review starkly reveals the similarities in ideology between Judge Bork and President Reagan. The Reagan agenda included a constitutional amendment to ban abortion; restoration of voluntary prayer in public school; an end to the use of mandatory busing for racial balancing in schools; abandonment of quotas and ratios as a remedy for racial injustice; the relaxation of certain judicial rules that strengthen the rights of the accused; and the overall rechanneling of power from the federal government to state and local governments.

Similarly, Judge Bork had been assessed as committed to a “strict construction” of the Constitution, arguing that “The Constitution can be law only if it is applied as intended . . . only a philosophy of original intention is legitimate for judges.” Judge Bork was known to generally favor school prayer, the death penalty, and to assume a most permissive position on antitrust and mergers. Moreover, Judge Bork had argued against decisions restricting racial covenants on real estate and had suggested that the Court cannot give substantive meaning to an idea as broad as liberty, and that the Court should not enforce that concept in the Fourteenth Amendment. For example, in testimony before a Senate Judiciary subcommittee in 1981, Judge Bork criticized the Supreme Court’s 1973 Roe v. Wade abortion decision as “an unconstitutional decision, a serious and wholly unjustifiable usurpation of state legislative authority.” In another example, in 1963-the same year as Martin Luther King’s “I Have a Dream Speech”-Bork wrote an article opposing passage of provisions of the 1964 Civil Rights Act that prohibited discrimination in public accommodations.

And writing in 1971, Judge Bork chastised the Warren Court for what he termed “judicial activism.” Bork wrote:

We have also damaged the law, and created disrespect for it, through our failure to observe the distinction, essential to democracy, between judges and legislators. The era of the Warren Court was, in my opinion, deeply harmful to the prestige of law.

If that court did inspire the young, it taught them to confuse the desirability of ends with the legitimacy of means, perhaps to confuse the idea of law with the fact of power.

On balance, the strong confluence in ideological positions between President Reagan and nominee Judge Bork served to enhance-if not promote-his initial selection by the president. But these ideologies also ignited and kindled bitter opposition as well as staunch support for the nominee.

**THE CALL TO ARMS**

Immediately following President Reagan’s announcement, several civil rights leaders condemned the nomination. For example, within an hour of the announcement, Ralph Neas, executive director of the Leadership Conference on Civil Rights (LCCR), and Benjamin L. Hooks, executive director of the NAACP and chairman of the LCCR said that Bork was “an ultraconservative” who would “dramatically alter the balance of the Supreme Court, jeopardizing the civil rights achievements of the past 30 years. Well-established law could overnight be substantially eroded or overturned.”

But it was Senator Edward Kennedy (D-MA) who led the charge against Judge Bork. Kennedy’s opposition to Judge Bork on the Senate floor, less than an hour after the nomination, was immediate and unequivocal. The senator said: “Bork stands for an extremist view of the Constitution and a role of the Supreme Court that would have placed him outside the mainstream of American constitutional jurisprudence in the 1980s, let alone the 1990s.” Making his position even more direct, Senator Kennedy bluntly charged that “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, school children could not be taught about evolution . . . and the doors of the federal courts would be shut on the fingers of millions.”

Senate Judiciary Committee Chairman Joseph Biden, Jr. (D-DE) also responded on the evening of the nomination: “I continue to have grave doubts about the nomination and expect it to cause a difficult and potentially contentious struggle in the Senate.”

In contrast to the sharp criticisms of President Reagan’s announcement, Judge Bork’s supporters hailed the nomination, saying that it signaled a move away from recent laws based on judicial overreaching.
and on the improper stretching of the Constitution to accommodate “modern times and liberal interests.” For example, Representative Henry Hyde (R-IL)—an outspoken opponent of abortion viewed the nomination as a “chance to change the direction of the Court.” Republican Senator Paul Trible of Virginia called Bork “an extraordinary choice” and Senator Orrin Hatch (R-UT) said Bork was “one of the brightest legal minds . . . one of the quintessential judges in this country.” Senator Hatch further warned that if the Democrats tried to “play politics” with the Bork nomination, their strategy would be unsuccessful both in the Senate and with the public.

**PREPARING FOR BATTLE: THE INTERIM DAYS**

Seven days after the nomination (July 8), Democrats on the Senate Judiciary Committee caucused and agreed on September 15 as a starting date for the committee hearings on Judge Bork. This delay in the start-up date did not sit well with Republicans. Indeed, Senate Minority Leader Robert Dole (R-KS) suggested that Republicans were “willing to work through the August recess to help expedite the confirmation process.” Nonetheless, and despite Republican opposition, Committee Chairman Joseph Biden, strategically scheduled the hearings to begin eleven weeks after the initial nomination and refused to set a closing date. After the caucus, Chairmen Biden told reporters, “Quite frankly, it goes well beyond Judge Bork. It’s a question of whether the Reagan-Meese agenda is going to be accomplished through the Court and whether Judge Bork has been picked to be the vehicle to accomplish that.”

The refusal of Senator Biden and other Democrats to expedite the hearings signaled the role of party, committee rules, and committee chairmanship in the nomination process by affording the Democrats time to mobilize interests, raise needed lobbying finances, and strategically order the testimony of witnesses. And as was reported in the New York Times, “The strategic advantage that Democratic control of committee procedures gave to opponents was augmented by sometimes counterproductive efforts of Republican Senators to discredit witnesses. . . . For example, Orrin Hatch . . . , Gordon Humphrey . . . and others kept prominent and articulate anti-Bork witnesses on the stand for hours with sometimes fumbling cross-examinations.”

During the weeks before the Judiciary Committee hearings were to begin, the tone was intensified by frequent and scathing speeches on the floor of the Senate and numerous press releases by both sides. For example, Senator Biden made an hour-long speech in the Senate vowing to defeat the nomination on the ground that Judge Bork would shift the Court in too conservative a direction. In response, Senator Alan Simpson (R-WY) called Biden’s speech a “vapid rationalization,” stating, “If we are going to oppose the Bork nomination simply because Judge Bork has been nominated by a conservative Republican president, why don’t we just come out and say so.”

In addition, one of the nomination subplots adding fuel to the growing controversy and contentious atmosphere was the fact that several senators were also running for the presidency. These included Judiciary Committee Chairman Joseph Biden, who stridently opposed the nomination, and Senator Robert Dole, who was “making his support of Judge Bork a centerpiece of his Presidential bid.” Also running for the presidency was Judiciary Committee member Paul Simon (D-IL). Thus the confirmation hearings stood to shape not just the image of Judge Bork but also the images of the senators involved—senators whose performances could potentially reflect on their presidential campaigns.

**CHOOSING SIDES: SENATORS, INTEREST GROUPS, AND THE PUBLIC**

Chairman Biden’s refusal to expedite the Judiciary Committee hearings set the stage for one of the most controversial and contentious confirmation battles in modern history, and the sides were drawn quickly. At one point, Senate Minority Leader Robert Dole accused Committee Chairman Biden of “stalling the nomination.” Biden charged that “Dole was being his typical, partisan cheap-shot self.” Anticipating the conflict ahead, several members of the Senate expressed concern that the Senate had become too polarized too fast: “The sides have been drawn very quickly,” said John Breaux (D-LA), “They didn’t wait for the hearings.” This was the scenario presented to the pool of undecideds in the Senate. As still undecided Senator Max Baucus (D-MT) commented, “What it comes down to is whether Bork turns out to be too much of an extremist.”

Well before the fourteen-member Senate Judiciary Committee hearings began, all but three Committee members had taken their stance either formally or informally. Democrats believed likely to oppose Judge
Bork included Joseph Biden, Edward Kennedy, Howard Metzenbaum (OH), Patrick Leahy (VT), Paul Simon, and Robert Byrd (WV). Republicans believed likely to support Judge Bork included Strom Thurmond, Orrin Hatch, Charles Grassley (IA), and Gordon Humphrey (NH). Thus, the balance of power in the Judiciary Committee would be determined by the undecided “fence sitters”: conservative Democrats Dennis DeConcini (AZ) and Howell Heflin (AL), and moderate Republican Arlen Specter (PA). When questioned on the nomination, Senator Heflin told reporters a week prior to the start of the Committee hearings, “I’m basically a conservative with conservative propensities, but I don’t want a right-wing activist that would end up reversing the progress that has been made in many areas by the courts.” Another of the swing votes, Senator Specter, was a liberal Republican who had in the past voted against several of Reagan’s judicial nominees. As reported by Congressional Quarterly in 1986, Senator Specter had the lowest presidential support score of any Republican, 31 percent.

In addition to the few “undecided” on the committee, others in the Senate were not quite ready to take sides. They wanted to see how the hearings would develop and wanted more information before taking a position. Critical among these “undecided” were the southern Democrats and the moderate Republicans. For example, on the day of the nomination (July 1), Arkansas Democrat Dale Bumpers refused to take sides but commented “Let’s put it this way. He certainly wouldn’t have been my first choice.” Repeatedly, the special dilemma for moderate Republicans and southern Democrats was a topic of debate and analysis throughout the entire Bork controversy. As analyzed by one observer:

. . . conservatives are threatening to ‘primary’ wa- tering Republicans: Either you vote to confirm Bork, or we will run a conservative against you in the Republican primary. . . . Southern Democrats face the same problem in reverse. If they vote to confirm Bork, they get in trouble with the party. . . . Black voters can create problems for southern Democrats in the primaries. Even worse, northern Democrats can charge them with disloyalty to the party and take away cherished leadership positions in the Senate. On the other hand, if southern Democrats vote against Bork, they get in trouble in the general elections.

However, more than senators were choosing sides. One of the most striking aspects throughout the whole of the Bork conflict was the plethora of organized interests that were mobilized to participate in the confirmation battle. Only days after Reagan’s nomination, the Senate was under intense pressure from a “multimillion-dollar” lobbying effort from those who supported and those who opposed the nomination. As direct-mail consultant Roger Graves put it: “This is equivalent of Jim Watt wanting to flood the Grand Canyon.” For example, the People for the American Way launched a $2 million media campaign against Judge Bork while the National Conservative Political Action Committee spent well over $1 million in his defense.

Judge Bork’s supporters, led by President Reagan and the White House staff, assembled an impressive number of conservative and/or New Right organizations including the Moral Majority, American Conservative Union, American Life League, Concerned Women for America, the Free Congress Foundation, and Phyllis Schafly’s Eagle Forum, which were augmented by the assistance of such conservative legal analysts as Bruce Fein, a former Justice Department official, and Tom Korologos, a veteran Washington lobbyist hired by the White House to aid Judge Bork during the confirmation hearings.

But opposing the nomination were a number of civil rights and civil liberties groups, including the NAACP, the National Organization of Women, United Mine Workers, Common Cause, the Leadership Conference on Civil Rights, many local bar associations, and others. The American Civil Liberties Union called Judge Bork “unfit” to serve on the high bench and the AFL-CIO promised a “no-holds-barred battle.” Many of the opposition groups found their causes in direct contravention to Judge Bork’s views. For example, Planned Parenthood, Inc., disliked Bork’s views on the right to privacy and a right to abortion.

In another example, Common Cause, one of the nation’s largest “non-partisan” citizen’s lobbies—located for a tradition of not taking a position on presidential appointees for ideological reasons—publicly opposed Judge Bork the same day President Reagan announced the nomination, maintaining that its longstanding position on civil rights ran counter to Bork’s record.” And on August 31, the American Civil Liberties Union (ACLU) abandoned its fifty-one-year-old policy against involvement in Supreme Court confirmation battles to oppose Judge Bork’s nomination. ACLU President Norman Dorsen told a news conference that Judge Bork was “not a conservative” but a “radical” espousing so limited a vision
of the Court’s role in protecting individual rights that the Court would “atrophy” if his views prevailed.

Additionally, both sides had initiated grass-roots campaigns. For example, undecided Senator Terry Sanford (D-NC) had received 1,080 letters on Bork before the Senate Judiciary Committee had begun: 600 for and 480 opposed.

However, irrespective of senators, organized interests, and grass roots lobbying a majority public opinion had not yet formed against Judge Bork. As revealed in a New York Times/CBS poll, Judge Bork was still unknown to nearly two-thirds of the public; another 15 percent were undecided about Judge Bork and, for those with an opinion, support was equal to opposition. But this opinion was measured prior to the formal committee hearings.

THE FORMAL HEARINGS: THE JUDICIARY COMMITTEE TESTIMONY

Beginning on September 15, the Senate Judiciary Committee kept Judge Bork for an unprecedented five days and over thirty hours of testimony-no previous Supreme Court nominee had ever spent more than four days before the committee. And it did not take long to see how the battle lines would develop. Opening statements from individual senators illuminated at the very outset the overall combative nature of the hearings. For the most part, initial debate consisted of Judge Bork’s supporters and opponents clearly stating their positions.

The opening statements were sharp and direct. Chairman Biden set the tone and justification for weighing Judge Bork’s philosophy. Said Biden:

...a vote to confirm you requires, in my view, an endorsement of your basic philosophic views as they relate to the Constitution. And thus the Senate, in exercising its constitutional role of advice and consent, has not only the right, in my opinion, but the duty to weigh the philosophy of the nominee as it reaches its own independent decision.

Following Chairman Biden’s opening remarks was Senator Thurmond warning that “... Judge Bork’s opponents will try to raise questions about his character and integrity.” “Failing this,” said Senator Thurmond, “they will assert that he is disqualified by virtue of his philosophy, by labeling him an extremist or ‘outside the mainstream.’... Do we really want to enshrine, for all time, every decision the Court makes?... I believe the Court should be allowed to correct errors it has made.”

Senator Kennedy’s opening statement countered that “Robert Bork falls short of what Americans demand of a man or woman as a Justice on the Supreme Court. Time and again, in his public record over more than a quarter of a century, Robert Bork has shown that he is hostile to the rule of law and the role of the courts in protecting individual liberty.” Senator Kennedy charged, “... it is easy to conclude from... Mr. Bork’s published views that he believes women and blacks are second-class citizens under the Constitution. He believes that, in the relation to the executive, Members of Congress are second-class citizens, yet he is asking the Senate to confirm him.” “In Bork’s America,” said Kennedy, “there is no room in the inn for Blacks and no place in the Constitution for women, and in our America, there should be no seat on the Supreme Court for Robert Bork.” This latter comment set the tone of the “case” against Bork and that in time came to serve as a constant refrain and rallying point for those who opposed the nomination.

Following the initial statements by each member of the committee, Judge Bork began his opening testimony by thanking President Reagan for placing his name in nomination. He then presented his concept on the role of a judge.

“My philosophy is neither liberal nor conservative,” said Judge Bork. “[W]hen a judge... 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.”

Overall, these opening statements set the stage for what soon developed into long and often bitter charges and countercharges, spirited defenses, and sharp cross-examinations. Indeed, for five days the committee questioned Judge Bork about a variety of critical issues, including: Judge Bork’s respect for legal precedent; the privacy issue, sterilization, and women’s rights; poll taxes, literacy tests, and the “one man, one vote” reapportionment formula; restrictive racial covenants; free speech and pornography; separation of church and state; the Equal Protection Clause, etc. As demonstrated by the excerpts below, the debate and testimony regarding voting rights, the privacy issue, as well as Judge Bork’s respect for precedent, were among those especially charged on both sides.
ON ABORTION/PRIVACY

Even before the hearings began, Judge Bork had stridently criticized such cases as *Griswold v. Connecticut*, striking down a Connecticut law banning the use of contraceptives, and the *Roe v. Wade* abortion decision. For example, Judge Bork had stated that the desire of a “husband and wife to have sexual relations without unwanted children” was indistinguishable, for constitutional purposes, from the desire of an electric company to “void a smoke pollution ordinance.” “The cases,” said Judge Bork, “are identical.” Thus, the related issues of privacy and abortion generated controversial testimony throughout the hearings.

In a sharp exchange during the hearings, Judge Bork said that there was no right of privacy in the Constitution and that judges cannot place a higher value on marital rights than on economic rights. Senator Biden asked Judge Bork: “Does a state legislative body, or any legislative body, have the right to pass a law telling a married couple . . . behind their bedroom door . . . they cannot use birth control? Does the majority have the right to tell a couple that they cannot use birth control?” Judge Bork responded, “I do not know what rationale the state would offer or what challenge the married couple would make. . . . All I have done was to point out that the right of privacy, as defined or undefined by Justice Douglas, was a free-floating right that was not derived in a principled fashion from constitutional materials.”

Later, following additional questioning by Chairman Biden and more by Bork-defender Senator Alan Simpson, Judge Bork said he believed that there were “several crucial protections of privacy in the Bill of Rights.” Later however, when Senator Howell Heflin addressed the same theme, Judge Bork said, “I do not have available a constitutional theory which would support a general defined right [of privacy] . . . and I can only say that if someone has a constitutional theory, I will listen attentively.”

ON REAPPORTIONMENT: ONE MAN, ONE VOTE

Judge Bork was also sharply questioned throughout the hearings about the Supreme Court’s decisions in voting rights and reapportionment cases. These concerns were seemingly well based, given Judge Bork’s widely publicized criticisms of *Baker v. Carr; Reynolds v. Sims*, and other voting rights cases. For example, in 1972 Judge Bork wrote that in *Katzenbach v. Morgan* the Supreme Court was wrong in upholding provisions of the 1965 Voting Rights Act that banned literacy tests under certain circumstances. In 1981, Judge Bork called the decisions in *Katzenbach* and *Oregon v. Mitchell*, which upheld a national ban on literacy tests, “very bad, indeed pernicious, constitutional law.” Indeed, in an interview just weeks before his nomination to the Supreme Court, on June 10, 1987, Judge Bork stated:

I think [the] Court stepped beyond its allowable boundaries when it imposed one man, one vote under the Equal Protection Clause. That is not consistent with American Political history, American political theory, with anything in the history or the structure or the language of the Constitution.

Senator Kennedy repeatedly challenged Judge Bork to clarify his position regarding these cases:

**Kennedy:** Well, I must say that you have indicated that position that you have expressed here on many different occasions. You said in 1973 before the Congress one man, one vote was too much of a straightjacket and that you, quote, “did not think that there is a theoretical basis for it.” And then you indicated on June 10th of this year, you said in an interview, “Well, I think this court stepped beyond its allowable boundaries when it imposed one man, one vote under the equal protection clause.”

**Bork:** Well, Senator, if the people of this country accept one man, one vote, that is fine. They can enact it any time they want to. I have no desire to go running around trying to overturn that decision. But as an original matter, it does not come out of any thing in the Constitution and if the people of the country want it, they can adopt that apportionment any time they want to.

ON JUDICIAL PRECEDENT

Throughout the hearings, senators questioned Judge Bork on his believed willingness to overturn past Supreme Court rulings. On the fourth day of testimony, in a rather dramatic effort, Senator Kennedy played a tape recording of a remark made two years earlier (1985) by Judge Bork. Bork stated in part: “I don’t think that in the field of constitutional law, precedent is all that important. . . . If you become convinced that a prior court has misread the Constitution, I think it’s your duty to go back and correct it.” After playing the tape, Kennedy challenged the nominee: “In light of what we have just heard, how can anyone have confidence that you will respect the decisions of the Supreme Court. . . .” Judge Bork countered, calling the recording an “off-the-cuff remark” and “not the kind of thing that
ought to be weighed against my more considered statements.” But Senator Kennedy was not convinced and summed up his position by referring to Judge Bork as a “walking constitutional amendment [who] should not be confirmed by the Senate.”

In yet another sharp exchange, Democratic Senator Howard Metzenbaum told Judge Bork “You are not a frightening man, but you are a man with frightening views. . . . The basic problem, as I see it, is that to you, the Constitution is not a living document; it is not a charter of liberty. . . . And if you cannot find protection for the individual in the fine print, then the people of this country are out of luck.” Senator Metzenbaum then concluded, “You have stated views time and again that would reverse progress for blacks, that would slam the door on women, that would allow government in the bedroom, that would adversely affect the rights of consumers, that would limit free speech, that would undercut the principles of equality under the law.” Clearly irritated, Judge Bork responded in part, “I think there is no basis for the concern you describe among women and blacks, and I regret to say I think there is no basis for the charges you have leveled at me.”

The final session of Judge Bork’s testimony was highlighted by more than an hour-long dialogue between Judge Bork and the still undecided Republican Senator Arlen Spector. Senator Spector questioned Judge Bork on a number of issues (e.g., sexual morality, privacy, speech, pornography, religion), attempting to clarify what the senator viewed as inconsistencies and/or recantations:

*Senator Spector:* Judge Bork, I have not made up my mind on the confirmation process as of this moment. At the outset, I was very concerned about what I considered to be a sharp variance in your writings as opposed to the tradition of U.S. constitutional jurisprudence. You have made significant shifts in accordance with this testimony which I think, candidly, has to be evaluated. We don’t expect a man to be in concrete on his thinking, and I understand that what you had written in the past was speculative and tentative and I respect that. . . .

*Judge Bork:* Senator, may I say just one word? I agree with you a great deal of what you say. I just want to talk about—you talk about significant shifts. I really haven’t shifted that much. I have told you where I have changed my mind, explicitly political speech, and so forth.

Judge Bork concluded his long days as a witness by reiterating a comment made at the outset of his testimony.” . . . I will adhere to my judicial philosophy. . . . I am a jurist who believes his role is to interpret the law and not make the law.” But this reiteration did little to clarify the situation. Indeed, after five days of testimony, the principal questions that now evolved concerned which of Bork’s views—those he had expressed over many years and evidenced in his legal writings, or his more moderate statements during the hearings—were representative of his judicial philosophy. In one exchange, for example, undecided Senator Heflin stated: “I wish I was a psychiatrist rather than a lawyer and member of this committee to try and figure out what you would do if you get on the Supreme Court.” Senator Heflin maintained, “Well, now there are those that raise the issue that your changing your position and sort of renouncing of your positions on certain positions came only at a time when a carrot was in effect, being dangled before your eyes; and . . . that you changed your mind on certain writings when you knew that you would have to come up and face questioning before a Senate panel on confirmation. . . .” Replied Judge Bork: “I can assure you that is not the way I operate, never have.”

At this critical period, near the end of Judge Bork’s testimony, public opinion polls suggested Judge Bork was losing ground with the public. A *New York Times/CBS* poll conducted September 21-22 (during Bork’s testimony) revealed 26 percent of those questioned had an unfavorable view of Judge Bork while only 16 percent had a favorable view. When the same question was asked September 9-10, before Judge Bork’s televised testimony began, only 12 percent said they had an unfavorable opinion of Bork and 11 percent had a favorable opinion. Following Judge Bork’s testimony, on September 26, a *Wall Street Journal/NBC* poll found 42 percent opposed to Bork and 34 percent in favor and a *Washington Post/ABC* poll showed 48 percent opposing Judge Bork and 44 percent supporting him.

In yet another example, a Harris Survey released on September 28 revealed that the “American People” opposed the Bork nomination 57-29 percent. Significantly, among those who said they saw the hearings on television or who followed them closely in the newspapers, a higher 61-32 percent majority opposed Judge Bork’s confirmation. Given the nature of electoral politics and the importance of “going public” in American politics generally, it seems clear that these polls had some impact on the eventual outcome of the Bork confirmation controversy.
The situation in the South was particularly affected by such polls. For example, a Roper Organization poll of twelve southern states published in the *Atlanta Constitution* showed 51 percent of respondents against Judge Bork and only 31 percent for him. Even southerners who described themselves as “conservative” opposed Judge Bork 44 percent to 39 percent. Undecided Democrat John B. Breaux of Louisiana, in response to a growing opposition to Judge Bork among his constituency, told the *Washington Post* that if he voted to confirm Judge Bork, “I better have a hell of a good reason.” In another example, Senator Wendell Ford of Kentucky stated that “I think the whole block of southern Democrats is moving against him a little . . . just like the public seems to be moving against him.” Clearly, senators’ attention to public opinion polls signaled concern about possible political fallout from the Bork vote. This fallout could be especially costly in the South, particularly in those states where the Black vote can prove determinative in state-wide elections. But, as we shall see, more than opinion polls were exerting influence on undecided senators; a host of witnesses attempted to affect the Senate as well.

**A PARADE OF WITNESSES**

After an unprecedented five days of testimony and questioning of Judge Bork, the committee was ready to begin the second stage of its formal hearings—testimony from a parade of some 120 witnesses either supporting or opposing Judge Bork’s confirmation.

Those testifying in support of Judge Bork included Edward H. Levi, attorney general under President Ford, and William French Smith, attorney general under President Reagan. Former Attorney General Levi, for example, characterized Judge Bork as having an “inquiring and powerful mind.” Similarly, William Smith described Judge Bork as “an able person of honor, kindness, fairness” and as one who “cares about our society and cares about people . . . a highly distinguished, fair-minded jurist and scholar of the highest professional integrity,” with “all the earmarks of a great Supreme Court Justice.”

Support for Judge Bork included testimony by former Chief Justice Warren E. Burger and Lloyd Cutler, a leading Washington lawyer. Burger called Judge Bork as “well qualified as any Supreme Court nominee in the past half-century,” and condemned what he viewed as “a campaign of disinformation” by Bork opponents. “If Judge Bork isn’t in the mainstream,” said Burger, “neither am I.” Similarly, former White House Counsel Cutler referred to Judge Bork as “a highly qualified conservative jurist who is closer to the moderate center than to the extreme right.” Said Cutler:

On the whole, I think he [Bork] would come much closer as a sitting Justice, if he is confirmed, to a Justice like Justice Powell and Justice Stevens—and I remind you that is precisely what Justice Stevens himself said, that ‘you will find in Judge Bork’s opinions and philosophy similar to that you will see in the opinions of Justice Stewart, Justice Powell, and some of the things that I . . . have written.’

Also, Judge Griffin Bell, former attorney general during the Carter administration, was among a number of prominent Democrats testifying in support of Judge Bork. Bell said, “I like to see a man go to the Court who is going to be his own judge, be his own man, and I think that is the way it is going to turn out.”

In an obvious attempt to rebut particular criticisms, Carla Hills, secretary of Housing and Urban Development under the Ford administration and head of the civil division in the Department of Justice when Judge Bork was solicitor general, testified that she was “startled and saddened” by the “vociferous opposition” and stated there was not a “scintilla of evidence” that Judge Bork was opposed to the equality of women. In response, Senator Orrin Hatch was quick to extol Mrs. Hill’s testimony and suggested that “Women ought to pay attention to you instead of the extreme misrepresentations put out by special interest groups.”

Though most Black leaders opposed Bork, a few did support him. Thomas Sowell, a noted conservative economist and senior fellow at the Hoover Institute, testified that he had publicly urged that Judge Bork be nominated to replace retiring Justice Potter Stewart and again as a replacement for retiring Chief Justice Warren Burger. Sowell continued: “So I’m, of course, heartened to see him nominated now, though I’m disheartened to see the confused, hysterical, and even dishonest terms in which that nomination is too often discussed in the media and elsewhere.” The final day of testimony, September 30, included a visceral defense of Judge Bork by Roy Innis, Chairman of the Congress on Racial Equality (CORE). Innis praised the nominee, suggesting that “Judge Bork’s presence on the Supreme Court can contribute mightily to the efforts to confront and mitigate one of the most pressing problems facing Black America today—urban crime.” “Judge Bork’s firm approach to criminal law
is a matter that should be of interest to the civil rights community, for crime preys most savagely on the poor of our major urban centers.” Innis was also critical of those opposing the nomination:

Judge Robert H. Bork has been roundly attacked by my colleagues. . . . The tragedy of this misguided view is that this desire for an activist judiciary clearly shows how out of touch much of the civil rights movement is with the problems facing black Americans in the 1980s. . . . Reliance on the Supreme Court to solve these problems is both foolish and sad.

. . . I believe black Americans . . . will be best served by courts staffed by judges who will apply the laws with honesty, impartiality, and fairness . . . for this reason . . . I strongly support . . . Judge Bork.

But opposition to the Bork nomination was strong and seemingly well planned. Among those testifying against Judge Bork were Nicholas Katzenbach, who served as attorney general under President Johnson; Burke Marshall, professor of law at Yale University who had headed the Justice Department’s civil rights division under President Kennedy; and Harvard law professor Laurence Tribe. Their testimony was especially critical of Judge Bork. For example, Mr. Marshall stated, “It appears to me that at every turning point in the past quarter-century on which there was still room for disagreement, Judge Bork favored positions that did harm to minorities.” Similarly, Professor Tribe suggested that Judge Bork’s approach to discrimination cases amounted to little more than “a dream and a prayer and a blank check.”

Judge Bork’s nomination was also opposed by a host of Black leaders and the civil rights community in general. Among those testifying in opposition to Judge Bork were William Coleman, transportation secretary under President Ford; Barbara Jordan, former Democratic Representative from Texas (1973-1979); and Mayor Andrew Young, former U.S. Ambassador and then mayor of Atlanta, Georgia. On the whole, their testimony charged that Judge Bork’s personal views and “restrictive approach to constitutional rights” posed a risk to racial justice and the rights of women and minorities. But it was the testimony of highly respected jurist and Republican cabinet member under President Ford, William Coleman, that captured the attention and interest of the committee. Said Coleman:

I have tried very hard to avoid this controversy. The Supreme Court has played such an important role in ending so many of the horribly racially discriminatory practices that existed when I came to the Bar. As one who has benefited so greatly from this country’s difficult but steady march toward a free, fair, and open society, the handwriting on the wall—“mene mene tekel upharsin”—would condemn my failure to testify against Judge Bork.

. . . urge this committee not to send this nomination to the floor of the Senate with its approval; if it does go to the floor, I urge the Senate not to give its consent.

And though Coleman’s—as well as Andrew Young’s—testimony is certainly worthy of more extensive review, it was Barbara Jordan’s comments that strikingly illustrated the high stakes seen by Black Americans in the Bork confirmation controversy. As Jordan stated:

My opposition to this nomination is really a result of living 51 years as a Black American born in the South and determined to be heard by the majority community. . . . When you experience the frustration of being in a minority position and watching the foreclosure of your last appeal and then suddenly you are rescued by the Supreme Court of the United States, Mr. Chairman, that is tantamount to being born again. . . . In 1962 . . . I filed for the election to the Texas House of Representatives. . . . I lost. . . . In 1964, I ran again for membership in the House of Representatives. . . . I lost. . . . The Texas legislature was so malapportioned that just a handful of people were electing a majority of the legislature. . . . I was dispirited. But something happened. A decision was handed down: Baker v. Carr. . . . In 1966, I won. . . . Do you know what Judge Bork says about those cases on reapportionment? He has disagreed with the principle of one person one vote many times.

Other Black leaders also testified against Judge Bork. Duke University Professor Emeritus Dr. John Hope Franklin, for example, recounted for the committee his “degradation and humiliation” as a seven-year-old child in the South when a train conductor “stopped the train and put us out in the woods” because his mother had “refused to go to the Negro coach.” Said Franklin, “Nothing in Judge Bork’s record suggests to me that, had he been on the Supreme Court at an earlier date, he would have had the vision and the courage to strike down a statute requiring the eviction of a black family from a train for sitting in the so-called white coach; or the rejection of a black student at a so-called white state university; or the refusal of a white restaurant owner to serve a black patron.”

The Bork Confirmation Battle: A Case Study 9
On the final day of the hearings, Judge Bork’s opponents released the names of 1,925 law school professors (representing 40 percent of the full-time law faculty of the American Bar Association accredited law schools in the United States), urging the Senate to defeat the nomination. But not all the fireworks were confined to Capitol Hill. Indeed many battles were played out at the White House and across the nation.

AWAY FROM CAPITOL HILL

AT THE WHITE HOUSE

Throughout the battle, President Reagan pressed for Judge Bork’s confirmation. At the outset the White House strategy had been to depict Judge Bork as a moderate, a mainstream conservative nominee, and to distance the whole effort from right-wing support. But by the eleventh day of the Judiciary Committee hearings, the president launched a counterattack against increasing opposition to Judge Bork. Speaking to a meeting of the Concerned Women for America, President Reagan stated: “It’s clear now that the charges that Robert Bork is too ideological are themselves ideologically inspired, and that the criticism of him as outside the mainstream can only be held by those who are themselves so far outside the mainstream that they’ve long ago lost sight of the moderate center.” Reagan’s statements, together with several White House press releases, signaled the administration’s concern about the increasingly mobilized opposition to Judge Bork. “Right now, we’re losing the public relations battle,” said one White House strategist. “All the little groupies are out there . . . this has turned into a political campaign.” The White House began to pull out all the stops. As a senior White House official stated, “We tried to present the issues in a dignified way, and it just didn’t work. So now it’s time to fight fire with fire.”

Consider the following paid telephone communication which was sent out across the nation:

Senator Humphrey: Hello, this is Senator Gordon Humphrey. In my role as Honorary Chairman of the National Conservative Political Action Committee, I decided to speak to you by tele-computer because of the urgent need for citizens to rally behind the President. President Reagan needs your support in his effort to have Judge Robert Bork confirmed to the United States Supreme Court.

Please hold for an important message from President Reagan.

President Reagan: Judge Bork deserves a careful highly civil examination of his record, but he has been subjected to a constant litany of character assassination and intentional misrepresentation. Tell your Senators to resist the politicization of our court system. Tell them you support the appointment of Judge Bork. . . .

Announcer: . . . And, if all possible please consider making a contribution to help with this important battle . . . tell me your name . . . telephone number . . . so that one of our volunteers can contact you.

ACROSS THE NATION

Although the committee hearings and Senate debates were televised in their entirety over the Cable News Network, public television or C-SPAN, most Americans received their information from thirty-second spots televised on the major networks’ evening news programs. Mass media campaigns including television and newspaper advertisements as well as direct mail and other tactics of modern day interest-group politics were employed effectively against the Bork nomination in unprecedented fashion. One of the most noted examples was a television advertisement narrated by Gregory Peck that told viewers:

Robert Bork wants to be a Supreme Court Justice. But the record shows he has a strange idea of what justice is. He defended poll taxes and literacy tests which keep many American from voting. He opposed the civil rights law that ended ‘white only’ signs at lunch counters. He doesn’t believe the Constitution protects your right to privacy. And he thinks that freedom of speech does not apply to literature and art and music. . . .

As such, the protracted confirmation battle had moved from the crucible of the Senate to the television and radio airwaves requiring additional and unprecedented strategies and resources.

THE DECISION: THE JUDICIARY COMMITTEE REJECTS JUDGE BORK

As the hearings concluded, lawmakers on both sides prepared for the final vote. President Reagan called the Bork nomination his “top domestic priority,” and held private “arm-twisting” sessions with undecided senators and urged the public to “[T]ell your senators to resist the politicization of the court system.” At the same time opponents continued
making phone calls keeping pressure on wavering senators.

Overall, it was clear that the Bork confirmation was continuing to lose ground. This was vividly reflected in a speech made by President Reagan in the Rose Garden at a ceremony marking German-American Day (October 2). President Reagan asserted that Judge Bork had “an outstanding record on civil rights,” and added: “Those who have been distorting his record have said . . . he’s going to turn back the clock on civil rights. It’s amazing they can find a room big enough for them to get in front of the cameras, their noses must be so long by now.” The president also attacked the “special interests” that had opposed Bork. Reagan added that “special interests are determined to pack the Supreme Court.” “Their aim,” said the president, “is to get through the courts what they can’t get at the ballot box.” Interestingly, however, those who opposed Judge Bork claimed that it was Reagan’s very nomination of Judge Bork that was in fact the attempt of a lame duck president to get through the courts what he could not get through the legislature. But the president held fast to his position. On October 3, for example, President Reagan charged that “liberal interest groups seek to politicize the court system, [and] to exercise a chilling effect on judges to intimidate them into making decisions not on the basis of the law or the merits of the case but on the basis of a litmus test or a response to political pressure.”

Despite intensive public and private lobbying efforts by President Reagan, just three days later (on October 6) the Judiciary Committee voted 9-5 to send Judge Bork’s name to the full Senate with a recommendation that the nomination be rejected. Significantly, the crucial Judiciary Committee votes to reject Judge Bork were cast by the previously “undecided” senators; i.e., Democratic Senators DeConcini and Heflin, and Republican Senator Spector. Additionally, just days before the committee vote, southern Democrats had begun to abandon the president’s nomination. Speaking on the Senate floor on October 1, for example, Terry Sanford (D-NC) was the first of the freshman southern Democrats to declare his opposition, followed by others like John Breaux and Bennett Johnson (LA), Richard Shelby (AL), Bob Graham (FL), Wyche Fowler (GA), John D. Rockefeller IV (WV), and Lloyd Bentsen (TX). Overall, the arguments cited by these southern senators focused on Judge Bork’s views on civil rights and privacy and a desire not to “reopen old wounds and reconsider decisions that had been accepted in practice.” Senator Sanford further commented, “In the course of his public life Robert Bork had been a socialist, a libertarian, a conservative, and now, most recently, a moderate. There is no way to predict what he will be as a member of the Supreme Court.”

The nine-member committee majority report summarized their position by stating that Judge Bork would threaten the important role of the Supreme Court in serving as “the ultimate bulwark of protection when the majority has attempted to impose its preference upon the fundamental principles of the Constitution—when it has attempted, in other words, to channel the force of government to override the rights of the individual.” The majority report stated:

[Bork’s] jurisprudence fails to incorporate the ennobling concepts of the Constitution. It is thus fundamentally at odds with the express understanding of the Framers and with the history of the Supreme Court in building our tradition of constitutionalism.

But the five-member minority—all Republicans—were just as strong in their support of Judge Bork and their opposition to the committee report. The minority report insisted that “despite sloganeering and misrepresentations to the contrary,” Judge Bork’s testimony before the Judiciary Committee “place[d] him well within the conservative mainstream of American jurisprudence” and that “the major criticisms leveled at Judge Bork are the result of misunderstandings by his critics.” The minority report concluded:

The failure of the Senate to confirm him [Bork] will be a failure larger than simply denying one qualified nominee a place on the Court. It will be a disservice to the process by rewarding those who have turned the nominating process into a negative campaign of distortions; it will be a disservice to the judiciary of this country who should not be forced to endure such a politicized process; and most importantly, it will be a disservice to the American people, who not only will be denied the service of this intellect on the Court, but will also see the judiciary have its independence threatened by activist special interest groups.

Moreover, both minority members and Judge Bork were bitterly critical of the overall atmosphere in which the nomination battle was being fought, leading Senator Orrin Hatch to charge that those opposed to Judge Bork had converted the confirmation battle into “a freak sideshow.”

The Bork Confirmation Battle: A Case Study
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JUDGE BORK AND THE PRESIDENT RESPOND

Only a few days after being rejected by the Judiciary Committee, on October 9 Judge Bork openly declared that he would not ask the president to withdraw his nomination and said he was determined to have a “full debate and a final Senate decision.” Though admitting that he held “no illusions” concerning his chances in the Senate, Judge Bork asserted that “a crucial principle was at stake” because opponents had “transformed the process into a political campaign that endangered the judicial system.” “Federal judges are not appointed to decide cases according to the latest opinion polls,” and when judicial nominees “are treated like political candidates . . . the effect will be to erode public confidence and endanger the independence of the judiciary,” said Judge Bork. Further, Judge Bork stated that if he withdrew, the “public campaign of distortions” against him “would be seen as a success, and would be mounted against future nominees.” The judge’s comments, however, seemed only to exacerbate the situation and increase the mounting tally of undecided senators opposed to his nomination. “Talk about arrogance,” said Senator Dale Bumpers (D-AR) of Judge Bork’s remarks, “[W]hen you win around here, it’s a great victory for the American people; when you lose, it’s a lynch-mob mentality.

Like Judge Bork, however, President Reagan indicated his determination to fight to the very end. Indeed, soon after the committee vote, President Reagan made a stinging speech from the Oval Office [which the commercial networks chose not to broadcast] in an attempt to revitalize support for Judge Bork. President Reagan berated the tactics of opponents and angrily proclaimed that his next nominee (should Judge Bork not be confirmed) would “upset the Democrats just as much.” The president charged that Bork’s opponents had made the confirmation process an “ugly spectacle marred by distortions and innuendos and casting aside the normal rules of decency and honesty.”

But similar to Judge Bork, the president’s comments also served to intensify the controversy. For example, Senator Terry Sanford (D-NC) delivered the Democratic response to Reagan’s speech and said that “[T]o suggest that [senators] have been swayed by anything but conscientious intellect is slanderous.” Sanford further charged that it had been the president, not the Senate, who had politicized the confirmation process. “We are tired of having our integrity impugned . . . we are tired of having our sincerity questioned. We are tired of having our intelligence insulted. . . . The Senators who are voting for Judge Bork have no monopoly on honesty.” Others were equally harsh in their criticisms of the president’s comments, including swing vote Senator DeConcini, who called Reagan’s speech “shameful, [and] an embarrassment for the president.” Senator DeConcini further warned that Judge Bork’s insistence on a Senate vote was a “big mistake.” “[T]he President has really opened himself in the worst light.”

THE FULL SENATE ACTS:
DEBATE AND DECISION

On October 21 the Bork nomination went to the full Senate. But well before the final debates it seemed clear that the confirmation was doomed to defeat. Said Senator Byrd at the start of the session, “I do not think we ought to spend a lot of time on the Bork nomination. I think it is beating a dead horse. It is not going anywhere.” But Judge Bork’s supporters were not ready to give up. Despite the bleak outlook, they at best hoped to portray his opponents as “abusers of the confirmation process,” thus perhaps making it easier for the next nominee. As suggested by Bork supporter Phil Gramm (R-TX), a tough floor debate would “put the facts before the American people and spare another good person some of the pain of the treatment Bork received.” Thus, what was termed a “debate” was actually a succession of speeches for over twenty-three hours by senators from each camp. In the main, Judge Bork’s supporters focused on events outside the Senate while opponents focused more closely on the twelve days of Judiciary Committee hearings. Critical of Judge Bork’s opponents’ tactics, William Armstrong (R-CO) asserted that concentration on occurrences outside the Senate were appropriate because of a “deliberate, calculated strategy to move the focus of the debate out of this chamber, out of the Senate, into the public arena;” however, “what is not proper is the vicious personal nature of that attack [on Bork] and the untruthfulness of it.”

One of the most bitter attacks against Judge Bork’s opponents was delivered by Senator Orrin Hatch. Hatch asserted that the nomination had been conducted like a “major political campaign,” characterized by “distorted newspaper ads, erroneous radio commercials, 30-second television smear
campaigns, misleading appeals . . . dishonest polls . . . and deceptive direct mail solicitation. . . .”

Further, Hatch dramatically held up enlarged mounted copies of several full-page newspaper ads, insisting that the ads “were a campaign of ridicule” that “mischaracterize, misconstrue and mislead.” “The Bork nomination has become a bruising political wrestling match, ultimately decided by political muscle in the form of lobbying strength, media attacks, fundraising, and majority party solidarity,” said Senator Hatch. At one point Senator Hatch even lambasted the Senate Judiciary Committee Report as “a very, very poor job,” “grossly slanted,” filled with “flaws and inaccuracies.” And Senator Hatch responded to an objection by Senator Biden by saying that he would be “more than happy to debate any one of these points anytime, anywhere.” Other Bork supporters similarly ridiculed the opposition. Senator Charles Grassley (R-IA) claimed Judge Bork’s opponents spent “millions to smear an American citizen”; Senator Steve Symms (R-ID) accused “liberal propagandists” of engaging in “character assassination;” and Senator Gordon Humphrey (R-NH) called Judge Bork’s opponents “a dozen clamoring special interest groups with selfish agendas screaming for Judge Bork’s scalp.”

Some senators were even more directly critical of their fellow colleagues. Senator Malcolm Wallop (R-WY), for example, charged that “the [Judiciary] committee started with a conclusion and came to a justification.” And in an hour-long speech staunchly defending the nomination, Senator John Danforth (R-MO), charged that Judge Bork had been “trashed in our house . . . [and] some of us helped to generate the trash. Some of us yielded to it. But all of us have been accomplices to it.” Senate Judiciary Committee Chairman Biden responded sharply to Danforth’s charges, calling them “one heck of an indictment of your colleagues” in the Senate.

However, Chairman Biden and others opposing the confirmation had tallied the preliminary votes and sensed victory. Thus, for Judge Bork’s opponents, the debates were in the main pro forma. Even so, those who did speak continued to beat away at what they considered an “ideologically unfit” nominee. Senator Edward Kennedy, for example, reiterated once more his position that “Bork’s constitution contains no real right to privacy for individuals against Government intrusion, no real protection for women against sex discrimination, no real support for civil rights, and no real limit on presidential power.” Kennedy’s comments were sharp and direct:

From the purchase of a home, to the ballot box, to the job site, to the indignity of “whites only” signs in public places, to the schools of the Nation’s Capital, Robert Bork has made a career of opposing simple justice, and he does not deserve a new career on the Supreme Court of the United States.

Senator Hatch immediately responded to Kennedy’s remarks by calling them “wholly imaginary—an absurd bad dream.”

Additionally, “swing vote” Senator Arlen Spector defended the quality of the Judiciary Committee’s hearings, saying that the “hearings established a proper and meaningful evaluation of a nominee’s views. . . .” Decidedly, Senator Spector maintained that he would vote against confirmation because of “substantial doubt” that Judge Bork would “apply fundamental principles of constitutional law.” Said Senator Spector:

I am troubled by his [Bork’s] writings that unless there is adherence to original intent, there is no judicial legitimacy; and without such legitimacy, there can be no judicial review. This approach could jeopardize the most fundamental principle of U.S. constitutional law—the supremacy of judicial review. . . .

Although others continued to offer comments and reactions throughout the three days of floor debate, there is no evidence to suggest that any votes were changed or even decided during this time. And so, on October 23, 115 days after the nomination, Judge Bork was rejected by the full Senate by an unprecedented margin of 16 votes, 42 in favor and 58 against confirmation. The negative tally against Judge Bork was larger than either the Haynsworth (1969) or Carswell (1970) rejections. In the words of the chamber’s presiding officer, “The nomination is not confirmed . . . the President is to be notified of the Senate’s action.” Six Republicans-Chafee (RI), Packwood (OR), Specter (PA), Stafford (VT), Warner (WV), and Weicker (CN)—joined with the fifty-two Democrats (including all but one southern Democrat) in voting against Judge Bork. Two Democrats-Hollings (SC) and Boren (OK)—joined the forty Republicans who voted in his favor. Overall, Judge Bork lost both a crucial group of moderate northern Republicans and southern Democrats, making him the twenty-seventh U.S. Supreme Court nominee to fail but only the fourth to be voted down by the full Senate this century.
In broad strokes, the Bork nomination pitted President Reagan and judicial conservatives, who believed that Judge Bork would help turn the Court away from “inappropriate judicial activism,” against an assortment of liberal and civil rights groups suspicious that Judge Bork would work to undo significant precedents of the last three decades.

Perhaps more than any other single component, the defeat of Robert Bork can be attributed to the dawning and increasing political power of Blacks—particularly in the South. Since 1954, Black Americans in particular have looked to the courts to intercede when states have attacked their freedoms, to shield them from unfavorable public opinions and majorities, from legislatures unwilling to act, and presidents less than dedicated to upholding the Constitutional rights of Blacks and other minorities.

When reviewed in perspective, the “new black voter” played a crucial role in influencing the votes of senators, especially southern senators, on the Bork nomination. In the 1966 congressional election, fewer than 4.5 million Blacks voted nationally; by 1986, that figure was more than 8.2 million with a vast percentage of the increase in the South. It is less than coincidence that a good portion of this increase can be attributed to the 1965 Voting Right Act—several parts of which Judge Bork had harshly criticized.

The Black vote played a key and determinative role in the 1986 elections that converted a 53-47 Republican majority in the Senate into a 54-46 Democratic one. Democrats retained a seat in Louisiana left open by Russell Long’s retirement and gained seats in Alabama, Florida, Georgia, and North Carolina that Republicans had won in Reagan’s first election in 1980. Without question, the balance of power in each of these Senate races was exercised by Black voters. For example, Senator John Breaux of Louisiana got only 40 percent of the white vote in 1986 but won some 90 percent of the Black vote. And Breaux was quite mindful of the influence of Black voters. “Those who helped us get elected—the Black voters . . . are united in their opposition to Bork, and don’t think for a moment that we are going to ignore that.”

Yet, the votes by southern senators evidence more than the significance of increased Black voting power in their home states. They also reflect uniquely that Supreme Court rulings such as those in Baker v. Carr, South Carolina v. Katzenbach and other voting rights decisions that sought to protect the franchise for Blacks and other groups, have also empowered these very groups to shape the complexion of the Court itself by forging a Senate majority capable of rejecting a nominee perceived hostile to such judicial decisions. This provides a unique example of the interaction and interdependence of law, politics, and the Court.

It is difficult to ignore that, after 115 days, countless hours of debate, special meetings, testimony by more than 120 witnesses, a barrage of media coverage, and an unprecedented mobilization of interest groups, in the final analysis partisan polarization was the most obvious cleavage within the Senate vote. Put more directly, 96 percent of the Democrats rejected Judge Bork, while 91 percent of the Republicans voted to confirm him. Thus, the Bork nomination serves to illustrate the continuing importance and influence of party in Senate voting on court appointments and suggests a confluence between partisan affiliation and voting behavior generally.

Overall, the Bork confirmation battle demonstrates vividly the role and dimensions of politics and policies endemic in the nature and institutional structure of the U.S. Supreme Court. At bottom, the battle was yet another round over the nature and extent of the Court’s policy-making role in the political system. At still another level, the Bork nomination was also of major symbolic importance. For many, Judge Bork came to symbolize the Reagan administration’s continued attacks on rights won by Blacks during the turbulent years of the Civil Rights Movement. Judge Bork came to represent a retreat from certain legal doctrines, such as those prohibiting segregated schools and restrictive covenants in the real estate market, and policies protecting the right of privacy.

As Senator Kennedy put it, the Bork nomination controversy may well be described as a bicentennial seminar on “America’s commitment to the rule of law, to the principle of equal justice for all Americans, and to the fundamental role of the Supreme Court in protecting the basic rights of every citizen.”