Natalie Roseberry,

Western Illinois University

The Bork Effect: An Analysis of Supreme Court Nomination Criteria

The nomination of Robert Bork in 1987 to the Supreme Court has attributed much debate over the process of the Supreme Court nominations and the Congressional inquisition of those nominees. As Ogundele and Keith (1999) state “while most agree that the Bork hearings significantly raised the visibility of the confirmation process, there is considerably less agreement on whether the hearings marked a drastic change in the criteria the Senate Judiciary Committee applied to Supreme Court nominees (p. 404).” This examination will explore other research and factors within the importance of Robert Bork’s nomination to the Supreme Court as well as the possibilities of its lasting effects on future nominees.

First we will spend a little time on understanding Robert Bork as a nominee. Robert Bork has a professional legal history that includes being a professor of Law at Yale, Solicitor General in the Nixon and Ford Administrations, as well as a Court of Appeals judge in District of Columbia. Prior to these accomplishments he was widely known as being the individual to execute Richard Nixon’s direct order to fire Watergate prosecutor Archibald Cox. Though out these interests Robert Bork continuously relied upon his conservative ideals. His main founding principles with regards to the law and justice were the importance of the strict adherence to the constitution and its direct vernacular. As Judge Bork stated in his article *Neutral Principles and Some First Amendment Problems*:

[T]he choice of “fundamental values” by the Court cannot be justified. Where constitutional materials do not clearly specify the value to be preferred, there is no principled way to prefer any claimed human value to any other. The judge must stick close to the text and the history, and their fair implications, and not construct new rights. (47 *Indiana Law Journal* (1971)).

Judge Bork’s statement provides a basis of his understanding through this quote of adhering strictly to the constitution and what the framers of the document intended for justice and liberty. His perspective is that one cannot deviate from the formula and interject personal beliefs into the law to construct it in ways that are beneficial to themselves and the times as opposed to the ideals of the origination of the Constitution. Judge Bork consistently withheld an intensely conservative viewpoint on law to which he leaves no deviation from original principles and little matter of interpretation. While in questioning of his congressional hearing on his Supreme Court Nomination, an audio tape of a speech Judge Bork had previously made was referenced by Senator Edward M. Kennedy, expressing his staunch constitutional ideals with regards to precedent:

I don’t think that in the field of constitutional law precedent is all that important. I say that for two reasons. One is historical and traditional. The court has never thought constitutional precedent was all that important. The reason being that if you construe a statute incorrectly, the congress can pass a law and correct it. If you construe the Constitution incorrectly Congress is helpless. Everybody is helpless. *If you become convinced that a prior court has misread the Constitution I think it’s your duty to go back and correct it.* Moreover, you will from time to time get will full courts who take an area of law and create precedents that have nothing to do with the name of the Constitution. And if a new court comes in and says, ‘Well, I respect precedent,’ what you have is a ratchet effect, with the Constitution getting further and further away from its original meaning, because some judges feel free to make up new constitutional law and other judges in the name of judicial restraint follow precedent. *I don’t think precedent is all that important. I think the importance is what the Framers were driving at, and to go back to that*. (Canisius College Speech, October 8, 1985, emphasis added).

Within this point of view, Robert Bork is re-emphasizing his belief on the importance of the Constitution, its meaning, and its intentions as opposed to all individual (moral) influences on interpretations

Now that a general idea on Robert Bork’s beliefs and legal priorities has been addressed we can look at the importance and significance of his Supreme Court nomination. Two main articles of research that address the impact of Robert Bork’s nomination to the Supreme Court and confirmation criteria used by the Senate are done by Guliuzza, Reagan, & Barrett (1992) and Ogundele & Keith (1999). First we will look at Guliuzza et al. (1992) to which the authors test the argument of whether there was a shift in confirmation criteria based on the Ronald Reagan… nomination of Robert Bork. The two main questions asked within this research were whether Robert Bork’s “confirmation hearings unique in the sense that the Senate Judiciary Committee shifted its attention away from more traditional questions of ‘character’ and ‘competency’ toward questions of ‘constitutionalism (p. 410).’” Or, if the hearings on Bork were unusual, “were they so because of Bork himself and the events surrounding the Bork nomination, or do they signal an enduring shift in the method by which the Senate performs its advice and consent function (p. 411).” There are many qualities stated by many “scholars” that make this situation unique. As stated by Guliuzza (1992), the first being the intense involvement in the nomination process by interest groups, and their “going public” against the nomination making “their Senators aware of the public’s opinion (p. 416-417). The second was the relation of the media with the participation and involvement of the radio and television broadcasts being done live from within the Russell Senate Office Building Caucus Room (p. 417). Third was Judge Bork’s “extensive testimony before the committee and the candor he displayed in answering questions (p. 417).”

According to Ogundele & Keith (1999), the nomination was not different in the effect that “confirmation of federal judicial nominees has been based on factors beyond the nominee’s personal and professional qualifications,” however, it differed based on three “important respects (p. 407):”

First, it was the first nomination where senators frankly stated that a nominee’s constitutional views were the reason for his rejection (Rose 1990; Carter 1990; Grossman 1990; Watson & Stokey 1998). Rose (1990:929) argued that it was unprecedented that in Bork’s case the senators openly admitted that Bork’s strong position on several salient issues was the reason for his rejection. Second, the timing of the Bork nomination was inauspicious. Watson and Stokey (1998) observed that the political environment in which Judge Bork found himself was highly charged and unfavorable. The nomination came toward the end of President Reagan’s second term and at the end of a long and open campaign by the Reagan Administration to fill the federal bench with conservative Republicans, a move seen by many as an attempt to “pack” the Court. Third, Bork would have replaced Justice Powell, who had provided the swing vote in many of the most crucial Supreme Court decisions and who was considered by most liberals to be a moderate. Bork’s confirmation thus would have added an additional conservative vote and would have upset a closely balanced Court (Segal and Spaeth 1986; 187;Carter 1990: 968; Shapiro 1990:953).

Within these three factors compose the discussion of the importance of Robert Bork’s influence on the changing of the Supreme Court nominees. As stated in Ogundele & Ketih (1998), “these characteristics are believed to have provided the impetus for the Senate’s rigorous inquire into Bork’s constitutional views and for its ultimate rejection of Judge Bork (p. 406).” The general concept is to what extent had and did the senate inquire about the previous nominees as compared to how the address nominations post Bork.

 To look at Ogundele & Keith’s (1999) findings, as limitedly addressed previously, the question to whether or not the Bork nomination affected the criteria to which the Senate Judiciary Committee applied to the Supreme Court nominees. The research is focused on the individual characteristics on the nominee in regards to ideology, qualifications, and judicial philosophy, recognizing that the Senate majorities tend to confirm those individuals who hold views that are not extreme in comparison to their own (p. 406). As well, Ogundele & Keith (1999) look at the nature of the political environment and asses that the existence of a divided government, the timing of the appointment, political closeness to the President, and critical nominations affect the “proportion of constitutional probes directed at nominees (p. 407). The last factor that is included in Ogundele & Keith’s (1998) research relies on environmental factors such as interests groups and their degree of involvement (p. 408). Within these subgroups of analysis, Ogundele & Keith (1998) conclude that “we do find empirical support for the proposition that the Bork hearings marked a statistically and substantively significant change in the criteria applied by the Senate Judiciary Committee. However, our study suggests that the extra focus on the judicial philosophies of Supreme Court nominees by the Judiciary Committee began earlier and that the Bork nomination simply continued this process (p. 415).” The research also concluded that the other factors listed also contribute to the set of questions posed to the nominees by the committee. Ogundele & Keith’s (1998) findings in Appendix 1 provide that:

When a candidate is not highly qualified, the committee is less likely to engage in constitutional questions-presumably because the committee is more concerned with questions of qualification than the candidate’s viewpoints. Likewise, prior service in the President’s administration and nomination in the fourth year of a President’s first term make it more likely that the nominee will face more constitutional or ideological questions (p. 416).

Thus, the findings show that there is no empirical evidence that provides for Judge Robert Bork’s nomination to be a direct reflection upon the change in the questions posed to the nominees.

Guliuzza III et al. (1992) address the idea of a Bork effect within the types of questions presented to the Supreme Court Nominees by the senate Judiciary Committee. Appendix 2 shows that the questions posed to Bork were not uncommon in consideration to the questions asked of prior and post Supreme Court nominees. As fount in Guliuzza III et al. (1992), Bork’s nomination is similar in that the types of questions posed to him “are nearly identical to those put to Thurgood Marshall and William Rehnquist I, and they are not radically different from those asked of Sandra Day O’Connor (p. 427). As well, when we look at Appendix 3, Guliuzza III et al. (1992) indicate that “the Judiciary Committee’s emphasis on Bork’s constitutional theory was neither unique nor unprecedented (p. 429).” This table shows that “over a 30 year period,” many nominees were questions on constitutional matters irrelevant to their confirmation. Appendix 4 compares Bork to his following nominees; Guliuzza III et al. (1992) prove that the consistent statistics are not in relation to the Bork nomination.

The Kennedy, Souter, and Thomas hearings are marked by a high percentage of constitutional questions, but the percentage is substantially lower than Bork’s. Further, those questions that center on ‘character’ are three to four times higher than in the Bork hearings. The post-Bork hearings are much more comparable to the Stevens or Fortas II nomination than they are to Bork’s (p. 429-430).

When looking at the differences among Bork’s nominations and those of other nominees that were in them controversial there are differences as shown in Table 5. Guliuzza III et al (1992)…

Although Fortas’ hearings are marked by a high level of constitutional questions, the total number is more than fifteen percent lower than Bork’s ninety-two percent. Further, the number of ‘character’ questions asked of Fortas were nearly four hundred percent higher than those put to Bork. The totals for Thomas, in each of the three categories, are very similar to Fortas II. Haynesworth and Carswell, as one might expect, are radically different than the other failed or highly controversial nominees (p. 430-431).

 When looking at Appendix 5, Robert Bork’s questioning was focused on questions of constitutionality and not significantly involving character and competency. It can be deduced that although he was a controversial nominee, the questions posed to him by the Senate Judiciary Committee reflected upon his legal standpoint and not of his any other significant category. As John Maltese (1995) states, “with Bork, many liberals were responding to what they perceived as an ongoing attempt by the Reagan administration to pack the courts. In addition, Bork’s problems were compounded by his controversial writings, the political climate in the South, the fact that he would replace a moderate swing vote on the Court, and the fact that the White house was not prepared for such intense opposition (p. 139).

 It is evident through the analysis that Bork’s nomination defeat was statistically significant through his constitutional beliefs. While we can determine his particular rejection, it does not remain significant that his nomination rejection changed the discretion of questions posed to future nominees of the Supreme Court. Thus as stated in Guliuzza III et al. (1992) the Bork hearings did prove significant by the “unusual participation by interest groups, heightened media attention, and the length and depth of the nominee’s testimony before the committee, and the determination of Bork’s opponents to keep him off the bench because of his potential to ‘transform’ the Court. His hearings do not appear to be unique in the level of questions focused on his constitutional theory or ideology (p. 430). Robert Bork’s 1987 nomination hearing holds no statistical proof that the criteria that the Senate Judiciary Committee uses to question and analyze the nominees have had any significance on the post questions of future Supreme Court nominees.



**APPENDIX 2**

TYPES OF QUESTIONS PUT TO SUPREME COURT NOMINEES

BY THE SENATE COMMITTEE ON THE JUDICIARY

**Nominee** **Comp' Char2 Constl3 Other' Total' Outcome6**

Stewart 7.2%7 6.0% 84.9% 1.8% 100% 70-17

(12)' (10) (141) (3) (166)

Fortas I 11.9% 47.6% 40.5% 0% 100% Voice

(10) (40) (34) (0) (84)

Marshall 3.1% 1.5% 95.4% 0% 100% 69-11

(4) (2) (124) (0) (124)

Fortas II 4.8% 18.3% 76.9% 0% 100% W/drew

(23) (88) (369) (0) (480)

Haynesworth 13.4% 79.9% 6.7% 0% 100% 45-55

(82) (488) (41) (0) (611)

Carswell 33.1% 62.7% 4.1% 0% 100% 45-51

(112) (212) (14) (0) (338)

Rehnquist I 1.7% 5.7% 92.6% 0% 100% 68-26

(7) (24) (390) (0) (421)

Stevens 6.7% 13.3% 77.9% 2.1% 100% 98-0

(13) (26) (152) (4) (195)

O’Connor 1.3% 7.9% 90.8% 0% 100% 99-0

(4) (25) (287) (0) (316)

Rehnquist II 1.3% 40.4% 58.3% 0% 100% 65-33

(7) (210) (303) (0) (520)

Bork 1.0% 4.6% 92.6% 1.9% 100% 42-58

(4) (20) (400) (8) (432)

Kennedy 2.9% 13.6% 83.5% 0% 100% 97-0

(12) (56) (344) (0) (412)

Souter 1.3% 11.3% 77.1% 10.3% 100% 90-9

(4) (35) (239) (32) (310)

Thomas 4.7% 16.0% 79.3% \* 0% 100% 52-48

(33) (112) (555) (0) (700)

' Refers to questions coded "Compentency."

2 Refers to questions coded "Character."

Refers to questions coded "Constitutionalism."

4 Refers to questions not coded in any of the previous categories.

*5* Percentages may not total 100% due to rounding.

6 Indicates how the full Senate voted on the nomination.

' Indicates the percentage of all questions that were of this type.

8 Indicates the number of questions that were of this type.

\* One coder originally reported for Thomas 64.3% "constitutionalism" and 15% "other."

This coder was concerned with the large number of those questions listed as "other" and she

described her concerns in a written report. It was clear, from a discussion with the coder,

that she was identifying questions as "other" that might be more properly categorized as

"constitutionalism" and were grouped as such by other coders.

**Source Guliuzza III, Reagan, Barrett (1992)**

**APPENDIX 3**

NOMINEES WITH THE HIGHEST PERCENTAGE OF CONSTITUTIONAL

QUESTIONS ASKED BY THE COMMITTEE

**Nominee Comp Char Const'l Total Outcome Senate9**

Marshall 3.1% 1.5% 95.4% 100% 69-11 D

(4) (2) (124) (124)

Rehnquist I 1.7% 5.7% 92.6% 100% 68-26 D

(7) (24) (390) (421)

Bork 1.0% 4.6% 92.6% 98.1%\* 42-58 D

(4) (20) (400) (432)

O'Connor 1.3% 7.9% 90.8% 100% 99-0 R

(4) (25) (287) (316)

Stewart 7.2% 6.0% 84.9% 98.2%\* 70-17 D

(12) (10) (141) (166)

Kennedy 2.9% 13.6% 83.5% 100% 97-0 D

(12) (56) (344) (412)

9 Refers to the party that controlled the Senate at the time of the nomination.

\* Indicates totals without the "Other" totals from Table I.

**Source Guliuzza III, Reagan, Barrett (1992)**

**APPENDIX 4**

TYPES OF QUESTIONS PUT TO ROBERT BORK AND

SUBSEQUENT NOMINEES BY THE COMMITTEE

**Nominee Comp Char Const'l Other Total Outcome**

Bork 1.0% 4.6% 92.6% 1.8% 100% 42-58

(4) (20) (400) (0) (432)

Kennedy 2.9% 13.6% 83.5% 0% 100% 97-0

(12) (56) (344) (0) (412)

Souter 1.3% 11.3% 77.1% 10.3% 100% 90-9

(4) (35) (239) (32) (310)

Thomas 4.7% 16.0% 79.3% 0% 100% 52-48

(33) (112) (555) (0) (700)

**Source Guliuzza III, Reagan, Barrett (1992)**

**APPENDIX 5**

TYPES OF QUESTIONS PUT TO ROBERT BORK AND OTHER FAILED OR

HIGHLY CONTROVERSIAL NOMINEES BY THE COMMITTEE

**Nominee Comp Char Const'l Other Total Outcome**

Fortas II 4.8% 18.3% 76.9% 0% 100% W/drew

(23) (88) (369) (0) (480)

Haynesworth 13.4% 79.9% 6.7% 0% 100% 45-55

(82) (488) (41) (0) (611)

Carswell 33.1% 62.7% 4.1% 0% 100% 45-51

(112) (212) (14) (0) (338)

Rehnquist II 1.3% 40.4% 58.3% 0% 100% 65-33

(7) (210) (303) (0) (520)

Bork 1.0% 4.6% 92.6% 1.9% 100% 42-58

(4) (20) (400) (8) (432)

Thomas 4.7% 16.0% 79.3% 0% 100% 52-48

(33) (112) (555) (0) (700)

**Source Guliuzza III, Reagan, Barrett (1992)**

References

Bork, R. (1985). Canisius College Speech. October 8, 1985.

Bork, R. (1971). Neutral Principles and Some First Amendment Problems, 47 *Indiana Law Journal* 1.

Epstein, L., Lindstadt, R., Segal J.A., & Westerland, C. (2006). The changing dynamics of senate voting on supreme court nominees. *Journal of Politics, 68,* pp. 296.

Guliuzza III, F., Reagan, D.J., Barrett, D.M. (1992). Character, competency, and constitutionalism: Did the bork nomination represent a fundamental shift in confirmation criteria? *Marquette Law Review Vol. 75:409*, p.409-437

Maltese, J. A. (1995). *The selling of supreme court nonimees.* Baltimore: The Johns Hopkins University Press.

Ogundele, A., & Keith, L. C. (1999). Reexamining the impact of the bork nomination to the supreme court. *Political Research Quarterly*, *52*(2), pp. 403-420. doi: Sage Publications