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Battle For Justice: How the Bork Nomination Shook America

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BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA

By Ethan Bronner. New York: W.W. Norton & Company. 1989. Pp. 399. $22.50.

*Reviewed by Arthur Austin**

> I should think it improper for a nominee . . . to express his personal views on controversial political issues affecting the Court. My attitude and outlook on relevant matters have been fully expressed over a period of years and are easily accessible. I should think it not only bad taste but inconsistent with the duties of the office for which I have been nominated for me to attempt to supplement my past record by present declarations. That is all I have to say.[1]

If Robert Bork had followed Felix Frankfurter's advice, he might be on the Supreme Court. He did, however, testify before the Senate Judiciary Committee and ignited one of the nastiest and most corrosive reactions in the history of the nomination process. While Bork's defeat was clear-cut, not so evident is the damage to the nomination process or the impact on the quality of future nominees.

As scholars plow through the debris,[2] a Boston Globe reporter has beaten everyone, including Robert Bork,[3] to press with the first book covering the "Nomination." While academics will invariably bore the public with turgid prose in arguing over

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1. E. BRONNER, BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA 220 (1989) (quoting Felix Frankfurter). Harlan Stone was the first nominee to testify before the Senate Judiciary Committee (in 1925). Despite his protestations (while testifying as the second nominee to face some congressional scrutiny), Frankfurter did answer questions. Collins & O'Brien, *Just Where Does Judge Bork Stand?*, Nat'l. L.J., Sept. 7, 1987, at 13, col. 1. *See also* Freund, *Appointment of Justices: Some Historical Perspectives*, 101 HARV. L. REV. 1147 (1988).

2. *See, e.g.*, Horwitz, *The Meaning of the Bork Nomination in American Constitutional History*, 50 U. PITT. L. REV. 655 (1989); *Essays on the Supreme Court Appointment Process*, 101 HARV. L. REV. 1146 (1988).

3. *See* R. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990).

the appropriate limits of the Senate's obligation to "Advice and Consent,"[4] Mr. Bronner provides a sweeping word movie of strategy, character profiles, and politics.[5] He proffers objectivity and neutrality, but sides with Senators Kennedy and Biden and the anti-Bork coalition. In the final analysis he finds Bork's legal philosophy too far removed from the expectations of society.[6]

Bronner pictures Bork's "originalism" as frozen in time; if the founding fathers did not cover certain rights in the Constitution, it meant that the task of determining coverage was delegated to the legislative bodies. Like Marxism, according to Bronner, originalism adheres to "strict, self-encased rules" that provide "little, if any, room for judges to give meaning to the charter's broad phrases."[7] The book contrasts originalism with a positive description of the liberal view that interprets the Constitution as a "living" document which evolves with changes in society. It is a document "relevant" to the times. In the comparison, Bork comes out as a fanatic who blames the liberal agenda for causing the nation to lose its "moral compass."[8]

To his credit, Bronner tries not to let his bias interfere with the real story: the "Nomination" introduced a new form of political gorilla warfare that, if repeated, could wreck the process. The anti-Bork strategy was contoured around Senator Kennedy's call to arms:

> 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, writers and artists could be censored at the whim of government, and the doors of the federal courts would be shut on the fingers of millions of citizens for whom the judiciary

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4. U.S. CONST. art. II, § 2, cl. 2.

5. The book has already been extensively reviewed. *See* Dwyer, *Did Fairness Get Bashed Along With Bork?*, Bus. Week, Dec. 18, 1989, at 20; Guiffra, *Bronner's* BATTLE FOR JUSTICE, The Federalist Paper, Nov. 1989, at 5; Kaus, *Bork Chop*, New Republic, Nov. 6, 1989, at 118, col. 1; Lerner, *The Demonizing of Bork*, Wall St. J., Oct. 19, 1989, at A18, col. 5; Moran, *Writing the Record of Bork's Nomination Fight*, Manhattan Lawyer, Oct. 10, 1989, at 24; Moran, *Revisiting the Bork Battlefield*, Legal Times, Sept. 25, 1989, at 62, col. 1; Lehmann-Haupt, *The Bork Nomination, and Why It Failed*, N.Y. Times, Sept. 7, 1989, at 16, col. 1.

6. For Bork's explanation of his constitutional philosophy, see R. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 1989. For a review of the book see Diggins, *The Judge Pleads His Case*, N.Y. Times, Nov. 19, 1989, at 15.

7. E. BRONNER, *supra* note 1, at 94.

8. *Id.*

> is—and is often the only—protector of the individual rights that are the heart of our democracy.[9]

This type of malicious doublespeak would make even that old master of political invective—Huey "The Kingfish" Long—envious. When the Bork supporters at the White House and the Justice Department let it pass,[10] the opposition realized that demagoguery would work, especially against people who were reluctant to get involved in a mudslinging contest.

Bronner provides a comprehensive study of the formation of a remarkedly effective coalition of leftists, liberals, and anti-Reaganites. The coalition's members showed amazing discipline; to avoid sideshow diversions from the media's attention on Bork's problems, they voted down testimony from the peripatetic Ralph Nadar and NOW's tough-talking Molly Yard. "It was the most difficult coalition decision of the entire battle, the only one that left scars."[11] Considering the egos involved, this is an event unlikely to ever be duplicated in liberal politics.

Exploiting the calumny and sting of Kennedy's indictment of Bork, the coalition gained a quick edge over the Bork people by distilling complicated legal issues into mass consumption buzzwords. While Judge Bork bored the audience at the hearing with explanations of "law," decisions, and the arcane canons of interpretation, the coalition accused him of not living in the "mainstream" of democracy and of not having a humane "vision." Experienced in the back-alleys of politics, media consultants labeled Bork as advocating a tyrannical ideology and cunningly "forced the debate into the domain of issues long settled, raising the specter of birth control police, poll taxes, and literacy tests."[12]

After convincing much of the public that Bork would refight

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9. *Id.* at 98.

10. Bork, himself, perhaps best expresses his coalition's passivity:

> The conventional wisdom in Washington then and for some time afterward was that Kennedy had made a serious tactical blunder. His statement was so outrageous that everyone said it helped rather than hurt me. I should have known better. This was a calculated personal assault by a shrewd politician, an assault more violent than any against a judicial nominee in our country's history. As it turned out, Kennedy set the themes and the tone for the entire campaign.

R. BORK, *supra* note 3, at 268.

11. E. BRONNER, *supra* note 1, at 301.

12. *Id.* at 159.

the *Brown v. Board of Education*[13] decision, the coalition initiated a campaign of disinformation to convince the public that he had ordered sterilization of women. Lawyers would agree that the *Oil, Chemical & Atomic Workers International Union v. American Cyanamid Co.*[14] decision only amounted to, in Judge Bork's words, a "mundane"[15] review of an administrative ruling. The panel, including the future Justice Antonin Scalia, held that the defendant's policy of giving women employees who were exposed to dangerous levels of lead the option of either sterilization, or a transfer to another department with less pay, was not a "hazard" as defined by OSHA.

The public's acceptance of the accusation that he upheld a policy of coerced sterilization became the nail in the Bork coffin. Robert Bork now faced a Catch 22; no one would understand or even be interested in a legal explanation of administrative law subtleties. If he did opt to offer no explanation, it would be deemed another example of insensitivity to women and the poor. Either way, anti-Bork politicians and the media made him "look like some kind of Nazi scientist . . . ."[16]

Could Bork have overcome the opposition's demagoguery and disinformation tactics? It is doubtful. Neither the Justice Department nor the White House came close to anticipating the intensity of the opposition and, once the fight began, neither could come up with an effective strategy to counter a dirty tricks campaign. While the pro-Bork people bickered amongst themselves, the coalition kept pounding away. Moreover, Bork contributed to his demise. He refused to get off the professorial level to respond to some of the more preposterous allegations. In

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13. 347 U.S. 483 (1954).

14. 741 F.2d 444 (D.C. Cir. 1984).

15. Judge Bork carefully explained the court's limited role in *American Cyanamid*:

> As we understand the law, we are not free to make a legislative judgment. We may not, on the one hand, decide that the company is innocent because it chose to let the women decide for themselves which course was less harmful to them. Nor may we decide that the company is guilty because it offered an option of sterilization that the women might ultimately regret choosing. These are moral issues of no small complexity, but they are not for us. Congress has enacted a statute and our only task is the mundane one of interpreting its language and applying its policy.

741 F.2d at 445.

16. E. BRONNER, *supra* note 1, at 179. In contrast, "[w]hen Judge Scalia was up for confirmation to the Supreme Court, no member of the Senate Judiciary Committee asked him even one question about his vote in *American Cyanamid*. Howard Metzenbaum's moral outrage was nowhere in evidence." R. BORK, *supra* note 3, at 328.

his autopsy he writes: "The entire process of a judicial confirmation was politicized more than ever before in America's history, but at least I did not contribute to that."[17] But more importantly, he followed some very bad advice and tried a quick conversion from conservative to centralist.

By waffling in an attempt to back away from the conservative positions that caused him so much trouble, Bork made the tactical blunder of playing into the hands of Senators Kennedy and Biden. It became easier for the coalition to convince people that he was willing to hypocritically reshape his views in an attempt to dupe the Judiciary Committee. Once he made it to the Court, the coalition alleged, Bork would remove the disguise and take our country back to pre-*Brown v. Board of Education* days.

Bronner's last chapter descends to the same type of demagoguery, albeit softer, used by Kennedy, Biden, and the coalition. Whereas Senator Kennedy exploded with a blunderbuss-brass knuckles attack, Bronner uses subtle innuendo and doublespeak. Testimony by a black historian recounting his pre-*Brown v. Board of Education* racial hardships is exploited as a not so subtle "contrast" with Robert Bork's Neanderthal "vision" of human "rights." Then "Reaganism" is trooped out as the evil empire with Bork acting as its Darth Vader.

In order to rationalize the coalition's skulduggery and disinformation tactics, Bronner revives the corpse of presidential candidate Michael Dukakis. If the Bush supporters could use Willie Horton to hammer Dukakis, and "raise fears that, under Dukakis, Americans would be unsafe in their own homes,"[18] then the coalition was entitled to use a smear campaign against Judge Bork. The assumption of a Bush dirty campaign is debatable, while the evocation of Dukakis and Horton is clearly irrelevant to Robert Bork's nomination. The comparison does, however, serve to confirm Mr. Bronner's bias. He fractures his credibility when he gives Bork an advantage over Dukakis in a mudslinging contest because Bork got five days of testimony to explain his "constitutional vision"[19] to the Judiciary Committee. Furthermore, to compare a tightly structured question and answer session in which the target never knows the questions and

17. R. BORK, *supra* note 3, at 279.

18. E. BRONNER, *supra* note 1, at 350.

19. *Id.* at 350. He continues: "The dispute over Bork can be summed up as a substantive debate with some slander. The Bush campaign against Dukakis had the inverse balance." *Id.*

refuses to mudsling, with the open field of a presidential campaign, is a feeble effort to buttress Bronner's rationalization for the coalition's despicable behavior. Terence Moran, who covered the nomination and hearings for the Legal Times, puts the anti-Bork coalition's tactics in perspective:

> Bronner's fine book may leave some opponents of Bork's confirmation asking themselves some troubling questions. What was truly gained by the campaign against Bork, given Justice Anthony Kennedy's apparent predilections? And what was lost? The power of progressivism stems in large part from its appeal to the moral sensibility of citizens, who know that the hard work of caring for neighbors and strangers makes a community stronger and benefits individuals in ways that Bork's jurisprudence is unable to encompass. But how is deceit progressive? And what is so liberal about personal viciousness? Does it say something sad about today's progressives that the fight against Bork was not conducted in the open ground of free debate, but on the enemy's twilight territory of half-truths and packaged distortions, in the dim shadows of the country's flickering commercial breaks?[20]

One of the most intriguing questions that lingers after the turmoil and strife of the "Nomination" is whether it represented an aberration, unlikely to be repeated, or whether it will stand as a model for every nomination. If the former, Robert Bork remains a footnote in history, with only he, Bronner, and a few legal historians interested in preserving the story.

The aberration theory makes sense. Bork, unlike Antonin Scalia or Anthony Kennedy, became a politically vulnerable target. He entered the nomination process with a long paper trail of provocative and conservative scholarship. With his intelligence and forceful personality, Bork could have influenced the undecided members of the Court on the important issues and was therefore even more dangerous. Moreover, the "spirit" and motivation for the formation of an anti-Bork coalition had existed for some time; it was the last chance for a catharsis for eight years of self-perceived humiliation imposed on the liberal-left by the Reagan Administration. One could also argue that after Bork neither the public nor the political parties could or would tolerate another nasty nomination hearing. Finally, the Bork "Nomination" created a dangerous precedent, leaving both sides

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20. Moran, *Revisiting the Bork Battlefield*, *supra* note 5, at 62, col. 4.

exposed to unwelcome revenge: "what goes around, comes around."

On the other hand, the intoxicating success of the anti-Bork coalition could breed repetition. Robert Bork speculates on this issue:

> When some of the groups wanted to mount such a campaign against Justice Kennedy, one senator said, "Nobody wants to go through that again. There's just too much blood on the floor." But, after some time has passed, they may well be able to mount such a campaign against a future nominee.[21]

Repetition has already occurred on the circuit court level when the Judiciary Committee rejected the nomination of Bernard H. Siegan. The New York Times reported that "[e]choes of the Bork battle reverberated in the committee room . . . Edward Kennedy . . . said Mr. Siegan was not qualified because his legal philosophy was 'out of the mainstream,' the test applied last year to Judge Bork."[22]

There is a genuine justification for the Committee taking a serious look at nominees. The continuing shift of political power to the Supreme Court—already a major influence in setting the agenda for the nation's policymakers—makes every change of membership worth mounting a fierce fight. Indeed, the importance of the position and the need to legitimize the Court compels a hard scrutiny.[23]

"Bork Chop,"[24] however, makes a hard scrutiny an unpredictable exercise. His nomination demonstrates that the elected politicians no longer retain total control of the nomination process. Rogue coalitions can exert powerful influence and compel runaway investigations. As one way to avoid this—or other associated pressures—cynics suggest nominating intellectually bland people. The consequence of following such advice, however, is the creation of a Supreme Court that would satisfy former Senator Hruska's plea that "there are a lot of mediocre judges and people and lawyers, and they are entitled to a little representation [on the Court], aren't they?"[25]

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21. R. BORK, *supra* note 3, at 346.

22. Greenhouse, *Panel Rejects Reagan Court Nominee*, N.Y. Times, July 15, 1988, at A12, cols. 5-6.

23. *See* Totenberg, *The Confirmation Process and the Public: To Know or Not to Know*, 101 HARV. L. REV. 1213 (1988).

24. Kaus, *supra* note 5.

25. Weaver, *Carswell Attacked And Defended As Senate Opens Debate on Nomi-*

Bronner profiles Professor Laurence Tribe of Harvard Law School as the intellectual hero of the anti-Bork campaign. Tribe, who is targeted by the Right if his turn for nomination ever occurs, was the frontman on constitutional law issues and served as Kennedy's personal guru. A network of law professors—operating in the background—supplied testimony, advice, and support. The existence of this large group, verified by a list of 1,925 law professors who signed an anti-Bork letter,[26] symbolizes the continuing tilt to the left in the composition of law school faculty. As one of the potential pernicious effects of "Bork Chop," some of the more zealous leftist professors may employ the coalition's victory to justify any intolerance of conservative colleagues.

Many conservative academics fear the Bork defeat may encourage a bias against research which does not adhere to "mainstream"—*i.e.* liberal-left—"voices." Young law professors entertaining promotion or judicial aspirations will hesitate to experiment with new thoughts that may later be construed as subversive to "mainstream" views. Max Lerner concludes that "[t]he word went forth to every law school that those with federal court ambitions must travel a safe constitutional journey, with no paper trail and no bite to their tongue or pen."[27] The rational course of behavior for potential nominees dictates the avoidance of risks by writing about vocational issues, such as "wrongful employee discharge in Ohio" or "the liability for owning pussycats." An even better (although impractical in a world of tenure) way to avoid being "Borked" is to follow Senator Dole's advice: "I wouldn't write a word. I would hide in the closet until I was nominated."[28]

The irony of the "mainstream" accusation when applied to Bork is the fact that his legal career typifies how scholarship and

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nation, N.Y. Times, Mar. 17, 1970, at 21, col. 1.

26. E. BRONNER, *supra* note 1, at 299.

27. Lerner, *supra* note 5, at A18, col. 6.

28. Roberts, *Picking Another Nominee: Lessons from Bork*, N.Y. Times, Oct. 28, 1987, at B8, col. 1. *See also* R. BORK, *supra* note 3, at 347.

For conservative academics, the most threatening episode of the hearings occurred when a black law professor who was scheduled to testify for Bork suddenly withdrew. Judiciary Committee Attorney Linda Green had advised the professor that it was against his best interest to testify. "Ms. Green said that she had cautioned Professor Baker that he could expect a grueling public examination of both his academic career and his knowledge of constitutional issues." Tolchin, *Inquiries Begun on Warning to Pro-Bork Witness*, N.Y. Times, Oct. 20, 1987, at A18, col. 2.

intellectual tenacity can change the minority view into "mainstream." For example, he persuasively challenged the teaching of the liberal-populist school of antitrust that prevailed during the years when the Warren Court ruled.[29] When he started his crusade, Bork and a few colleagues were cutting against the "mainstream" of antitrust literature. Today, his antitrust philosophy, blended into the law and economics discipline,[30] helps the Chicago School dominate the field.

Mr. Bronner believes that Edward Kennedy's speech accusing Bork of aspiring to turn the legal clock back "was a landmark for judicial nominations."[31] Few people would question its inflammatory intent and its effect in galvanizing the anti-Bork coalition. One can speculate on what would have happened had he not been so flagrantly disingenuous. It is also interesting to ponder over the outcome of the Bork nomination had Leo Damore's best selling book, SENATORIAL PRIVILEGE: THE CHAPPAQUIDDICK COVER-UP, been published in 1987 instead of 1988.[32]

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29. R. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978).

30. Law and economics is "the most important thing in legal education since the birth of Harvard Law School." Barrett, *A Movement Called 'Law and Economics' Sways Legal Circles*, Wall St. J., Aug. 4, 1986, at 1, col. 1 (quoting Professor Bruce A. Ackerman of Columbia University Law School).

31. E. BRONNER, *supra* note 1, at 99.

32. Damore gives a detailed description of Kennedy's ability to mobilize support to create the "truth." According to a Wall Street Journal reviewer: "As press agents, publicists and political advisers, the Kennedy sanitation people practically were trained to disregard the truth in their efforts to 'manage' information. Anybody can be honest; it takes a trained professional to effectively deceive." Brooks, *Bookshorts: Kennedy's Big Mess; Savitch's Sad Life*, Wall St. J., Aug. 16, 1988, at 26, col. 2.