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ABSTRACT

Senate confirmation hearings on President Reagan's nominees for the U. S. Supreme Court raise questions about what these nominations tell about law. The controversy that surrounded the confirmation of the Reagan nominees was a direct result of two competing conceptions of law: legal formalism and legal realism. Legal formalism views law as a science based on "universal" legal principles, binding courts to precedent and the decisions of higher courts. Legal realism rejects formalism, seeing reliance on precedent as a static disguise for judicial discretion. Realists see the law more as a collection of argument warrants than scientific principles. To formalists, the selection of a justice should depend on that person's ability to apply the law, not any political ideology. To realists, it matters a great deal who is making the decisions, so extremist views justify rejection of a Supreme Court nominee. The disagreement explains the debate over the elevation of Associate Justice William Rehnquist to the position of Chief Justice, and the nominations of Antonin Scalia, Robert Bork, and Anthony Kennedy to the Court. Legal realists involved in the Senate confirmation hearings on the nominations focused on the nominees' perceived conservatism, while conservative Senators sought to emphasize the nominees' qualifications. The controversy surrounding the nominations foreshadows legislative battles to come; future nominees will be measured in an ideological crucible. (SG)

COMPETING CONCEPTIONS OF THE LAW: PUBLIC ARGUMENTS REGARDING NOMINEES TO THE UNITED STATES SUPREME COURT

by

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The April 1989 issue of the ABA (American Bar Association) Journal claims that the United States Supreme Court is approaching a "crossroads."[1] Noting that Ronald Reagan had started to change the make-up and direction of the Court, the magazine began a series of articles speculating whether the new justices "would lead the Court in a conservative revolution?" or whether they would "respect precedent, leaving decisions like Roe v. Wade firmly in place?" While it is impossible to offer definitive answers to these questions, it is apparent that the Court is on the brink of experiencing an ideological transformation. If George Bush is able to select any nominees for the Supreme Court during his tenure as president, it is possible that Ronald Reagan's vision of a conservative majority may come to fruition.

In this paper we consider the last four Reagan selections to the Supreme Court.[2] Our objective is not to determine whether the Court is headed for the right, but rather to assess what these nominations can tell us about law. Specifically, it is our contention that the controversy involved in these confirmations is a direct result of two competing conceptions of the law. In support of this thesis, the first section of this paper describes and distinguishes between legal formalism and legal realism. The second section

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[1]"The Court at the Crossroads," ABA Journal, April 1989, p. 55.

[2]We are intentionally excluding Douglas Ginsberg because he withdrew his name prior to formal hearings.

attempts to show how these theories of the law are manifested in the standards suggested in the confirmation hearings for assessing these nominees. The final section discusses how this change was reflected in the actual debates over the aforementioned nominees.

Competing Conceptions of Law

Law is a system of argumentation which attempts to integrate statutes into a set of procedural and substantive principles of justice guaranteed by the United States Constitution.[3] "The legal field," Rowland has argued, "is organized around the general purpose of preventing social conflict."[4] Cataldo, Kempin, Stockton, and Weber concurred in this assessment in their description of the important agents within the legal system. They see these agents as helping people avoid conflict with each other and the government: "They are attempting to settle arguments that have arisen informally or formally through court action. They are attempting to discourage conduct that is antisocial."[5] By discouraging such conduct, the law helps to promote social cohesion. This cohesion is the design which orders legal structures and

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[3]See, for example, Martin Golding, Philosopny of Law (Englewood Cliffs: Prentice Hall, 1974), p. 9; and Carter, pp. 1-9.

[4]Robert Rowland, "Argument Fields," in Dimensions of Argument: Proceedings of the Second Summer Conference on Argumentation, eds. George Ziegelmueller and Jack Rhodes (Annandale, Va.: Speech Communication Association, 15 October 1981), p. 68.

[5]Bernard Cataldo, Frederick G. Kempin, Jr., John M. Stockton, and Charles Weber, Introduction to Law and the Legal Process, 2nd ed. (New York: Wiley and Sons, 1973), p. 1.

procedures.[6] Toward that end, law provides a means by which controversies can be defined and resolved.[7]

The Court fulfills its role through a delicate process: by choosing which cases to consider, it applies the Constitution's broad, eighteenth-century principles to the dilemmas of today. Through the process of adapting general principles to contemporary concerns the Court gives the Constitution its special status. It justifies change by referring to tradition, using the Constitution as Scripture and making it relevant to the times. Although this sort of judicial construction of the Constitution would imply that the Court has considerable power, the Court's power is actually severely constrained by the Constitution. The Court is limited because it has no force to back up its rulings outside of the willingness of the legislative and executive branches, and ultimately the people, to accept its decisions. The Court has no army, no resources, and no bureaucracy to administer its decisions. If Congress is unhappy with a court decision it has the option of either ignoring the decision or passing a law specifically aimed at overcoming the ruling's impact.

Legal reasoning is conveyed through judicial opinions.[8] These opinions are issued to explain the outcome at the conclusion of a suit. It

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[6]See Rowland, p. 71; and American Bar Association Project on Standards for Criminal Justice, The Prosecution and the Defense Function (New York: Institute of Judicial Administration, 1971), p. 2.

[7]See Don R. Le Duc, "'Free Speech' Decisions and the Legal Process: The Judicial Opinion in Context," Quarterly Journal of Speech 62 (October 1976): 279.

[8]For a more detailed description of the importance of judicial opinions see J.M. Makau, "A Functional Analysis of Judicial Argumentation: Implications

should be remembered that most legal proceedings never result in a judicial opinion. When a case is tried to a jury the judge serves primarily as an impartial moderator and judicial opinions are unnecessary. Opinions are written only at those trials where the judge is forced to rule on a question of law. Consequently, opinions are more common at the appellate level where arguments are tried to a judge or panel of judges as opposed to a jury. So for example, the Supreme Court has limited original jurisdiction, meaning that most of its cases are appeals from lower courts. Thus, it issues dozens of opinions per year. In contrast, many trial courts hearing criminal cases seldom issue opinions because the jury resolves the issues. Although some courts will necessarily issue more opinions than other courts, all legal opinions express the issues raised in a case and the legal principles invoked to resolve the controversy. In this sense, they are arguments about arguments which the court found to be persuasive. Such written opinions serve as a record of outcomes in cases that have proved particularly difficult to settle.[9] In this sense, opinions are a collection of warrants available for use by the courts to justify future decisions. The courts can rely on the outcome in one case to justify a similar outcome in a different case. Or, by distinguishing between cases, the Court can argue for a different outcome although the circumstances between cases may be very similar. These opinions establish the boundaries for future argument. Even dissenting opinions are important,

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to Argumentation Theory," paper presented at the 1983 Speech Communication Association Convention, Washington, D.C.

[9]The act of justification is an important part of the decision making process. See Richard D. Rieke and Malcolm O. Sillars, Argumentation and the Decision Making Process (New York: Wiley and Sons, 1975), pp. 25-26.

for they indicate arguments which might be employed in future cases.[10] Opinions force judges to offer reasons in support of their conclusion, limiting arbitrary decisions. This is important, it must be remembered, since the courts are really powerless--they have neither the means nor the resources to implement their own decisions.[11] Because they must rely on the efforts of other branches of government to enforce their decisions, it is important that courts act only on the foundation of good and substantial reasons. Should the courts ever lose credibility, the judicial system would lose its credibility along with its power.[12]

Legal Formalism

All of this is not to suggest that the individual judge is powerless. It might be argued that the need to explain and justify, communicate and inform, while simultaneously maintaining and building the integrity of the court, would greatly constrain the individual judge. Indeed, for a time it was argued that judges ought to have little power. This traditional view of the law, popularized in the 1870s by Christopher Columbus Langdell, first Dean of

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[10]See Charles Evans Hughes, The Supreme Court of the United States (New York: Columbia University Press, 1928), p. 68.

[11]The courts can have impact only so far as they are able to influence others to implement their decisions. For example, in Brown v. Board of Education the Supreme Court unanimously struck down racial segregation in education. However, despite the sweeping nature of the Court's mandate for racial desegregation, many lower courts and governmental agencies refused to enforce the Court's decision. The result was a weakening of the mandate since the Supreme Court was powerless to enforce its own judgment.

[12]See Philip B. Kurland, Politics, the Constitution, and the Warren Court (Chicago: University of Chicago Press, 1969), p. 23.

the Harvard Law School, held that a judge did little more than arrive at the obvious conclusion. Langdell believed that the law was a comprehensive corpus of rules so complete that it was able to resolve any particular case merely by invoking the pertinent standard.[13] In his view, law was a science based on "universal" legal principles that were entirely neutral. Attorneys and judges did not make the law; they just applied the law mechanically to the immediate case. Judges had absolutely no discretion in the application of the law.[14]

One of the key ingredients of this view was the doctrine of *stare decisis.* According to this doctrine, judges are bound by prior decisions. These decisions serve as precedents limiting the power of the judge to interpret the law. This doctrine has particular importance in a hierarchical system.[15] In such a system the courts are arranged in a subservient fashion. The state district courts are subservient to the state supreme courts. The state supreme courts are subservient to the federal district courts, but only on questions involving the federal government.[16] The United States Supreme Court sits at the highest level. Consequently whatever the United States Supreme Court holds is binding on the lower courts. In this view, decisions work their

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[13]See Peter Mancusi, "The Trouble at Harvard Law," Boston Globe Magazine, 27 April 1986, p. 24.

[14]This view is summarized by Jerome Frank, Law and the Modern Mind (New York: Coward-McCann, 1930), pp. 32-33. See also Carter, p. 2.

[15]The idea of "vertical" versus "horizontal" *stare decisis* is based on Carter, p. 40.

[16]This is a simplified description of the state courts. Some states have substantially more complex systems and use different designations to refer to their courts.

way up the hierarchy. They begin with a decision at the lowest court that has jurisdiction and work toward the highest court having jurisdiction. Once the Supreme Court resolves a case (either by reviewing the case or denying *certiorari* and refusing to consider it), the legal principles are resolved. All lesser courts are bound to apply the decisions of the higher courts. The result, Langdell and other "legal formalists" argued, is a scientific application of the law. Since all courts are bound to precedent and are accountable to a higher court, the result will necessarily be a consistent application of the law.

Legal Realism

This view has been questioned by scholars such as Jerome Frank who has observed that the law is not unchanging, but wholly dynamic and frequently inconsistent.[17] Instead of seeing *stare decisis* as a limitation on a judge's power, Frank and others claim that *stare decisis* serves to provide and disguise enormous judicial discretion.[18] "The truth of the matter," Frank argues, "is that the popular notion of the possibilities of legal exactness is based upon a misconception. The law always has been, is now, and will ever continue to be, largely vague and variable."[19] It would be impossible for the legislature to devise laws that anticipated and resolved each and every possible contingency, for the law deals with complex behavior and relations. Frank observes that "the whole confused, shifting helter-skelter of life

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[17]See for example Roscoe Pound, "What of Stare Decisis?" Fordham Law Review 10 (January 1941): 5-6.

[18]Kairys, p. 15.

[19]Frank, p. 6.

parades before it--more confused than ever, in our kaleidoscopic age."[20] Instead of inflexibly applying precedents as required by the legal formalists' conception of *stare decisis*, judges must inevitably exercise discretionary power when rendering verdicts. If we approached law as a method of applying general rules to diverse facts, we would probably be troubled to find the rules changing from case to case. Such a static view of the law, however, must be rejected as it is inadequate to explain contemporary jurisprudence. Edward Levi observed that "this change in the rules is the indispensable dynamic quality of law . . . (which) occurs because the scope of a rule of law, and therefore its meaning, depends upon a determination of what facts will be considered similar to those present when the rule is first announced."[21] By retaining the right themselves to define "key issues" in any given case, and by comparing those issues with relevant cases previously adjudicated, the judge is able to arrive at a decision. Levi observes that "the determination of similarity or difference is the function of each judge."[22] In situations where case law is considered, and there is no statute, the judge is not bound by the rule of law made in prior cases. Such rules are mere *obiter dictum* which can be dismissed if the judge can establish either the existence or absence of facts which the previous judge thought were important. "It is not what the prior judge intended that is of any importance," Levi theorizes, "rather it is what the present judge, attempting to see the law as a fairly consistent whole, thinks should be the determining classification. In arriving at this result he

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[20]Frank, p. 6.

[21]Edward Levi, An Introduction to Legal Reasoning (Chicago: University of Chicago Press, 1949), p. 2.

[22]Levi, p. 2.

will ignore what the past thought important; he will emphasize facts which prior judges would have thought made no difference."[23] The judge decides each case on its own merits, not because he or she is unable to rely on precedent, but rather because the doctrine of dictum forces each judge to make their own decision.[24] This doctrine holds that a principle is dependent on the circumstances of the case. Consequently, judges are bound to honor precedent only in identical circumstances. By defining and distinguishing between cases, judges are able to develop their own conclusions. Seen from this light, the law is more a collection of argument warrants than scientific principles.[25] The individual judge selects from among these available warrants to arrive at a decision.

While some might use this as a basis to criticize the law, the legal realists argue that it is essential to the smooth operation of the legal process. Without such discretion in the application of the law, it would be impossible for the law to evolve and to address new legal questions, and hence "our society would be strait-jacketed."[26] Judicial discretion allows the law to change to keep up with the times. This gradual evolution absolves the

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[23]Levi, p. 2.

[24]See Levi, p. 2.

[25]In more contemporary times, scholars operating under the rubric of critical legal studies have gone even further. While the legal realists believe in discretion, they see legal principles as being neutral. In contrast, the proponents of critical legal studies have charged that these principles are not objective. They have claimed that outcomes in similar cases may vary depending on a judge's personal predispositions. Some have gone so far as to argue that the legal system is used as a means of social and economic repression.

[26]Frank, pp. 6-7.

legislature of the need to update the law on a recurrent basis to address new social and legal problems. Consequently, the various legislatures are saved from being overburdened with policy questions and other matters. All of this led Frank to conclude that "much of the uncertainty of law is not an unfortunate accident: it is of immense social value."[27] Moreover, because of our ever-changing world flexibility in the law is "inevitable."[28] Further, this discretion encourages participation in the legal system.

The goal of minimizing conflict, coupled with the method of legal reasoning, results in an ordered yet evolving application of the law. Individual agents use legal reasoning to arrive at conclusions which attempt to reduce conflict and foster acceptable social behavior. This motivation, coupled with the discretion involved in the identification and application of relevant law, results in a dynamic legal system. In describing this process Levi has argued that the law goes through a "circular motion" consisting of three stages: creation, application, and disintegration.[29] In the first stage a legal concept is created. While working through a number of cases the court searches for a guiding principle; it "fumbles for a phrase."[30] In the second stage the court consistently applies the principle. It reasons from previous decisions to resolve similar cases.[31] In the third phase the principle breaks

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[27]Frank, pp. 6-7.

[28]See, for example, Benjamin N. Cardozo, The Nature of the Judicial Process (New Haven: Yale University Press, 1921).

[29]See Levi, pp. 8-9.

[30]Levi, p. 9.

[31]See Levi, p. 9.

down. The continued application of the principle through a series of examples demonstrates that the principle has become inadequate.[32] This revelation requires the court to return to the first stage and attempt to forge a new principle. This circular progression through phases is only possible because of the inherent discretion of judges in the evolution of the law. If the traditional view of the law were correct, the only source of constructive change would be the legislature. In that view, the only changes in the law would come from the legislature. The legal realists, however, claim that law is constantly evolving because of the legal reasoning process. It is through this process that the Court adapts doctrine to circumstances, and circumstances to doctrine.

There is a real difference between what the "legal formalists" and the "legal realists" have to say about the law. The formalists see law as a science much like mathematics, in which a judge merely invokes a preestablished set of formulas to a particular set of circumstances. Like physics or mathematics, there is a always a correct answer. Moreover, the answers are consistent from case to case. In contrast, the judicial realists believe that the judge has a great deal of discretion in deciding a case. The judge must decide which precedents to follow, which precedents to distinguish, and when to create a new precedent by offering a novel solution. According to the realists, there is no single correct answer. Two judges might be able to produce equally valid conclusions from the same set of facts.

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[32]See Levi, p. 9.

Standards for Assessing Justices

These conceptions of law have a profound impact on the standards the Senate uses for selecting Supreme Court Justices. If the legal formalist are correct, then there can be but a single proper conclusion to each case. Consequently, it matters little who is constructing the proofs. Any competent jurist should be able to produce the proper conclusions. A review of recent confirmation hearings reveals a number of Senators who subscribe to this theory of the law. Senator Orrin Hatch, for example, has argued that "since judges are obligated to find, and not make, the law, their personal views on the political or sociological merits of an issue have little relevant to inquiries about judicial qualifications."[33] By the same logic, Senator Dennis DeConcini claimed that "as long as a nominees is otherwise qualified, the nominee's personal philosophy should never be a consideration unless that philosophy undermines the fundamental principles of our constitutional system or the nominee's dedication to his or her ideological principles is so strong that he or she cannot be an impartial judge."[34] Political persuasion is unimportant, according to this view, because the individual judge has no discretion when finding the law. Thus, a liberal or a conservative justice should come to exactly the same conclusions.

The standards for selecting judges changes, however, if you believe that there is discretion in finding the law. If the legal realists are correct, then it matters a great deal who is making the decisions. Consequently, it is

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[33]Orrin Hatch, Senate Committee on the Judiciary, Nomination of Justice William Hubbs Rehnquist, 99th Cong., 2nd sess., July 29-31 and 1 August 1986, p. 23. Hereafter referred to as Rehnquist Hearings.

[34]Dennis DeConcini, Congressional Record, 9 October 1987, p. S13939.

important to ascertain if judges hold biases and preconceptions during confirmation hearings. Moreover, the political preferences of a judge are a relevant criteria. If a judge has extreme political views, they might rely on those views when finding the law. Senator Simon justified such considerations when he argued:

> There are two fundamental reasons that nominees legal views should not be altogether off limits to the Senate. One is that just as we know that nominee's competence and integrity will affect his view as a judge, we know that the nominee's individual views about legal matters will in some measure affect decisions the nominee makes as a judge. The reason is the judges inevitably have leeway. They must fill in gaps in the law and must resolve ambiguities about what the law is, and in doing so, a judge inevitably draws upon his or her starting point views and outlook. . . . The second reason a nominee's views may be relevant to the current Senate is that they were relevant to the President's own decision to nominate.[35]

Thus, Simon concluded, it was important for the Senate to study not only qualifications, but also to look at political ideas. Senator Inouye went so far as to expressly reject formalism, noting:

> The purpose of the Court is not to design a vast edifice of impeccably logical legal rules. As one legal scholar noted, in this country the courts must do what is necessary and impossible--necessary because justice and decency require it; impossible because we often lack the courage, compassion, and sensitivity that our system demands of it.[36]

If the nominees' beliefs are too extreme, then they would constitute a reason for rejecting a particular candidate. Llyod Cutler, counsel to President Carter, has observed that "it is improper to nominate someone, however well

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[35]Paul Simon, Senate Committee on the Judiciary, Nomination of Judge Antonin Scalia, 99th Cong., 2nd sess., 5-6 August 1986, p. 26. Hereafter referred to as Scalia Hearings.

[36]Daniel Inouye, Congressional Record, 8 October 1987, p. S13837.

qualified professionally, whose ideology so dominates his judicial judgment as to put his impartiality in particular cases into question."[37]

This distinction is critical. By the formalists view of the law, you only need to consider professional competence. While the realists consider competence, they also take into account political considerations. Consequently, it would be possible to reject a well qualified nominee who is a political extremist. The importance of this distinction is obvious. If the Senate relies on the formalists' conception of the law, then only unqualified nominees should be rejected. In contrast, if the Senate relies on the realists' view, then there is good reason for objecting to candidates who would use their discretion to impose a particular political agenda. Accordingly, the standards that the Senate uses when assessing judges will tell us a great deal about how the Senate conceives of the law.

Case Studies

The confirmation debates over Supreme Court nominees graphically illustrate the tension between these two competing conceptions of the law. This tension can be seen in the four most recent nominations--William Rehnquist, Antonin Scalia, Robert Bork, and Anthony Kennedy--to the Supreme Court. While three of the four nominees were confirmed, a review of these public arguments is instructive in that it reveals the conflict between these views of the law as manifest in public argument. In the paragraphs that follow we briefly characterize the debate over each of the nominees.

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[37]Llyod Cutler, Scalia Hearings, p. 149.

William Rehnquist

The decision to confirm Justice Rehnquist as Chief Justice was among the most important of the 99th Congress. While 40 men have served as President, only 15 have ever worn the robes of Chief Justice of the United States. Four nominees, beginning with John Rutledge, have been rejected by the Senate.[38] Consequently, the Senate took great care in assessing the "man, who in all likelihood, will be the first Chief Justice of the 21st century."[39] Ultimately, the controversy surrounding the Rehnquist nomination came down to two questions: First, was William Rehnquist qualified to be Chief Justice? Second, should William Rehnquist be excluded because he was a political extremist?

The answer to the first question was extremely easy. It would be difficult, if not impossible, to argue that Justice Rehnquist did not possess the academic credentials to be Chief Justice of the United States. "His academic credentials are the best," Senator Dole argued, continuing to note that "he was first in his class at Stanford law school; he has a master's degree in history from Harvard; he had the highest honors at Stanford in his undergraduate days."[40] After graduation in 1952 he served for a year as a clerk for Supreme Court Justice Robert H. Jackson. From 1953 until 1969, Justice Rehnquist was in private practice in Phoenix. Rehnquist was appointed Assistant Attorney General in charge of the Office of Legal Counsel in 1969 and confirmed as an Associate Supreme Court Justice in 1971. During his fifteen years on the

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[38]In addition to Rutledge, George Williams, Caleb Cushing, and Abe Fortas have failed to win confirmation.

[39]Paul Tribble, Rehnquist Hearings, p. 13.

[40]Robert Dole, Congressional Record, 17 September 1986, p. S12831.

Court he has authored more than 230 majority opinions and 80 dissenting opinions.[41] "Whether or not one agrees with his judgment throughout the years," Senator Laxalt observed, "it is difficult to disagree with the unanimous opinion of the American Bar Association committee that his legal analysis and writing are of the 'highest quality'" and that he meets "the highest standards of professional competence, judicial temperament, and integrity."[42] Even Justice Rehnquist's most ardent opponents were forced to admit that he was well qualified for the position, as is evidenced by the fact that his qualifications were never an issue.

The case against Rehnquist conceded that he was qualified and alleged simply that he was too much of a political extremist to serve as Chief Justice.[43] In particular, the opponents of the nomination argued that Rehnquist was an ideologue who would try to enforce his peculiar political views on American jurisprudence. Senator Edward Kennedy, a leading liberal, summarized the case against Rehnquist in his opening statement at the confirmation hearings:

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[41]Dole, p. S12831.

[42]Paul Laxalt, Congressional Record, 17 September 1986, p. S12809.

[43]The hearings on Rehnquist's nomination focused almost entirely on the extremism issue. During the floor debates on the nomination opponents also objected to the nomination on the grounds that Rehnquist has failed to recuse himself in certain cases (notably Laird v. Tatum, 93 S.Ct. 7 (1972)); that he had harassed voters while serving as a poll watcher during the elections of 1960, 1962, and 1964; that he had written a memo to Justice Jackson critical of school desegregation in 1952; that he owned property under restrictive covenants; and on the charge that he had acted unethically in setting up a trust account in 1961 for his brother-in-law, Harold Cornell. These issues, however, were frequently taken as signs of a larger problem regarding his extreme viewpoints on certain matters.

> As a member of the Court, he has a virtually unblemished record of opposition to individual rights in cases involving minorities, women, children , and the poor. His views are so far outside the mainstream, even of the Burger Court, that in 54 cases decided in the merits, Justice Rehnquist could not attract a single other Justice to his extremist views. Again and again, on vital issues, such as racial desegregation, equal rights for women, separation of Church and State, he stood alone in 8-to-1 decisions, with all the other Justices on the other sides.[44]

Senator Kennedy concluded: "He is too extreme on race, too extreme on women's rights, too extreme on freedom of speech, too extreme on separation of church and state, too extreme to be Chief Justice."[45] Benjamin Hooks, representing the Leadership Conference on Civil Rights, noted simply: "The Senate must not allow such a right-wing ideologue to become Chief Justice."[46]

To substantiate the charges of extremism, opponents looked to Rehnquist's record as an Associate Justice. Elaine Jones and Eric Schnapper of the Legal Defense Fund reported that "among the 83 cases in which members of the Court had disagreed about the interpretation of application of a twentieth century civil rights statute, Justice Rehnquist has joined on 80 occasions for the interpretation least favorable to minorities, women, the elderly, or the disabled."[47] Gary Orfield, Professor of Political Science, Public Policy and Education at the University of Chicago, boldly declared that "no modern Justice has been so consistently hostile to enforcement of equal protection of the laws or has embraced so consistently a fundamentalist legal

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[44]Edward Kennedy, Rehnquist Hearings, p. 15.

[45]Kennedy, Rehnquist Hearings, p. 15.

[46]Benjamin Hooks, Rehnquist Hearings, p. 912.

[47]Elaine R. Jones and Eric Schnapper, Rehnquist Hearings, p. 931.

philosophy that so firmly denies any possibility of judicial protection for victims of discrimination."[48] Senator Biden was even more succinct: "Look at the record in case after case. He always winds up in opposition to the rights of the minority."[49] Representative Weiss, testifying on behalf of the Americans for Democratic Action, concluded that "he seems ready to reverse much of the progress our nation has made over the last 25 years in the areas of equal protection, voting rights, and civil liberties."[50]

Those who opposed Rehnquist argued that the issue was not partisanship, but rather at what point a nominee's political ideals become so extreme that they constitute grounds for rejection. At one point in the hearing, Senator Metzenbaum took care to distinguish between these concerns, noting "constitutional extremism is different from a conservative or liberal political philosophy."[51] The case against Rehnquist, so claimed his opponents, was not a partisan issue. Senator Frank Lautenberg captured the spirit of this argument when he noted that "no one so extreme, so out of touch with the mainstream of thought should become the symbol of Justice in our Nation."[52]

In response to this criticism, advocates of Justice Rehnquist were quick to point out that he was no extremist. Rather, they alleged that he was the victim of a partisan political crusade. Senator Dennis DeConcini, a supporter

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[48]Gary Orfield, Rehnquist Hearings, p. 740.

[49]Joseph Biden, Congressional Record, 17 September 1986, p. S12811.

[50]Ted Weiss, Rehnquist Hearings, p. 414.

[51]Howard Metzenbaum, Rehnquist Hearings, p. 18.

[52]Frank Lautenberg, Congressional Record, 17 September 1986, p. S12829.

of Rehnquist, described the situation like this: "I think we all know here that this Justice is very conservative and that many Members of this body who are not very conservative do not want to see this type of Justice sit there because of his conservative views."[53] While it was true, they admitted, that Rehnquist was a conservative, he was hardly a fanatic. Craig Bradley, a former clerk to Justice Rehnquist and a professor of law at Indiana University, testified that the Justice "cannot be described as an extremist. He cannot be described as a knee-jerk conservative."[54] To illustrate this fact, his defenders pointed to his long and distinguished tenure as an Associate Justice. Senator DeConcini pointed to "a study of the Court's 20 top civil rights cases of 1986 shows that Justice Rehnquist voted in the mainstream 70 percent of the time."[55] Even in those instances in which he dissented, Senator Thurmond noted that the principles established "are gaining acceptance with the other Justices in recent terms."[56] Finally, his supporters charged that Rehnquist's opponents were actually the ones out of touch with the American people. Senator Dole, in the concluding speech on behalf of Rehnquist in the Senate noted: "He certainly has the confidence of the President, who in turn, received an overwhelming mandate from the electorate in 1980, and again in 1984. If that is extremism, then the majority of the American people fit into that same mold."[57]

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[53]Dennis DeConcini, Congressional Record, 17 September 1986, p. S12818.

[54]Craig Bradley, Rehnquist Hearings, p. 423.

[55]DeConcini, 17 September 1986, p. S12818.

[56]Strom Thurmond, Congressional Record, 17 September 1986, p. S12818.

[57]Dole, p. S12831.

Antonin Scalia

Immediately after the Senate confirmed William Rehnquist as Chief Justice, the body decided whether Antonin Scalia should be confirmed as an Associate Justice. As with Rehnquist, the Scalia nomination hinged on his qualifications and his politics. Like Rehnquist, the qualifications of the nominee were essentially stipulated by all participants in the nomination process. Senator Pete Domenici briefly summarized Scalia's experience as follows:

> You are all aware of the litany of Antonin Scalia's successes all the way from graduate summa cum laude from Georgetown, magna cum laude from Harvard, graduate fellow at Harvard, associate with a prestigious law firm, law professor at four universities, Assistant Attorney General, Judge of the U.S. Court of Appeals, and on and on and on. That is many lifetimes worth of achievements for most of us.[58]

Even the liberal Senators who had opposed Rehnquist's accession to Chief Justice were forced to admit that Scalia was qualified for the Supreme Court. Senator Patrick Leahy admitted to Scalia that "I too have been impressed by your impressive background."[59]

Rather than attacking his qualifications to be a Supreme Court Justice, the case against Scalia was based entirely on his conservative politics and the implied philosophy of jurisprudence. The argument was unique in that it did not charge that Scalia was a judicial activist who would use his power to promote a conservative agenda, but rather the charge was that Scalia would be unwilling to strike laws which were consistent with prevailing public

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[58]Pete Domenici, Scalia Hearings, p. 10.

[59]Patrick Leahy, Scalia Hearings, p. 20.

opinion. This sort of deference, Thomas Kerr, Executive Committee Chairperson of the Americans for Democratic Action, charged:

> would have upheld Plessy v. Ferguson rather than provide the liberating rule of Brown; would have continued to deny assistance of legal counsel to indigent accused rather than provide the fundamental fairness of Gideon v. Wainwright; would have encouraged the police of the states to continue to enter our homes and seize our property, rather than provide the protection of Mapp v. Ohio; would have up held the practice in some states, and widely regarded as legitimate there as last as the 1960's, to punish interracial marriage as a crime, rather than provide the understanding of privacy, dignity and individual choice of Loving v. Virginia; would have sanctioned continuation of state practices in laws discriminating against jurors, or administration of estates, or otherwise enjoying the equal protection of the laws, rather than admit women to equality as the U.S. Supreme Court did in 1971 in Reed v. Reed.[60]

Other critics amplified this reasoning. Audrey Feinberg, testifying on behalf of the Nation Institute, warned that "Judge Scalia's decisions reveal a remarkably consistent record of failure to support civil liberties and civil rights, and of narrowly interpreting the Constitution."[61] Eleanor Smeal, speaking on behalf of the National Organization for Women warned that Scalia would be unwilling to protect the rights of women and minority members of society.[62] Kate Michelman, Executive Director of the National Abortion Rights League, charged that Scalia could be the swing vote in overturning the Roe v. Wade decision legalizing abortion.[63] Lawrence Gold,

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[60]Thomas Kerr, Scalia Hearings, p. 205.

[61]Audrey Feinberg, Scalia Hearings, pp. 250-251.

[62]Eleanor Cutri Smeal, Scalia Hearings, pp. 170-184

[63]Kate Michelman, Scalia Hearings, pp. 276-293.

General Counsel of the American Federation of Labor and Congress of Industrial Organizations, feared that Scalia's judicial thinking would "hobble Congress and aggrandize Executive Power."[64]

Although he was unwilling to comment on hypothetical or specific cases, Scalia went to great lengths to reassure the Senate that he would not use his power on the Court to undercut prevailing legal doctrine. In response to a question from Senator Kennedy Scalia emphatically stated: "I assure you I have no agenda. I am not going to the Court with a list of things I want to do. My only agenda is to be a good judge."[65] At another point during the hearing he stated: "There are countless laws on the books that I might not agree with, aside from abortion, that I might think are misguided, even immoral. In no way would I let that influence how I might apply them."[66]

Scalia's defenders in the Senate picked up on these themes and stressed that he would assess each case on its merits. A long string of prominent witnesses testified that Scalia would be an outstanding jurist.[67] These witnesses stressed that Scalia would not use his new position to promote a

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[64]Lawrence Gold, Scalia Hearings, pp. 185. Gold's testimony runs from pp. 185-202.

[65]Antonin Scalia, quoted by Alan Cranston, Congressional Record, 17 September 1987, p. S12840.

[66]Antonin Scalia, p. S12840.

[67]A partial list of those testifying on Scalia's behalf include: Carla Hills, former Secretary of Housing and Urban Development; Erwin Griswold, former Solicitor General of the United States and former dean of Harvard Law School; Gerald Casper, Dean of the University of Chicago School of Law; Paul Verkull, President and Profess of Law at the College of William and Mary; and Lloyd Cutler, former counsel to President Carter.

particular agenda or set of political principles. Dean Guido Calabresi of the Yale Law School was quoted as saying:

> I have always found him (Scalia) sensitive to points of view different from his own, willing to listen, and though guided, as any good judge should be, by a vision of our Constitution and the roles of judges under it, flexible enough, also as a good judge should be, to respond to the needs of justice in particular cases.[68]

The implication of this statement, of course, was that Justice Scalia would not use his position to impose his admittedly conservative views. To support this fact, Senator McConnell noted that Judge Scalia had authored the opinion in Synar v. United States striking down the key provision of the Gramm-Rudman-Hollings laws for being unconstitutionally violative of the doctrine of separation of powers.[69] No true conservative, it was implied, would have gutted legislation championed by leading Republicans in Congress.

Rather than being a right-wing conservative willing to impose his views in a particular case, proponents of Scalia depicted him as an opponent of judicial intervention regardless of the issue. Paul Verkuil, President of the College of William and Mary and a Professor of Law, testified that "his views are also consistent across whatever philosophical issue is presented."[70] In this sense, Professor Verkuil continued, he has all the makings of another John Marshall Harlan, "a judge universally respected for his restraint during

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[68]Guido Calabresi, quoted by Orrin Hatch, Scalia Hearings, p. 16.

[69]Mitch McConnell, Scalia Hearings, p. 28. Referring to Synar v. United States, 626 F.Supp 1374 (D.D.C. 1987).

[70]Paul Verkuil, Scalia Hearings, p. 147.

the Warren years."[71] Like Harlan, Scalia would probably be unwilling to sanction judicial activism on behalf of any cause. Indeed, Llyod Cutler went so far as to argue that "his major opinions on the court have been supported about as frequently by what is colloquially called the 'liberal' wing of the court (including President Carter's four appointees) as by the 'conservative' wing."[72]

Ultimately, the entirety of the United States Senate came to the realization that Scalia was unlikely to impose a political agenda through the Court. Although they remained skeptical, those who doubted Scalia were sufficiently reassured that they were unwilling to oppose his nomination. Senator Edward Kennedy, champion of the liberal wing of the Democrat Party, was forced to admit that on most issues "it is difficult to maintain that Judge Scalia is outside of the mainstream."[73] Senator Joseph Biden noted that "although I strongly disagree with Judge Scalia's judicial philosophy in a number of areas, I find his views to be within the legitimate parameters of the debate."[74] Senator Howard Metzenbaum seemed to capture the liberal's sentiment when he boldly stated:

> I will vote for Judge Scalia, despite his conservative views because I believe he is qualified.
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> I will vote for Judge Scalia because I do not believe that his presence on the Court will shift the Court dramatically and dangerously to the right.

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[71]Verkuil, p. 147.

[72]Cutler, p. 153.

[73]Edward Kennedy, Scalia Hearings, p. 12. See also Congressional Record, 17 September 1986, p. S12384.

[74]Biden, 17 September 1986, p. S12833.

> I will vote for Judge Scalia because I do not believe that his presence on the Court will endanger the basic individual rights protections Americans enjoy today.[75]

In the end, even the liberals who opposed Rehnquist supported the Scalia nomination.

Robert Bork

The case for Robert Bork alleged that he was imminently qualified to be a Justice on the United States Supreme Court. Senator David Karnes described Bork's legal record as follows:

> A graduate of the University of Chicago Law School, a Phi Beta Kappa and managing editor of the institution's Law Review, Robert Bork has twice served on the faculty of Yale Law School and was a professor at that prestigious institution for 15 years. In his private practice of law, Mr. Bork earned a national reputation as an outstanding litigator. In his 4 years as Solicitor General of the United States, Robert Bork fulfilled his role in a job that is universally recognized as one requiring the talents of a "lawyer's lawyer."[76]

The Minority Views of the Senate Judiciary Committee claimed simply that "Judge Robert Heron Bork is among the most qualified nominees to the Supreme Court in recent history."[77]

There was no need to belabor Judge Bork's qualifications, as those who opposed him did not contest his knowledge of the law. Senator Alan Dixon, for example, began by acknowledging "that Judge Bork is an extremely

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[75]Howard Metzenbaum, Congressional Record, 17 September 1986, p. S12834.

[76]David Karnes, Congressional Record, 7 October 1987, p. S13749.

[77]Report of the Committee on the Judiciary of the United States Senate, Nomination of Robert H. Bork to be an Associate Justice of the United States Supreme Court, 13 October 1987, p. 218. Hereafter cited as Report on Bork

qualified lawyer."[78] Senator Lawton Chiles added, "I am satisfied that Judge Bork has the capacity. He seems to be a highly intelligent, perhaps brilliant legal scholar."[79] Senator John Melcher said "I find Judge Bork's qualifications to be exemplary."[80] Even some of Judge Bork's harshest critics were forced to concede his qualifications. Former Representative Barbara Jordan publicly noted, "I concede Judge Bork's scholarship and intellect and its quality, and there is no need for us to debate that."[81] Senator Patrick Leahy referred to Bork as "an intellectual, of the first order. He is a thinker; he is a philosopher."[82] Professor Laurence Tribe of Harvard Law School said, "I have high regard for Judge Bork's intellect, and I have no reason to doubt his integrity."[83]

The case against Judge Bork was grounded in legal realism. It claimed that while technically qualified, he was too much of an ideologue to serve on the Supreme Court. Senator Brock Adams argued:

> Despite Judge Bork's evident intelligence, I am convinced that his confirmation would be detrimental to the ends of liberty and equality. I am convinced that Judge Bork's view of the equal protection clause is adequate and narrow. His views would require the law to tolerate discrimination based on gender, poverty, and citizenship. I am convinced that Judge Bork's view of liberty under the Constitution is contrary to Supreme Court

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[78]Alan Dixon, Congressional Record, 7 October 1987, p. S13707.

[79]Lawton Chiles, Congressional Record, 7 October 1987, p. S13722.

[80]John Melcher, Congressional Record, 9 October 1987, p. S14012.

[81]Report on Bork, p. 218

[82]Report on Bork, p. 220.

[83]Report on Bork, p. 218.

> precedents that have developed in our more enlightened years.[84]

The questions involved, critics charged, were more than partisan politics. The critics alleged specific objections to how Judge Bork would function on the Court. In particular, there were concerns about Judge Bork's theory of constitutional interpretation and his willingness to abide by judicial precedent.

Critics charged that Judge Bork was a strict constructionist who would be unwilling to protect rights and privileges not specifically enumerated in the Constitution. According to Senator Dodd, Judge Bork "looks at the Constitution in a rigid and abstract way. As some have suggested, he reads it more like the Tax Code than a basic charter of freedoms of Americans."[85] Professor Laurence Tribe warned that if Judge Bork "is confirmed as the 106th Justice (he) would be the first to read liberty as though it were exhausted by the rights . . . the majority expressly conceded individuals in the Bill or Rights."[86] This distinction was important, Senator Inouye charged, because "there is a difference between technically applying rules and achieving justice. A legal technician could logically argue that there is no constitutional basis for prohibiting discrimination on the basis of sex, sexual preference or race."[87] This was unacceptable in a Justice, Inouye continued, as often times they were required to uphold values found in "not only the words but also

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[84]Brock Adams, Congressional Record, 6 October 1987, p. S13502.

[85]Christopher Dodd, Congressional Record, 6 October 1987, p. S13507.

[86]Report on Bork, p. 13.

[87]Inouye, Congressional Record, 8 October 1987, p. S31837.

the spirit of our Constitution."[88] In this view, the Constitution is not a mere list of rules written by the founding fathers. Senator Gore noted that the Constitution "is an instrument of dynamic principles and the blueprint of a broad, democratic and pluralistic society."[89]

In addition to holding a narrow view of the Constitution, critics claimed that Bork would be unwilling to abide by previous Court decisions. "For nearly a quarter of a century," Senator George Mitchell charged, "Judge Bork has harshly attacked the Supreme Court."[90] As a result, Mitchell warned that Bork might not be bound by previous Court decisions on racial justice, personal privacy, one-man one-vote, and free speech. Senator Metzenbaum was even more pointed:

> Judge Bork has little respect for precedent. He has repeatedly said that many of the Supreme Court's decisions should be overruled. In January 1987, he said: "An originalist judge would have no problem whatever in overruling a nonoriginalist precedent because that precedent has no legitimacy."[91]

As a result, critics argued that the confirmation of Judge Bork would undercut important Court decisions of recent years.

Those who attempted to defend Judge Bork did so on two levels. First, they attempted to argue that ideology was not germane to expertise. The Minority View appended to the Senate Judiciary Committee's Report noted that "in our opinion, it is inappropriate to register opposition because one

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[88]Inouye, 8 October 1987, p. S13838.

[89]Albert Gore, Congressional Record, 7 October 1987, p. S13679.

[90]George Mitchell, Congressional Record, 8 October 1987, p. S13822.

[91]Howard Metzenbaum, Congressional Record, 22 October 1987, p. S14838.

disagrees, on a policy level, with the particular results produced by sound judicial reasoning in a narrow range of cases."[92] In support of this fact, the Minority Report noted that "the history of the Advise and Consent clause shows that the Framers envisioned confirmation as a tool for weighing the qualifications, rather than ideology, of each candidate."[93]

Second, Bork's defenders attempted to establish that he was not an extremist and that even if he was more conservative than the other justices, he would be unable to radically change judicial outcomes. In an effort to prove that Bork was not an extremist, advocates pointed to the fact that he had been confirmed for the Court of Appeals on a unanimous vote in 1982.[94] They noted that Bork had an exemplary record as an appeals judge. Senator Hatfield chronicled his record as follows:

> During this 5-year period, with over 400 decisions and 125 opinions which he authored, spanning a wide range of constitutional and statutory questions. Judge Bork voted with the so-called "liberals" on that court in 75 percent of the case. Of the 10 race, sex and age discrimination cases involving substantive legal issues as the scope of the protection of those rights, Judge Bork voted with the plaintiff 7 times. Of the three remaining cases in which Judge Bork voted against the plaintiff, the Supreme Court upheld Judge Bork's position in two of them. But the most important conclusion is simply this: At no time has the Supreme Court reversed Judge Bork during his tenure as a judge on the U.S. Court of Appeals. At no time.[95]

Those who defended Bork also noted that he had been endorsed by seven former Attorney Generals of both parties and several sitting and former

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[92]Report on Bork, p. 227.

[93]Report on Bork, p. 226.

[94]See Mark Hatfield, Congressional Record, 7 October 1982, p. S13744.

[95]Hatfield, p. S13744.

justices.[96] Finally, they noted that while Bork and Justice Scalia sat together for several years on the Court of Appeals they had voted alike in 98 percent of the cases in which they both participated.[97]

Moreover, even if Judge Bork would be more conservative than his colleagues, Bork's defenders argued that he would not be able to drastically alter the Court's course. After all, Judge Bork was only one of nine votes. Consequently, his opinion would only be decisive on cases "that were evenly divided whether there were four Justices on one side in favor and four justices on the other side opposed."[98] "If Judge Bork is such an extremist," the Minority Report argued, "he will plainly be unable to obtain the four votes necessary to impose his will on the Supreme Court. By the same token, if he can command the votes necessary to craft a majority, that must mean that a majority of the Supreme Court is outside the mainstream."[99]

Anthony Kennedy

The Kennedy confirmation was perhaps the least controversial of the four nominations. From the outset, everyone agreed that Judge Kennedy was well qualified to serve on the Supreme Court. The Report of the Senate Committee on the Judiciary noted that he had received a B.A. from Stanford in 1957 and a law degree from Harvard in 1961. From 1961 to 1975 he had

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[96]See Gordon Humphrey, Congressional Record, 6 October 1987, pp. S13671-S13672.

[97]See Humphrey, p. S13671, and Ted Stevens, Congressional Record, 8 October 1987, p. S13836.

[98]Thad Cocran, Congressional Record, 9 October 1987, p. S14002.

[99]Report on Bork, p. 231.

been a solo practitioner or a partner in several California law firms. In 1975, President Ford appointed Kennedy to the U.S. Court of Appeals for the Ninth Circuit in 1975.[100] The American Bar Association's Standing Committee on the Federal Judiciary, chaired by Judge Harold R. Tyler, Jr., concluded that Judge Kennedy "is among the best available for appointment to the Supreme Court of the United States from the standpoint of professional competence, integrity and judicial temperament and that he is entitled to . . . the highest evaluation of a nominee to the Court because of the high standards which he meets.[101] At no point in the Judiciary Report or the floor debate did anyone object to Judge Kennedy on the grounds that he was unqualified.

It was also agreed almost from the outset by all parties that Kennedy was not an extremist. Senator Levin noted that "Judge Kennedy does not appear to be a zealot, or a jurist who allows an ideology to dominate his approach toward a particular decision."[102] Even those who objected most vociferously to Bork admitted that Kennedy was a moderate. The feeling is exemplified in the endorsements of Senators Ted Kennedy, Joe Biden and Christopher Dodd. Senator Kennedy noted simply that "I will support the nomination of Judge Anthony Kennedy to the United States Supreme Court."[103] Based on Anthony Kennedy's record on the Federal Court of

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[100]Report of the Committee on the Judiciary of the United States Senate, Nomination of Anthony M. Kennedy to be an Associate Justice of the United States Supreme Court, 1 February 1988, p. 3. Hereafter referred to as Report on Kennedy.

[101]Report on Kennedy, p. 4.

[102]Levin, Congressional Record, 3 February 1988, p. S505.

[103]Edward Kennedy, Congressional Record, 3 February 1989, p. S483.

Appeals and his testimony before the Judiciary Committee, Senator Kennedy concluded that the nominee "has demonstrated integrity, intelligence, courage and craftsmanship--and a judicial philosophy that places him within the mainstream of constitutional interpretation."[104] Along the same lines, Senator Biden noted that Judge Kennedy's "judicial philosophy and approach to constitutional interpretation are balanced and likely to contribute to our evolving understanding of the Constitution."[105] Biden continued to note that he "avoids reliance on a narrow, fixed, or unitary theory of interpretation" and relies instead on "a number of sources in resolving constitutional questions, including 'the precedents of the law and the shared traditions and historic values of our people.'"[106] Senator Dodd was even more direct in explaining why he opposed Bork but supported Kennedy:

> I voted against the confirmation of Judge Bork. I did so not because Judge Bork is a conservative jurist, but because I concluded that his views are totally out of step with many of our fundamental constitutional values and that his confirmation was not in the best interest of the United States. Judge Kennedy also is conservative. I do not agree with everything Judge Kennedy has said or written, and I fully expect to disagree with some of the opinions he likely would write and votes he likely would cast as a Supreme Court Justice. However, while he is conservative and possesses views with which I disagree, I believe that Judge Kennedy's considerable intellectual strengths are coupled with a deep and abiding commitment to fundamental constitutional values and principles.[107]

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[104]Kennedy, 3 February 1989, p. S483.

[105]Joseph Biden, Congressional Record, 3 February 1989, p. S484.

[106]Biden, p. S484.

[107]Christopher Dodd, Congressional Record, 3 February 1989, p. S513.

Perhaps John Kerry said it best when he noted that "unlike Judge Bork, Anthony Kennedy is not a judicial activist. He does not have a radical agenda. From all that his record permits us to determine, he is a judicial moderate, well within the mainstream of the judiciary."[108]

Of course, we know that three of the four nominees were confirmed. Justices Scalia and Kennedy received the unanimous support of the Senate, Justice Rehnquist was affirmed by a comfortable 65 to 33 margin, and Judge Bork was defeated by the Senate. While these outcomes will have a significant impact on the Court of the 1990s, they also tell us a great deal about the public standards used for assessing nominees. All four of these individuals were supremely qualified from an academic or professional perspective to serve on the court. All four had distinguished academic records in college and law school. During their confirmation proceedings, no one objected to any of the nominations on the grounds that the nominees were unqualified. Rather, the sole basis for objecting to any of the four was their political orientation. The successful case against Bork alleged that he was an extremist who would use his new power to enforce a conservative agenda. Those who unsuccessfully objected to Rehnquist did so on similar grounds. In contrast, it was alleged that Scalia and Kennedy would show so much deference when deciding cases that he would be unwilling to uphold any law which violated either tradition or prevailing public opinion. Ultimately, three of the four nominees succeeded in proving that they were not extremists. What makes these nominations notable, however, is not that Justice Rehnquist and Judge Scalia were able to win their cases, but rather that they were held accountable for their political beliefs. It was not enough to

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[108]John Kerry, Congressional Record, 3 February 1988, p. S511.

prove that they were qualified. The mere fact that political belief was a relevant issue tells us a great deal about the competing conceptions of the law and the nature of judicial argument.

All four nominations were political battles. We do not presuppose that the jurisprudential arguments offered at the hearings were as influential as calls from party leaders, colleagues, and constituents. However, the nomination proceedings were more than a political spectacle. At the very least, they graphically illustrate two very different conceptions of the law. These conceptions are significant, to our thinking, because they foreshadow legislative battles to come in the future. When the Bush nominees come to the Senate for confirmation, they will be measured in an ideological crucible.