The War Against Robert H. Bork

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T T ENDED about as well as it had begun. On Thursday, October 22. the White House decided that it *was time* to terminate the two-day-old Senate floor debate over the nomination of Judge Robert H. Bork to the Supreme Court. A pro-Bork Senator phoned the judge and gave him a message: the debate now looked as if it would be so long and bitter that Senate Majority Leader Robert Byrd was threatening to cut it off and not resume it again for quite a while.

The meaning was dear. An extended postponement would keep the seat of recently retired Supreme Court Justice Lewis Powell, Jr. unfilled for a long time. If Bork persisted in his candidacy, it would be his fault that the Court would be unable to function at full strength.

Bork replied, predictably, that he did not want to bring any harm to the Supreme Court. A few more days would suffice, *he* said, to bring the debate to an orderly conclusion. That evening the leadership of the Senate began announcing to the press that Bork had given them *the* signal to end

• he debate and vote the next day. On Friday, at 2:00 P.M., the Senate rejected Bork's nomination by a vote of 58-42.

Thus pro-Bork and anti-Bork politicians worked together at the end to hustle the Bork debate off the public stage as quickly as possible. Well they might. The war against Robert Bork showed the modern American Left at its ugliest, and the response by pro-Bork forces showed the Right at its most impotent.

To defeat Bork, the Left spent a huge amount of money—S10 to S15 million—on a negative political campaign of a size wholly unprecedented in the history of American judicial selection. They could not have mounted such a Herculean effort had they not hated Bork with a special venom. And indeed they did hate and fear him intensely, because of the special role he had come to play as a conservative in this country's intellectual politics.

For American politicians, the presidential elec- ion of 1980 may have been about the usual politi- :ai coin of patronage and congressional seats. For

• :onservative intellectuals concerned with public policy, however, the issue was different. In the years approaching 1980 they had been speaking and writing with increasing vigor in fields from foreign affairs to regulatory policy, but in various ways they were still being denied entry into the fellowship of the cultivated. Surely, they thought, Ronald Reagan's victory in 1980 would change all that.

In most important respects this expectation proved to be wrong. When it came to the legal profession, for instance, the Reagan administration had real power available to it because of its control over the appointment of judges. Moreover, the administration actually used its power. Yet one can gauge the effect of all this Reaganite political force on our legal culture by observing the ever more luxuriant types of radicalism now thriving at the country's elite law schools.

If anything, losing the federal courts piece by piece made many people on the Left, whose views were so much out of political fashion. not chastened but bitter. In retrospect it is no surprise that this should have been so. During the early and relatively energetic Reagan years, these people had a great practical need of the courts to protect them from the President and the Republican Senate on issues from the environment to abortion. Even more important was the symbolic meaning of all the new, relatively conservative judges appointed by Reagan. Liberalism, *which* had once prided itself on being the party of the people, had in recent years been losing popularity and had therefore increasingly looked not to Congress but to the judiciary as its special preserve. Having come to think of the courts as in effect belonging to them, liberals were all the more disconcerted and threatened by the new conservative judges of the Reagan years.

Worse yet, liberals could not successfully charge that the Reaganites were destroying the quality of the courts by making inferior appointments. The Reagan administration by and large followed prevailing standards in the matter of judicial qualifications. It did not flood the courts with unfit judges. With very few exceptions its appointments were respectable, and some were truly impressive.

I N response to this situation, important sectors of liberal opinion began undermining the idea of the apolitical Supreme Court. the very principle that liberalism had once

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defended so vigorously. When a prominent liberal law professor, Laurence H. Tribe of Harvard, argued ***in God Save This Honorable Court*** (1985) that Supreme Court appointments had never been anything other than grossly and patently political. he was merely dressing up and codifying the changing liberal fashion.

There is irony here. Twenty years ago at the Yale Law School, another liberal professor, the late Alexander M. Bickel, was teaching his younger colleague Robert Bork about the virtues of judicial restraint. Judges, according to Bickel, should be chosen non-democratically but should behave from that point on with great deference toward the decisions of democratically elected officials. In this Bickel was speaking from the mainstream tradition of liberal thought. By the time we arrive at the view of the liberal. Professor Tribe, we are hearing that judges are chosen through politics and should be given very wide license to override the legislature in the name of their own conception of justice.

In 1986, when President Reagan nominated the very conservative Judge Antonin Scalia to the Supreme Court, there was no significant outcry from liberals. Scalia, the commentators explained at the time, was the first Italian American to be named to the Court. He had a base of political power in the Italian-American community. With his Catholicism and his many children, he was untouchable. In comparison with the frank cynicism of this kind of talk, the vague old idea of a "Jewish seat" or a "black seat" was a genteel anachronism. But the other side of the coin was soon to show itself. If a controversial conservative candidate was untouchable because he had an outside constituency, with a similar candidate who had no such clout—a candidate like Bork—it would be no holds barred.

Long before Bork's nomination this year, liberals had begun to develop a rationale for challenging just such a candidate. even one (like Bork) of the highest quality. Still. beyond the general arguments there was something special about Bork that simply drove his opponents into a frenzy. As Linda Greenhouse of the New York ***Times*** put it, "a kind of metaphysical shudder . . . ran through the liberal community" when Bork appeared clearly on the horizon. But why? The best way to answer this question is to turn it on its head and ask why conservatives were so enthusiastic about putting Bork on the Court.

CONSERVATIVE admirers of Bork had pushed for his nomination from the very beginning of the Reagan administration. When he was passed over for Scalia, there was among conservatives attentive to these matters a sense not just of disappointment but of injustice. These people thought highly of Scalia, but they viewed Bork as in effect a holder of title to one of the nine seats on the Court.

This was not because they saw Bork as a predictable right-winger. To he sure, he had the "correct" conservative views. He was a proponent of judicial restraint. He did not like the Court's reasoning in ***Roe v. Wade,*** the decision legalizing abortion. As a judge on the District of Columbia Court of Appeals, he had refused to rule that a man had a right of privacy allowing him to practice homosexual acts in the Navy. He was the author of a hook, ***The Antitrust Paradox,*** which rigorously criticized some of the grounds on which the government habitually brought antitrust prosecutions.

But to conservatives Bork was far more than a collection of views. He had become a symbol of the intellectual force of contemporary American conservatism and an exemplar of its success in challenging previously dominant liberal ideas.

It was appropriate that he had come out of the University of Chicago. Among American academics, those who defend free markets and mistrust government regulation have traditionally been treated like moral lepers. As a result, most professors with views like these have written their books and articles cautiously, holding caveats and qualifications in front of them like shields against social opprobrium. But the Chicago intellectuals by whom Bork was influenced not only defended the free market but defended it frontally. They wrote bluntly. They were not shy about debating those with whom they disagreed. They were not apologetic. They did not act guilty.

Neither did Bork. His writings made no attempt to conceal or soften their own message. He was willing to say what he thought and just as willing to take it back if he concluded he had been wrong. He was unashamed of his conservative politics.

All the more amazing was it, then, that he should have risen to undisputed eminence as a scholar at one of the great bastions of liberal jurisprudence, the Yale Law School. He had won at the game whose rules had been established by his ideological enemies, and he had done so without genuflecting toward them and their views.

In short, the symbolic significance of the Bork appointment to conservatives lay in the challenge it represented to the liberal monopoly over the great academic institutions and even over the idea of intellectual merit itself. It was for the same reason—and not because of some argument over legal doctrines or the balance of the Court—that liberal organizations fought against his nomination as if their very lives depended on defeating him.

During this fight, anti-Bork activists and commentators often pointed out that there had been politics in the process before. Some significant fraction of Supreme Court nominees, we kept hearing, had been rejected for political reasons over the course of American history. We were supposed to conclude from this that the campaign against Bork was a normal, and therefore legitimate, event.

It was a mark of the climate surrounding the tight that people so often quoted this disingenuous argument as if it were weighty and telling. In fact, there had never been anything remotely resembling the scale of the national media campaign that was launched against Bork. Nor was there ever anything like the degree to which constituency interest groups were organized to put sustained pressure on individual Senators.

THERE is much that the public will never know about the internal operations of the great anti-Bork campaign. Federal law does not require any substantial disclosure by the sorts of organizations through which the campaign's money flowed, and the organizations themselves are not notably forthcoming about their finances. **But** we do know some things, because even before the final Senate vote, the anti-Bork organizers started celebrating their victory in print.

Thus we learned from a story in the October 11 Boston *Globe*, based on interviews with Senator Edward M. Kennedy and the liberal lobbyist Anthony Podesta, that soon after Justice Powell announced his retirement from the Court, Ken-itedy's staff had prepared the draft of a speech about Robert Bork. Then, when Bork was named, Kennedy was ready **CO go.** His speech raised what would become the **major theme** of the campaign: that Bork stood "outside **the** mainstream of American constitutional **'urisprudence.'It** also made specific accusations: "Judge Bork's America is a land in which wom would be forced into back-alley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens' doors in midnight raids. . . . and the doors of the federal courts would be shut on millions of citizens."

These accusations vere scurrilous, but the scurrility was calculated: only language of this brutality, it was thought, would arouse the fears necessary to get the relevant interest groups moving.

Shortly after delivering this speech, Kennedy met with Senator Joseph Biden, chairman of the Senate Judiciary Committee and then still a presidential candidate. In the fall of 1986, Biden had said that if nothing were found amiss in Bork's background, "I'd have to vote for him." But after meeting with Kennedy and then with a delegation of civil-rights activists, Biden decided that he was against Bork after all. Indeed, he declared even prior to the hearings over which it was his Job to preside that he would lead the fight against Bork. As for his 1986 statement, Biden explained that he had meant only that he would vote for Bork to replace another conservative justice. Since Powell was a "moderate," Bork was not an a' .:cotable substitute.

Iliden and Kennedy now met with two other Democratic Senators—Howard M. Metzenbaum of Ohio and Alan Cranston of California—to plan strategy. The first thing they had to do was buy time to launch a media campaign and permit the interest groups to organize. Therefore the highest priority, they decided, was to make sure that there were no hearings on Bork's confirmation until after the Senate's August recess. Nevertheless, within days after this private meeting, Biden publicly pledged to the Washington *Post* that he "would not engage in any tactics to delay the hearings."

Taking advantage of the delay Biden had promised not to engineer, Kennedy worked the phones tirelessly, rousing organization heads by telling them that the Bork nomination was a major disaster for civil liberties and a major event in the lives of those who cared about such things. He also phoned the whole of the AFL-CIO executive committee and helped to persuade them that action against Bork was absolutely necessary.

Early in July Benjamin Hooks, executive director of the NAACP, announced that his organization's coming conference would be focused on the single subject of defeating the Bork nomination. "We're trying to contact all the Senators—some once, some ten or twelve times," he said. At the convention, Hooks declared that he was working to get ocher civil-rights organizations to do the same. Around the same time, the convention of the National Education Association voted to join the fight against Bork. The National Abortion Rights Action League announced that its convention would concentrate on the Bork struggle. Eleanor Smeal, the president of the National Organization for Women, said that NOW would organize rallies and establish telephone banks for generating mail to key Senators. Later, in August, anti-Bork activists from the Alliance for Justice and the Federation of Women Lawyers buttonholed attorneys and held seminars on Bork at the convention of the American Bar Association.

The direction in which these efforts flowed is worth noting. First anti-Bork activists—academics, association officials, congressional staffers—decided what was wrong with Bork. Then a key Senator, adopting their ideas, launched the anti-Bork campaign. Next, anti-Bork Senators got together to delay the processes of confirmation, so chat pressure from outside organizations could be mobilized. Finally, word went out to the members of these organizations that Robert Bork was a monster, and that they must add their voices to the pressure already being brought to bear on Senate deliberations.

NOT even all this would have been enough, however, without reinforcement from a media campaign of a scope usually seen only in a nationwide political race. The anti-Bork campaign used polling and statistical analysis to find out which themes would affect people the most, which Senators were the most vulnerable. and where advertising should be targeted. Guided by this research, anti-Bork organizations bought full-pave advertisements in newspapers and ran TV spots in major markets.

Different organizations put their names on different pieces of the effort. Planned Parenthood sponsored one big newspaper ad. The National Abortion Rights Action League ran another. But talking about the media campaign against Bork means talking **most** of all about People for the American Way (PFAW). And talking about PFAW means talking about its founder and leader, the Hollywood producer Norman Lear. PFAW's operating style reflects Lear's correct perception, back in 1982 when the organization was born, that the Left was in political trouble partly because the Right had appropriated ail the symbols of patriotism. Lear aimed to get some of them back, and PFAW—from its red-white-and-blue logo on down—pursues liberal goals by presenting them as established elements of the American consensus.

The big anti-Bork TV commercial that PFAW ran was an example of this approach. The spot was narrated by Gregory Peck, whose screen image is one of rectitude and whose voice we all trust. "There's a special feeling of awe people get," intones Peck in the commercial, "when they visit the Supreme Court of the United States, the ultimate guardian of our liberties." As Peck speaks, a traditional four-person nuclear family, with faces of a sort we have rarely seen since *Leave It to Beaver*, is walking up the Court steps. Father points the building out to the children. Peck goes on. Bork should not he on the Court, he says: "He defended poll taxes and literacy tests, which kept many Americans from voting. He opposed the civil-rights law that ended 'whites only' signs at lunch counters. He doesn't believe the Constitution protects your right to privacy. And he thinks freedom of speech does not apply to literature and art and music." The commercial ends with the family in profile, gazing reverently at the Court. A gentle wind blows through their hair. The camera focuses lovingly on the cherubic face of the youngest. The End.

IThis entire spot was composed of false innuendoes and outright lies. For example, Bork never defended poll taxes or literacy tests. He said the Equal Protection Clause of the Constitution was the wrong rationale for the Supreme Court to have used in striking down a 51.50 poll tax in *Harper v. Virginia Board of Elections.* He explicitly indicated that he was able to reach his conclusion only because the case did not involve racial discrimination. He also made it quite clear that he thought the tax might well be unconstitutional on other grounds. To turn all this into a defense of poll taxes was slander.

The PFAW accusation on the subject of privacy was just as had. The truth is that Bork as an author has written and Bork as a judge has ruled that there are indeed rights of privacy in the Constitu-

Ition. What he does not see in the Constitution is a unitary and generalized right of privacy, as it has been defined by Justice William 0. Douglas. The PFAW ad deliberately and mendaciously confused this distinction.

The ad contained more such errors and lies, as did the anti-Bork campaign as a whole. For the record, the following charges made against Bork in various ads were not true: that, according to Bork, women can be forced to choose between being sterilized and losing their jobs; that, according to Bork, women have no "reproductive rights"; that Bork has voted with business in 96 percent of "controversial *cases"* before him on the Court of Appeals.

All these and many other lies provided the fuel for the mobilization campaign.

ONE of the major targets of this cam) paign was the Southern Democrats in the Senate. In the past such Senators would surely have been in the pro-Bork camp because of their relatively conservative views. But the anti-Bork strategists believed from their data-gathering that, this time, the minds of a number of Southern Democrats might be changed by the great persuader: electoral calculus.

There were five new Southern Democrats in the Senate. Some of them, went the argument, had literally gained their seats because of their winning margins in black areas. That is, if the black-area votes were subtracted from the winners' total, the winning numbers became losing numbers.

The "black vote" argument was not so open and shut as lobbyists and commentators made it seem. The new Democratic Senators from the South had indeed benefited from the black vote. But they had benefited from other electoral trends as well. John Morgan, who helped wage Republican Henson Moore's losing Senate campaign in Louisiana in 1986. has pointed out that the Democratic winner, John Breaux, is a Cajun. Breaux could not have won over Moore just by winning black votes: he won because he also gathered normally Republican votes from Cajun areas. In Alabama, Democrat Richard Shelby could not have defeated Jeremiah Denton in 1986, black vote or no black vote, unless significant numbers of urban and suburban whites had found Shelby an acceptable alternative to the eccentric Denton and defected from their normal Republican voting pattern. In Georgia, a good turnout among suburban Republicans in the Atlanta area, instead of the poor turnout that actually occurred. would have erased Wyche Fowler's victory margin over Mack Mattingly. And in North Carolina, Terry Sanford benefited in 1986 from his opponent's loss of a Republican's normal share of conservative "Jessecrats" (Jesse Helms, that is).

None of this means that black voters were not important to these men. But before the anti-Bork campaign started, the situation did not seem so predetermined. As late as the end of July, administration vote counters were listing most of the Southern Democrats as potentially pro-Bork. At this point the "black vote" factor did not seem to have irreversibly locked the Southerners up on

the other side. But anti-Bork campaigners had an interest in having the starkest version of the "black vote" argument believed, the version that would leave each Senator the least room for freedom of choice.

Nationwide advertising thus heavily emphasized the alleged threat to minorities posed by the Bork nomination, creating pressure on Southern Senators from black organizations. The advertising also made pro-Bork voters uneasy and less likely to exert a contrary influence on their Senators.

BUT where was the counter-pressure from the Right? At first, spokesmen for conservative organizations promised that their side would match whatever the liberals did. Early newspaper stories on the liberals' organizing efforts always reported that the conservatives were organizing, too. This was true: conservatives and their organizations sent plenty of pro-Bork mail to the Senate, probably more than the other side did. Nevertheless, by the time the hearings began in September, no one pretended any longer that the pro- and anti-Bork sides were evenly matched in effort or pressure.

The main reason the conservative groups were not in evidence was that early on, representatives of major right-wing organizations meeting with the President's operatives were given the clear message that they should keep a low profile on the Bork issue.

Later, as the fight was nearing its finish, bitter stories started circulating in the pro-Bork camp about just why the administration had pulled its punches in this way when it was obvious that the Left was launching a massive assault. One such story was that Bork was seen by the senior 'White House staff—most of whom had, to say the least. no enthusiasm for him—as a political liability, to be confirmed quietly or not at all. Consequently, the story continued. when the trouble started the President's men did almost nothing to stop Bork from twisting slowly in the wind.

It is certainly true that no senior White House official—except, sporadically, the President himself—showed notable zest for the Bork fight. But when Bork's managers waved the right wing away, they were also operating from a deliberately "low key" strategy for the confirmation.

The main charge made by the Left against Bork. as his political managers saw, was that he was "out of the mainstream." One way of viewing this "out of the mainstream" charge was merely as a screen for the major battle the liberals were about to. wage. Instead, the managers took the charge at :ace value. as meaning what it said, and they decided on a strategy CO refute it. It is too much to say that they set out to "repackage" Bork as a "moderate" (though it was indirectly suggested to him that he shave his beard). But they did set out to show that Bork was not a monster or an extremist. For this, the last thing they needed was incendiary statements from the Right. Instead, they said, their arena would be the Senate Judiciary Committee hearings, where fairness and reason could prevail. Their chief weapon would be Bork himself.

The tone of the hearings, when they began, was indeed different from the atmosphere on the outside. Chairman Biden boasted that not a single witness requested by the Bork forces was refused permission to testify. The Senators heard dignified language from lawyers and eminent persons of all types. Absent was the interest-group frenzy that the media campaign displayed—and even more conspicuously absent were the anti-Bork interest groups themselves.

Usually, on so controversial a matter as Bork, organizations and associations concerned with the issue actively try to get onto the witness list, so that they can have their moment of glory before the television cameras. A TV appearance gives them prestige, visibility, and an enhanced capacity to raise funds. But in this case anti-Bork organization leaders realized that testifying to the committee would be not so much an opportunity as a risk.

These groups had said a lot of things about Bork. But if their leaders became witnesses, pro-Bork Senators would get to ask them questions. The tables would be turned. It was safe enough ' to have a pro-Bork Senator dueling verbally in the hearing room with an anti-Bork law professor. The debate would be about ideas, and the professor could take care of himself. But when an organization leader sat down to testify, other kinds of questions could arise. What was the membership of his group? What were its general aims? What were its views of abortion or religion or crime control? Where did its money come from? How much money had it raised and spent in the campaign? What activities had it engaged in?

In short, if these groups went in to testify, pro-Bork Senators could make them and their campaign the issue. The Opole strategy of the campaign was to submerge talk of the interest groups' particular aims and speak only in terms of values that were consensual: not abortion but "privacy," not "conservative" but "out of the mainstream." It was best not to testify.

'Tints self-effacing tactic left Bork as the undisputed center of the hearings. His White House managers' confidence in him on the eve of the hearings was not unreasonable. They saw quite correctly that Bork was a witty and genial man, wholly without the intellectual rigidity that is the mark of a dangerous ideologue. They thought that after a few days of testimony by him, it would be impossible for anyone to charge in good faith that he was extreme. intemperate, or eccentric. In this they were right. Yet after the hearings, as the Bork nomination floundered, the organizations that had worked to bring him down said over and over again: "We

didn't defeat Judge Bork. Judge Bork defeated Judge Bork." Conservatives had a different lament about the hearings: Bork had been made to sound too moderate, and he had therefore failed to rouse to action the people who were his natural supporters.

Both charges were false. In the hearings Bork did just about all that he could have done on behalf of his own nomination.

His testimony lasted for four days of usually hostile questions. The pressure of the situation was enormous and deliberate. Bork's opponents were hoping that he would crack—that *he* would admit to some scandalous behavior in his past, Eor instance, or that he would say something intemperate enough to sink him. But they did not succeed in driving him into any specific misstep that they could use against him. This was extraordinary, given the length and intensity of the questioning. Moreover, Bork set a general tone in his testimony that was uniformly high, civil, and—irrelevant though it came to seem—learned.

But if the hearings were to have overcome the force of the anti-Bork campaign outside the hearing room, it was necessary for Bork to make large numbers of Americans feel an emotional connection to him, one strong enough so that they would speak up about it and move their Senators. This Bork did not do.

He did not sound as blunt as many conservative activists would have liked. Partly, no doubt, this was the result of a deliberate decision on his part. What is also true is that Bork clearly does not have unqualified views about some of the subjects that conservatives wished he would tackle. Moreover, Bork was and is a sitting federal judge. His tone was bounded by the traditional standards of the profession. He sounded—judicious.

Those who had hoped that Bork would inspire people in something like the way Oliver North had done in the Iran-contra hearings overlooked the fact that Bork simply did not have the personal equipment for the job. But even if he had possessed this equipment, it would have been wholly inappropriate for him to talk Iike an enthusiast for one political perspective or another. Bork was nothing if not forthcoming in the hearings. He answered types of questions that judicial candidates had never consented to answer before. But to make an impact through TV that might have offset the force of the campaign against him would have required behavior that Bork could not and should not have engaged in.

The hearings had their high-toned moments and their low ones. When Senator Kennedy was on, he would typically read a hostile question off *a* sheet that his staff had prepared for him. Bork would parry. There would be a brief silence. Then, instead of responding to Bork or pressing him further, Kennedy would rush along to the next prepared query as if he could not understand Bork's answer.

Bork's supporters laughed at this, but during one patch of the questioning, Biden kept passing Kennedy a Kennedy-Bork scorecard. "12-0," it read, then "18-0," then "24-0," then "30-0 if he keeps on." Both Kennedy and Biden knew that the point of the hearings was not to have a debate or to get any real answers to real questions. The point was to go through the forms of the process while making sure above all to preserve the air of controversy surrounding the nominee.

Tt-tz majority report that the Senate Judiciary Committee finally produced on the hearings showed unmistakably that this had been the intent behind the proceedings. The report dealt with Bork's views on various subjects —privacy, executive power, judicial restraint, civil rights, antitrust, women's rights, and the like—and found them unacceptable in each category.

There are respectable arguments to be made for views other than Bork's on all these topics. But the majority report almost never offers them, since its aim is not to debate Bork in good faith but to make the inherently dishonest case that Bork is outside the American mainstream. In the section on privacy, for instance, the majority calls Bork an extremist for disagreeing with Justice Douglas's concept of privacy in *Griswold v. Connecticut.* The report gives no sense of the fact that there are prominent scholars on both sides of a vigorous debate over this issue. More interesting, the section makes its whole case on the subject of privacy without discussing the issue that for many organizations was at the heart of- the anti-Bork campaign—that is, abortion_ It is impossible to think that this central but controversial question was omitted by accident.

The report uses language like, "Prior to the 440/ hearings, Judge Bork did not include women within coverage of the equal protection clause," which is simply not true. The report charges that Bork's views on executive power place him "well outside the mainstream of legal thought" when his general dews on the subject are thoroughly conventional. And so an and on and on.

More pervasive than these distortions is the anti-intellectualism that forms the whole basis of the report. In almost every one of its arguments the document's major premise is that in order to describe, categorize, and judge a legal scholar's views, one must above all know what ethnic. gender, and interest groups have been advantaged or disadvantaged by his decisions. Process is nothing; only results count.

If the majority on the Senate Judiciary Committee knew better than to treat the hearings as a meaningful debate, so did the press. After the hearings, Bork's opponents charged that it was his own performance before the television cameras that did him in. The proof of this was in the polls showing that Bork sank in popular approval after he had testified. People had seen Bork testify and decided they did not like him.

This was another of the lies of the anti-Bark

campaign. The truth is that "people," by and large, did not see Bork testify at all. The networks televised almost none of the hearings, and not even all public-television stations ran them. The vast majority of Americans never saw any

• ubstantial part of the hearings while they were Ca k in g place.

Instead. what most people saw of Bork in the hearings was what the networks and public television chose to present on the nightly news. The usual rules of broadcasting applied. The excerpts taken out of the testimony were tiny snippets of the larger give-and-take. Viewers rarely got to see answers of any length or complexity. Sentences were selected for presentation according to what t program's producers judged to be the essence of Bork's philosophy or the day's important trend. A demagogic question and a thoughtful answer were likely to show up on the evening news—and, less defensibly, in the print media—as, "judge Bork today denied the charge. . . ."

But even beyond the limitations of the medium, press treatment of Bork was extraordinarily 'lopsided. S. Robert and Linda Lichter's *Media Monitor* followed press coverage of Bork from his nomination on July I until the day he made the surprise announcement that he would not withdraw. Here are some of the things they found: The press quoted twice as many opponents of Bork as supporters, and nearly two-thirds of the judgments they cited were negative. Among legal scholars quoted on Bork, nearly three-quarters said negative things. The sources split evenly on his abilities, but 82 percent of those who talked about his philosophy criticized it.

Even more important, coverage became sharply more negative over time, especially on television news programs. Before the hearings, assessments of Bork by leading news organizations were balanced more or less evenly. But the figure was only 38-percent positive during the hearings and dropped to 28 percent afterward. After the hearings, not a single positive judgment of Bork was broadcast by TV news.

Thus most people got their information not from the hearings but from news sources whose bias in this instance was clearly more than accidental. Yet journalists simply repeated the line that it was Bork who had killed his candidacy in he hearings. "Bork Was His Own Worst Enemy," , n a particularly explicit headline at the end of October in the Washington *Post.* The circle of Influence was complete.

L6irrER the hearings, a number of Senators who had decided to vote against Bork started coming forward at conveniently dra-!limit: intervals to announce their intentions. To the press, the anti-Bork momentum seemed irresistible. So these announcements were prominently featured in the news, and the momentum increased. Soon the journalists had ocher predictable elements of the story to report: top White House aides were privately conceding defeat. President Reagan was saying, kiss-of-death style, that it was up to Bork to decide whether or not he wanted to withdraw. Friends were trying to persuade Bork to back out, on the ground that forcing an actual vote in the Senate would only be a personal embarrassment and give more publicity to his defeat. It was said, falsely, that Bork's wife and family were begging him to quit. Finally, in anticipation of his imminent withdrawal, the press even mounted a "death watch," staking out Bork's home so that he could not come or go without their notice.

But almost all the Washington insiders had underestimated Bork's strength and that of his family. Furthermore, by this point Bork's enemies had managed to vilify him so much that they could do his reputation no further harm even if he decided to fight on to the end. The idea of staying in the contest became thinkable. Staying in, when everyone knew it was so much easier to quit, would make it clear that Bork was uphold- 1/ i/U1 ing the principle that the Senate must be accountable for this most important of actions. Indeed, some in the federal judiciary urged Bork to take the principled route and finish the fight, because they were appalled at what the anti-Bork cam- v161,4, paign was doing to the judicial selection process in general.

On Friday, October 9, Bark went to the White House—CO withdraw, the press was certain. But then came one of the few unplanned moments of the whole affair. Bork asked the President whether he would get support from the \White House if he stayed in the fight. The President, promising what he could not deliver, said yes. On the basis of Reagan's answer Bork walked into the White House press room and said he was staying. For once, the journalists gathered in the press room were truly surprised by something that happened there.

During the period between that day and the final vote on October 2, , a group consisting largely of attorneys, acting from a combination of admiration for Bork and anger at the nature of the campaign against him, launched a last-ditch effort. They had several goals in mind: to save the Bork nomination if possible, to save Bork's reputation in any case, and to expose what had been done to him and to the federal judiciary. Leonard Garment, a Washington lawyer, was one of the leaders (and I myself joined him in the effort). Another was a New York attorney, Michael Armstrong, like Garment the head of one of the professional committees that exist in many states to make recommendations on the selection of federal judges. In a parallel effort, conservative groups like the American Conservative Union and the Free Congress Foundation, which had been working with little administration encouragement, produced final mailings and advertising.

The Washington-New York effort aimed at persuading Senators that the anti-Bork campaign had

been so dirty and full of false information as to have seriously misled them. Because of this, went the argument, Senators should not commit themselves to voting one way or another on the Bork nomination until they had heard a full debate on the Senator floor. Newspaper ads were placed to demonstrate that the campaign had been deceptive and a threat to the independence of the federal judiciary. Visual aids were prepared for those Senators, such as Judiciary Committee members Orrin Hatch and Alan Simpson, who had supported Bork staunchly and were going to lead the pro-Bork side of the debate. A team of attorneys in New York drafted detailed replies to each section of the Judiciary Committee's majority report, in an attempt to show that the report was so intellectually dishonest and of such low quality that it was itself a scandal in the history of Supreme Court nominations. (Because the debate was cut short, only three of the ten replies were delivered to the Senate before the vote.)

1. His last-ditch effort got a boost from the emergence of the story of John T. Baker. Baker was a professor at the law school of the University of Oregon and a former dean of the law school of Howard University. He had been scheduled to testify in favor of Bork. Baker was a black who, because of his former position at Howard, could not be dismissed as someone cut off from the black community. His appearance might have been of significant help to Bork's case. But at the last minute, Baker changed his mind and backed out.

After the hearings, Baker told friends that he had changed his mind about testifying because he "couldn't take the heat." Just before he was scheduled to testify, he said, he had received a call from a woman lie had known for some time. Linda Greene. She was black, a lawyer, and a Metzenbaum appointee on the majority staff of the Senate Judiciary Committee. She told Baker that if he appeared before the committee, he was going to be humiliated. She already knew the questions the staff had prepared, and they had little to do with Baker's views about Bork. Instead, they were questions about Baker's own ability and character.

The majority was going to charge Baker, before the TV cameras, with being unqualified to talk about the constitutional issues that formed the crux of the Bork debate. What is more, the majority was going to dredge up the story of why Baker had left the deanship of Howard Law School. Baker had resigned from this post publicly charging that the university's administration would not permit him to establish and enforce the professional standards that were necessary if Howard was to have a respectable law school.

Some days later, the president of Howard, James Cheek, charged that Baker had really left because Cheek would not give in to his extortionate demands for increased salary and benefits. If Baker testified, warned Greene, he would be exposed to the embarrassment of this controversy once again.

Baker phoned the White House and canceled his appearance.

Although Greene insisted that she had acted out of no motive but sisterly love, her exchange with Baker was, on the face of it, intimidation of a witness, and the story probably did succeed in raising some doubts about the legitimacy of the anti-Bork campaign. Nevertheless the last-ditch effort failed. This was not surprising; the attempt was a long shot in the first place. If there was to have been any chance of switching a vote or two to "undecided" and reopening the fight, it was necessary that everyone think the pro-Bork forces were playing to win. This condition was never met. The White House explicitly refused to entertain—even as a tactic—the possibility of reversing the trend against Bork. Named and unnamed White House sources kept emphasizing to reporters that the Bork. battle was lost. Senate Minority Leader Robert Dole did the same. When Vice President George Bush began making spirited pro-Bork speeches, he was stopped. The Justice Department provided generous tactical help but did not want the campaign to go beyond a set of narrow bounds.

There were respects in which the final pro-Bork effort was easier than anticipated. Volunteers turned out to be available. Money, contrary to earlier predictions by Bork's White House managers, was available as well. Outside groups, far. from being standoffish, as they had earlier been described, were willing to help. The substantive case was even stronger than had been anticipated. But all these factors were as nothing against the determination—on the part of those who were tired, who wanted to avoid further confrontation, who worried about the next battle, or who had developed a psychological or ideological stake in failure—that the fight be over.

In the week of the final debate, 23 judges of the Second Circuit, the country's most prestigious, signed a petition deploring the nature of the campaign that had been waged against Bork. Whatever one's views of the nominee, the petition was an event that should have been of major interest to any journalist purporting to be concerned or knowledgeable about the American judiciary. To have so many judges putting their names to a public-policy document of this sort was highly unusual in the history of the federal courts and a clearly significant result of the Bork affair. But the reporter for *the* New York *Times* had to be badgered into even mentioning the event at the very end of a long story on the confirmation fight. Norman Lear's campaign in the South had shaped Bork's fate, but it was attitudes like this that sealed it.

B°"'s opponents said over and over that Reagan himself had been the one to politicize the process, by calling for law-and-order

judges in his political speeches. Yet the Reagan administration, though it certainly did appeal in its campaigns to popular frustration with "soft" judges, accepted conventional constraints when time actually came to name people to the hench. Indeed, the big fight over the propriety of the administration's judicial selection process had been about whether Justice Department questioners should be allowed to ask prospective nominees how they felt about *Roe v. Wade*. This question is as nothing compared with all the things that were asked by the Judiciary Committee of Robert Bork.

Bork's pursuers also kept insisting that rejecting Court nominees for political reasons was as American as apple pie. It is possible that some of them believed this. Yet in recent times, the rejections we call "political" have been hung on some nonpolitical peg. When Bork's name went to the Senate, that body had not rejected a nominee for seventeen years—not since G. Harrold Carswell (nominated by Richard Nixon). There had been politics in that rejection, but opponents had also argued successfully that Carswell presented a serious problem of competence. A little earlier there had been Clement Haynsworth, also nominated by Nixon, whose rejection was also politically motivated. But opponents managed to discover a conflict of interest in Hayns• worth's performance on the bench. Similarly with the rejection of Supreme Court Associate Justice Abe Forms, nominated by Lyndon Johnson to be Chief Justice. In that case, which anti-Bork partisans cited as a justification for their campaign. opponents could and did point to the issue of Fortas's participation in politics while on the !)ench, the problem of lecture fees paid to him out of earmarked funds collected from businessmen, and his refusal to go before the Judiciary Committee and answer questions about these matters.

There was more at work here than hypocrisy. As long as an administration feels compelled to pay obeisance to nonpolitical standards like character and competence, there are limits to the types of people it can pick as judges_ Political congeniality cannot be the only criterion. As long as the Senate opponents of a Supreme Court nominee feel compelled to find a nonpolitical reason for opposing him, they acknowledge that the confirmation process should take place free of the intervention of partisan politics. As long as they make this acknowledgment, they accept very definite limits on the sorts of political arguments they can use and the kinds of political pressure they can [3]PPIY.

To be sure, Bork's opponents tried very hard o hnd a conventional "hook" on which to hang him. They tried to disinter the Watergate episode known as the "Saturday night massacre." in which then-Solicitor General Robert Bork staved on to become Acting Attorney General after President Nixon had fired Attorney General Elliot Richardson and Deputy Attorney General William Ruckelshaus. Witnesses were produced from Nixon's Department of Justice who testified to the Judiciary Committee that Bork had been insufficiently zealous in finding a new special prosecutor to replace the recently dismissed Archibald Cox. The charge was false, and the evidence to disprove it was available to the committee. Elliot Richardson and Archibald Cox themselves had said publicly that Bork had acted in a wholly honorable fashion. This did not prevent the committee from staging its Watergate show. But it did keep the Watergate charge from being very useful as a tool against Bork.

The opponents also surfaced allegations that Bork was a tax delinquent, that he was a drunk, and that he had deceived a fellow judge in the writing of an opinion. From the Hill came rumors that Bork's wife Mary Ellen did not believe that the Holocaust had ever occurred. But nothing took. There was no scandal. During the course of the hearings, Chairman Biden admitted aloud that there simply was no significant blot on Bork's integrity.

But—and here is where one of the crucial lines was crossed—the opponents would not stop. They went ahead to oppose Bork on purely ideological grounds_ They did not do this honestly, by saying that they hated Bork's ideas. Failing a scandal of the usual sort, they decided to present Bork's philosophy as itself a scandal. When they said he was no true conservative, or that he was extreme and outside the mainstream, they were saying that Bork's were not the sort of ideas that should be met through the normal give-and-take of serious argument. They were saying that Bork's views were beyond the pale, that they were threats to the American system and should be treated as such rather than listened to with seriousness or respect. If the opponents had only said that Bork's ideas were wrong, they would have had to muster sustained arguments against them. But if his ideas were scandalous, therk their mere existence was enough to disqualify him from the Court.

M

os r of the scandals that the opponents discovered in Bork's views were sheer inventions. Even the scandals they claimed to have discovered in his early writings, before his career as a judge started, were not genuine. One of their best-

known examples was a 1963 *New Republic* article in which Bork had called the principle of the pending Civil Rights Act of 1964 one of "unsurpassed ugliness." In citing this, the anti-Bork forces meant, of course, to show that Bork had opposed the idea behind one of the most basic of civil-rights documents. Here they were guilty of yet another misrepresentation. In his *:Vew Republic* article Bork had quoted Mark deWolf Howe condemning segregation as one of the "ugly customs of a stubborn people." Bork agreed: there could be no doubt about the "ugliness of racial discrimination." But he wor-

ried *that* parts of the pending act could turn into another sort of unnecessary coercion, and it was this that Bork called a principle of "unsurpassed ugliness"—using the particular word "ugliness," of course, as an echo of Howe.

Though Bork was overstating for literary effect, the reality here was simply not scandalous, especially in light of the fact that, as the *New Republic's* liberal editors said in the same issue, many of its readers shared Bork's worry. But there was something more important for the present case: Bork repudiated his 1963 view, publicly, fourteen years ago. Throughout the campaign against his nomination, Bork's opponents, even if they mentioned that he had disavowed his earlier view, accorded it the same weight as if he were still committed to it.

At present Bork is an appeals court judge of acknowledged prudence. For years, though, he was a writer and a law professor. His obligation during those years was not to behave with maximum prudence. Quite the contrary. His duty was to follow his ideas where they took him, to spin out the implications with honesty and imagination, and then to apply the same honesty in admitting mistakes when further argument and evidence required him to do so.

As everyone recognizes, Bork took these obligations seriously—that is, he spoke honestly, assumed that his intellectual adversaries made their own arguments in good faith, and readily admitted he was wrong when so persuaded. Yet it was on the basis of these qualities that Bork's opponents on the Left declared him unfit for the highest judicial office. In doing so they attacked the entire process by which intellectual life does and should go on.

The irony here is large. For a long time now liberals in America have denounced conservatives for anti-intellectualism and have represented themselves and the institutions they control, like universities and the courts, as the preservers and defenders of intellect. In the Bork campaign they acted with a contempt for intellect at least as bad in its way as anything that ever came out of the fundamentalist Right of the 20's.

The anti-Bork forces would not have been able to make their anti-intellectual appeal decisive, though, were it not for the other line that they decided to cross: the line between the insider politics of judicial selection and the constituency politics of a national political campaign. No matter how fierce the politicking on the inside has been in the selection of federal judges, and it has sometimes been fierce indeed. the Bork campaign was different. Those who claimed that the media aspect of the campaign meant little, and that the important decisions were made by the Senate, were being either ignorant or disingenuous.

The achievement of the anti-Bork campaign was, first, to use the media to activate outside pressure groups on a large scale. Second, the campaign managed to bring this force to bear on Senators who then reached their decisions on the basis of factors that had never influenced them so powerfully before.

But, as Norman Lear has replied to his critics on this issue, what is wrong with that? Should we not be proud CO see the American people making clear what they will and will not stand for on the Supreme Court? Is this not democracy in action?

The answer, which Americans should not have to have repeated for them, is that under the system designed by *the* Founders, judges are not supposed to be chosen by popular election. This does not mean that judges are to be fully insulated from democratic pressures. After all, they are to be selected by the President, with the advice and consent of the Senate. But the insulation must be substantial. According to the Founders, judges should not live in fear of losing their positions for making decisions that yield the "wrong" results from the point of view of one or another pressure group.

We have at various times been more or less respectful of this principle, but there can be no doubt that it has been at the base of whatever success we have enjoyed as a society under law. It is the failure to show the slightest bit of care or respect for this truth that makes Lear-type talk about "democracy" a national menace.

IT WILLtake years to undo the damage that the war against Bork has wreaked. if indeed the harm can be undone at all. There was a sense, though, in which those on Bork's side of the case also incurred a substantial share of the blame. Since the 1980 election, many conservatives have tended to bask complacently in the false sense that the American electorate had won their fight for them. But the activists of the Left did not accept defeat and skulk off into a helpless silence. They pulled in their horns, solidified their bases in liberal organizations, waited for the appropriate target, then ran up the hill with a vast war whoop.

They were delivering a message: that the Left is no more tolerant than it was twenty years ago of ideas to the right of its own, and that its deepest hatred is reserved for public figures who champion those despised ideas with genuine intellectual skill. We are going to have another twenty years of ideological strife in which to remember the lesson.

ministration's multiple-point basing system, deserves at least part of the blame.)

No doubt there are many reasons why officials of this government may *be* pursuing START. But one hopes to heaven that this risky and ill-advised effort is not being undertaken in the absurd hope that an agreement slashing strategic arsenals by 50 percent will stiffen congressional resolve to spend *more* for our national defense. This is Alice-in-Wonderland political logic, unworthy of the principal author of NSC-68.

Let me dose with a suggestion: let the administration begin to publicize on Capitol Hill and among the public at large the newly acknowledged fact that the START agreement will not save the American taxpayer a dime, that indeed it will cost money and in all likelihood make our defense effort on the whole more expensive. Let the administration begin to spell out in detail for Congress the costly changes to our forces and the new weapons systems that must be deployed to recapture what amounts to a diminished level of strategic stability under START. Let it do this without even going into the serious problems of verifying the agreement or enforcing compliance when Soviet violations are discovered. Then we shall see, even more clearly than we do today, whence the real pressure for an agreement is coming—whether from Capitol Hill, as Ambassador Nitze implies, or, as seems more obvious, from the White House and the Department of State.

That the administration can offer no better justification for its policies at this late hour I find almost a little surprising. At any rate, the intellectual and strategic bankruptcy of this approach to our security should be plain.

Bork & His Enemies

To THE EDITOR OF COMMENTARY:

I agree with what Suzanne Garment writes in her article, "The War Against Robert H. Bork" [January], about the scurrility and ruthlessness of the campaign against Judge Bork, and I too supported his nomination to the Supreme Court. Nevertheless, it was not only the malice of his enemies that defeated Judge Bork. There were serious defects in his jurisprudence that also contributed to the result.

All of Judge Bork's constitutional opinions are derived, directly or indirectly, from his conviction that the Constitution ought to be interpreted in the light of the "original intent" of the Framers of that document. But Judge Bork has never interpreted the intentions of those who framed and those who ratified the Constitution in the light of the doctrines to which they themselves subscribed. This misunderstanding of "original intent"—not only by Judge Bork, but by Chief Justice Rehnquist and Attorney General Meese—I have documented in "What Were the 'Original Intentions' of the Framers of the Constitution of the United States?" (published in the Spring 1987 issue of the *University of Puget Sound Law Review* but written before Judge Bork's nomination).

In 1825, Thomas Jefferson consulted James Madison on the question of what books and documents ought to be considered authoritative for the teaching of law at the new University of Virginia. Madison recommended as the first of the "best guides" to "the distinctive principles" of the governments, both of Virginia and of the United States, "The Declaration of Independence, as the fundamental act of Union of these States." ...

Bork's many writings do not display the slightest awareness that the principles of the Constitution are to be found in the Declaration of Independence—or in any of the other documents of the Founding which express the same philosophical ground for constitutional jurisprudence....

Bork has written that "judges have no mandate to govern in the\ name of contractarian or utilitarian or what-have-you philosophy rather than according to the historical Constitution." But the historical Constitution *was* based upon a particular version of "contractarian philosophy." For that we have the authority of no one less than James Madison, who wrote repeatedly "that all power in just and free governments is derived from compact. . . ." And John Adams, in the Massachusetts Bill of Rights, wrote that "The body politic is . . . a social compact by which the whole people covenants with each citizen and each citizen with the whole people that all shall be governed by certain laws for the common good...."

Bork's "originalism" is morally stultifying, in that it does not allow him to distinguish the principles of the Constitution from the compro. wises of the Constitution. Thus he is compelled to speak of the Consti. tution's "wholesome inconsisten. cies." But the greatest of all inconistencies in the original Constitution concerns slavery. And however nececsary the compromise with slavery might have been, it hardly deserves to *be* called "wholesome."

Bork's conception of "original intent" is an invention of contempo. rary conservative jurisprudence. Although it speaks constantly of his. tory, it rejects the ideas of natural rights and of natural law which were the historic foundation of the historic Constitution. Judge Bork's lengthy testimony gave rise to a widespread feeling—one that did not arise only from the propaganda of his antagonists—that his was a desiccated scholasticism, that had little in common with that passionate commitment to human freedom—under "the laws of nature and of nature's God"—that is the true legacy of our Revolution.

HARRY V. JAFFA Claremont, California

To THE EDITOR OF COMMENTARY: In vilifying the opponents of Robert H. Bork for allegedly vili fying Bork, Suzanne Garment says almost nothing about Judge Bork's own views on the issues. .. . It may therefore be useful to set forth some of these in his own words.

On free speech: as late as June 1987, he declared that he did not think "courts ought to throw protection around" art and literature. Ever since 1971, he has insisted that the Constitution protects only speech related to "the way we govern ourselves"; his liberal views on libel in political matters are related to that exclusive concern with po-li tical speech.

On equality: in June 1987, he declared. "I do think the equal-protection clause probably should have been kept to things like race and ethnicity," excluding women and others.

On privacy: even at the confirmation hearing, where he experienced several "confirmation conversions," he insisted that there was no principled way to justify the 1965 decision striking down the laws against the use of contraceptive devices. Other targets of his criticism of privacy law include the 1925 decision establishing a parent's right to send a child to a private school as well. of course. as the abortion decision....

Although Bork may not personally like poll taxes and literacy tests . . . as the *Wall Street Journal* has pointed out, "had he been a Supreme Court Justice in the 1960's, he would almost certainly have upheld these laws." ...

The fact is that whether Bork likes literacy tests, poll taxes, contraception, or abortion law is irrelevant. He was being considered for a seat on the Supreme Court, where he would apply his views of what the *Constitution* requires or permits, not what he would approve were he a legislator. It is his view of the Constitution that the nation repudiated. And not just because of media campaigns. The "nationwide advertising ... creating pressure on Southern Senators from black organizations," as Mrs. Garment describes it, could hardly have affected a conservative like John Stennis who is not running for reelection, or a retiring Republican like Robert Stafford, both of whom voted against Bork.

Losers are entitled to sulk, not to distort history.

HERMAN SCHWARTZ
The American University
Washington, D.C.

To THE EDITOR OF COMMENTARY:

In her piece on the defeat of the Bork nomination, Suzanne Garment sprays accusations all over the place. . . . Since Mrs. Garment was herself an active participant in the hard-fought battle over the nomination, there is a temptation simply to avert one's eyes and ignore her public tantrum. But Mrs. Garment's piece is part of a concerted effort, now joined by the former nominee himself, to rewrite history in an attempt to influence the course of future Court nominations. As such it warrants a response.

As the evidence demonstrates, Mrs. Garment is wrong on all counts. The fight over Robert H. Bork's confirmation was a fair fight and he lost it in every arena in which it was contested—among legal scholars, among the American people, and in the Senate itself. Judge Bork's nomination was defeated not for hidden or conspiratorial reasons, but because his dearly articulated views of the Constitution and the role of the courts were viewed by a majority of Senators as at odds with our history and traditions and as a threat to liberty. Far from misleading the public, the process provided an extraordinary learning experience for all of us about the meaning of the Constitution and, in the end, was an affirmation of the historic role of the Supreme Court in protecting our fundamental rights and liberties.

1. Mrs. Garment's first major charge is that the process of judicial selection was corrupted because Bork's opponents decided to cross "the line between the inside politics of judicial selection and the constituency politics of a national political campaign." . . . The danger of allowing constituency politics to intrude on the selection process is that judges "are not supposed to be chosen by popular election" and should not "live in fear of losing their positions for making decisions that yield the 'wrong' results...."

Of course judges should not be vulnerable to retaliation for their decisions. That is the essence of an independent judiciary. But Mrs. Garment has turned matters completely on their head. In performing its constitutional duty to advise and consent to judicial nominations, the Senate affords citizens the only chance they have to assess a nominee's fitness for office. The process is by no means the equivalent of a popular election because the great majority of conscientious Senators' in the Bork deliberations, as on other nominations, weighed arguments, not telegrams. As one observer has noted, if a nominee satisfies the people's representatives in the confirmation process, he will never have to answer to them again. So Mrs. Garment's notion of judges living "in fear of losing their positions" makes no sense.

Mrs. Garment evidently has little faith in her own argument since she does not follow it consistently. In her haste to condemn politicization by those who *opposed* Bork, she voices no criticism of Ronald Reagan's 1984 and 1986 campaign appeals for the election of Republicans on grounds that they would ensure the confirmation of judges who would carry out the Reagan social agenda. Nor does she seem disturbed by the Reagan pitch for citizens to pressure their Senators to vote for Bork because he was "tough on crime," a characterization that Bork had the good grace to reject at his hearing.

Perhaps recognizing the flaw in her argument, Mrs. Garment wheels out her fallback position: the problem was not so much that Senators heeded their constituents as that they did not properly understand the politics of their own states. & she suggests that the significance 0; the black vote in the 1986 Senate elections in the South was inflatee because the anti-civil-rights incu r°. bent in Georgia might have won it only white Republicans in the At. lanta area had gotten themselves to the polls. So, too, in North c ar°. lina Mrs. Garment asserts that Se n. ator Terry Sanford's oppone nt would *have* won if *he* had gotten a "Republican's normal share" of th e Helms vote. According to Mrs. Gar. ment's logic, if popular will is in. deed a legitimate factor in the con. firmadon process, Southern Senators (who voted against Bork 16-6I should have realized that the 1986 elections were an anomaly--thz the racial politics of a Jesse Helms are the "normal" condition of the South. Now that truly may be a principle of "unsurpassed ugliness.'

2. In Mrs. Garment's melodrama there are many villains .. . but she reserves a special place in her rogues' gallery for People for the American Way and its founder, Norman Lear. In Mrs. Garment's account, the television ad produced by People for the American War and narrated by Gregory Peck was "composed of false innuendoes and outright lies."

In this charge as in so many others Mrs. Garment is simply wrong on her facts. She says, for example. that, contrary to the ad's assernoo. Bork never defended poll taxes *or* literacy tests, but merely suggested that the Supreme Court in the poll-tax case could have struck the az down "on other grounds," present* ably proof of racial discrimmatum The fact is that over the course more than half a century, Southall states had used both poll taxes mt literacy tests as devices to disco. franchise black citizens. When olt device failed, state legislatures came up with another variation. They took the process from courts, and the need for pro racial discrimination in each ant. And when it came right down to it states were willing to user pdt tax to disenfranchise poo whal citizens if that were the cts t e t. keeping blacks off the rolls.

That is why black citizens *b.* 1964 challenged the poll tax form of *economic* discrin1 102ul t that violated the Furteen:. Amendment and why Congress 1965 outlawed the use of ltuniu_., tests *in* Southern states o t hou d qui c r r i i n min g c a as ti e o - b n. y-case p ii roof of

So Mrs. Garment begs the question when she suggests that Bork was only quibbling about the rationale and not the result. In fact, he challenged the authority of the supreme Court (in the case of poll taxes) and Congress (in the case of literacy tests) to take the only effective attic— that were available to them to enfranchise black citizens.

Neither People for the American Way nor any other Bork opponents that we know of ever charged that Bork favored poll taxes, although his 1973 statement that the Virginia poll tax "was a very small poll tax, it was not discriminatory, and I doubt that it had much impact on the welfare of the nation one way or another," certainly raised legitimate questions both about his sensitivity and accuracy.

Similarly, Mrs. Garment is wrong in charging that People for the American Way and others were "guilty• of yet another misrepresentation" in citing Bork's statements that the 1963 civil-rights bill barring racial discrimination in public accommodations was based on a principle of "unsurpassed ugliness." Aparendy the "misrepresentation" lies in the failure to point out that in using the phrase "unsurpassed ugliness," Bork was borrowing words that Mark deWolf Howe had applied to segregation. But Bork's meaning was crystal clear when he wrote, even as 200,000 people were gathering to hear Martin Luther King's "I Have a Dream" speech, that barring racial segregation in restaurants and hotels and theaters was, for proprietors who practiced such discrimination, "a loss in a vital area of personal liberty" and a form of coercion that "is itself a principle of unsurpassed ugliness." Whether the phrase was borrowed from Howe or was Bork's own, the meaning was the same. Presumably Bork borrowed the quotation because *he* deemed it apt.

Mrs. Garment continues her string of errors when *she* says that the People for the American Way ad was "just as bad" in its statement that Bork "doesn't believe the Constitution protects your right to privacy." Mrs. Garment contends that Bork *does* believe in a right to privacy but not the "generalized" one that Justice Douglas articulated In the *Griswold case.* the 1965 decision in which the Supreme Court struck down a Connecticut law making it a crime for anyone. even married couples, to use birth control.

The statement in the ad was based on a 1971 Bork article saying that the desire of a "husband and wife to have sexual relations without unwanted children" was indistinguishable for constitutional purposes from the desire of an electric-utility company to "void a smoke-pollution ordinance," and in a 1982 speech that "the result in the *Griswold* case could not have been reached by interpretation of the Constitution." At his hearing, Bork tried for a while to soften these views by suggesting that rights to privacy might indeed be found elsewhere in the Constitution. **But** *in* the end he could find no basis in the Constitution for striking down Connecticut's anti-birth-control law. His reassurances that the Fourth Amendment protects privacy by guarding against unreasonable searches and seizures would provide no help to the Connecticut couple or to those asserting similar daims.

Contrary to Mrs. Garment's allegations, People for the American Way's television and print ads were only a small part of the detailed research, costing a fraction of what she asserted. Legal analysis and public-information efforts engaged in by People for the American Way and other civil-rights, civil-liberties, religious, and civic organizations were at the core of the campaign....

But even if the ads are taken in isolation from all *else,* they require no apology. The hurt they caused was the sting that the truth sometimes inflicts.

3. Perhaps the most bizarre notion of all is Mrs. Garment's assertion that the real basis of opposition to Bork was not a fundamental disagreement over constitutional principles but the threat that Bork represented to the "liberal monopoly over the great academic institutions."

Mrs. Garment paints a picture of Robert Bork as a lonely gladiator angering liberals by storming one of the "great bastions of liberal jurisprudence"—a portrait that will come as a surprise to those who know the Yale Law School of Eugene Rostow, Ralph Winter, the late Joseph W. Bishop, Jr., and the late Alexander M. Bickel. among others. Her suggestion that there is a "liberal monopoly over the great academic institutions" ignores the predominance of conservative scholars at the University of Chicago Law School and elsewhere. . . .

Mrs. Garment's assertion that the battle was really over control of the heart and soul of American law schools misses the point of the entire process. Perhaps to her mind, the ideological and personal struggles that take place in universities, or, for that matter, in the boardrooms of corporations or newspapers, are the most important and exciting things. But *she* trivializes and cheapens the Bork confirmation process to suggest that the struggle was that kind of petty power play.

In fact, the Bork confirmation would never have engaged the attention of the Senate and the American people if it were not about something much larger. That something concerned flesh-and-blood people and their problems. The issue was whether the constitutional principles that had led the Supreme Court in the past to rule that ra-daily restrictive covenants could not be enforced against black home-seekers, that political dissenters could have their say without fear of imprisonment, and that states could not make it a criminal offense for people to use birth-control devices would continue to be available to racial, religious, and political minorities who today seek the protection of the courts.

The continued applicability of these principles—essentially that the Constitution is capacious enough to encompass tights that are not explicidy guaranteed by its text and that the courts will protect the liberties of people who cannot obtain protection from the elected branches of government—is hardly an ironclad guarantee to minorities that their claims will be vindicated. ... But in themvake of the rejection of the man who repudiated this understanding of the meaning of the Constitution and the role of the judiciary, the principles take on *a* new vitality; they are reaffirmed as standards against which judges will measure their own actions.

Of course, there is irony in all this. The Reagan administration began by warning the courts to heed "the groundswell of conservatism evidenced by the 1980 election" and by calling on the public to put pressure on the judiciary. In the Bork confirmation battle, the American people responded by making clear that the courts should remain the single branch of government where the majority does not rule and where citizens can obtain relief from its excesses. Suzanne Garment may lament this turn of

events, but for most of us there could *be* no more appropriate celebration of the bicentennial of the Constitution.

WILLIAM L. TAYLOR
Consultant to People for the American Way on the Bork nomination

ARTHUR J. KROPP
President, People for the American Way
Washington, D.C.

TO THE EDITOR OF COMMENTARY:

There is much truth in Suzanne Garment's article. There is also much truth, of crucial importance to any rigorous assessment of the Bork controversy, that she failed to mention at all.

It is easy enough to demolish the Left. But what about the people *not* of the Left who had serious misgivings about the Bork nomination to the Supreme Court? Mrs. Garment did not address these. Nor did she confront the fact that Judge Bork hurt himself badly during the hearings because he was perceived by a number of Senators (and others) to have retreated from positions he had held for so long and often had espoused so passionately —the so-called "confirmation conversion." For one example, Bork had stated previously his belief that the Fourteenth Amendment was not intended to incorporate the Bill of Rights, i.e., to apply the Bill of Rights to the states. In his testimony, however, he declared his "full acceptance of the incorporation doctrine." After Bork testified, one of his staunchest supporters, Bruce Fein of the Heritage Foundation, was moved to observe, "Bork is bending his views to improve his confirmation chances, and it's a shame."

In an op-ed piece in the Chicago *Tribune,* Philip B. Kurland of the University of Chicago law school. by no means a man of the Left, had this to say: "Bork's entire current constitutional jurisprudential theory is essentially directed to a diminution of minority and individual rights." In his testimony before the Senate Judiciary Committee, the well-respected John Hope Franklin, professor of legal history at Duke University, remarked about Bork: "One searches his record in vain to find a civil-rights advance that he supported from its inception."

The point is that a wide range of scholars examined Bork's record and concluded that he was basically hostile to the Supreme Court's record as protector of civil rights and civil liberties, though one would hardly discern this from Mrs. Garment's article. For constitutional reasons persuasive to Bork, far more often than not he would uphold the power of the executive and legislative branches over that of the judicial branch to grant redress in cases where individual citizens claim to be aggrieved by government.

There was nothing in the article about the key role played by Pennsylvania Republican Senator Arlen Specter. Unlike some of the others, Senator Specter had no "original intent" to defeat Judge Bork. Probably more than any other Senator, he had done his homework carefully before the hearings began. . . . Senator Specter's questioning of the nominee was generally acknowledged to have been thorough, incisive, and eminently fair. He treated Bork with the respect and consideration he deserved, yet he was deeply troubled by many of his responses. For instance, Senator Specter found it hard to understand how Bork could take an expansive view of presidential power, finding room for "organic development" of that power under the Constitution, but apparently finding no such room for "organic development" of the meaning of "liberty" for individual citizens under the Constitution.

In an op-ed piece in the New York *Times,* Senator Specter said, "I reluctantly decided to vote against him, because I had substantial doubts about what he would do with fundamental minority rights, about equal protection of the law and freedom of speech."

One of the most devastating comments on the Bork nomination was made by Senator John Warner, a Virginia Republican, normally almost unfailingly loyal to the administration. Senator Warner said that he had really wanted to support Bork and had agonized for *weeks* before he decided to vote against confirmation. In Senator Warner's words: "I searched the record. I looked at this distinguished jurist, and I cannot find in him the record of compassion, of sensitivity and understanding of the pleas of the people to enable him to sit on the highest Court of the land."

Mrs. Garment's failure to come to grips with the reasons given for the rejection of Judge Bork by people of the caliber of Senators Specter and Warner discredits her article.

SAMUEL RABINOVITZ
White Plains, New York

TO THE EDITOR OF COMMENTARY:

Suzanne Garment's detailed article was timely, excellent, and needed, particularly by those of us who were wondering what constitutes reality. Like most people, I knew nothing of Judge Bork, but I was willing to learn. Also, I was interested in hearing the question one asks a candidate for the Supreme Court. Therefore I read newspaper accounts and magazine articles, listened to talk shows, and watched various political-analysis programs. In particular I listened to the snippets of testimony on the television evening news programs and the interpretations offered by the network reporters and anchors. Late at night I would listen to extensive playbacks of the day's proceedings (I think on C-SPAN)....

When I compared the day's testimony of Bork opponents and supporters with the network news excerpts, I had the sense that they were fairly reported. Yet when I made similar comparisons with Bork's own testimony I was appalled at the differences. The networks had prepared me to hear a social Neanderthal. . . . Instead, I heard the opposite. I saw and heard a brilliant man, in response to specific questions, brilliantly analyze and expound on the law. I saw Democratic Senators apparently completely uninterested in anything the man had to say. Night after night my wife heard me ex-claim,"in anger, at the misrepresentations provided daily by the print and electronic media... .

What I found most disturbing was that these hearings provided further proof of my observations ... that liberals *have a totalitarian* mentality, they are absolutely intolerant of any ideas that differ from their own. I have never felt so politically vulnerable, even threatened, as I do today by the power that the Left has over the media and other organizations and institutions in our society that shape our culture....

SHELDON *F.* GOTTLIEB
Mobile, Alabama

TO THE EDITOR OF COMMENTARY: . .

Notwithstanding the blatant political war against Robert H. Bork, including the demagogic

4.itements by Senators Biden, Ken-Nfetienbaum, Leahy, *et al.*, television campaign . . . , and :he intimidation of witnesses, Bork's ,pponents contend that it was the :earint:s and the principled discus-„on of constitutional law therein :hat determined his fate... . saving viewed or listened to ?¡og of the testimony during the ..earings . , I can only conclude -.hat Bork's opponents were destined .o defeat his nomination. From the moment the Senators began their .juestioning of Bork, I realized .hot they had either a very simplistic understanding of constitutional or no understanding at all... . Except for the testimony of Bork himself and a handful of the witnesses, there was little principled liscussion of constitutional law and none from the Democratic Sena-:ors on the committee.

Far from being a lesson in con-,titutional law, the hearings were a ?oll of results popular with the Democratic members of the committee. The issue before the committee was whether Bork agreed with the results dear to the mem-1'ers. The scenario played itself out)ver and over again. Senators would read a diatribe against the nominee and then inarticulately Bork to comment. Of course. :specially in the case of Senator Kennedy. the script was prepared a thirty-second snippets so that the lyening news could report that the lominee was in favor of the scull-anon of women, poll taxes, and 7inally restrictive covenants and i4amst voting rights. abortion, and Piracy in the marital bedroom. Even though Bork stated that he Weed with the result in many of th.e cases discussed but disagreed pith the reasoning, the Senators lever relented or *conceded.* . . .

In essence, Bork and the mem-'ers of the committee . . . were 'Peskin; two very different Ian-!uages • As a result, the lesson in Ja.nc.se.t.itu.t.ional law never took

The damage to the confirmation :7[1]c esi has been done. In the Juslcur Y Committee's view, the role [1] the Court is to reach particular !iult; comporting with the prevail-rno, „ I in the committee and the the committee had its :night as well submit the calendar to the Senate for a .-e. abolish the Court, and be-'ine a nation of men, not laws.

ROBERT S. NAYBERG "hum'. New York

To THE EDITOR OF COMMENTARY:

. . . As a supporter of the Reagan administration, as one who feels comfortable with the philosophical thrust of COMMENTARY, as one who began with no preconceptions and spent hours listening to and watching the confirmation hearings, I came away with the feeling that Robert H. Bork was a terrible nominee. Every shot fired in the "war" was fired by the nominee in the direction of his foot. Most of them were on target.

Edward Kennedy, Norman Lear, Gregory Peck, *et aL,* were a side-show. Robert Bork was the problem. Three cheers for Anthony Kennedy.

MARTIN KATZ Hartsdale, New York

To THE EDITOR OF COMMENTARY:

No one 'likes to lose, and it is easy to understand why diehard supporters of Robert H. Bork like Suzanne Garment are trying to revise history to distort what happened in the landmark Senate vote on the Bork nomination. But Judge Bork was not the victim of a "lynch mob" or of a multimillion-dollar media campaign. In fact, the victory won by progressives and civil-rights advocates in blocking the Bork nomination was largely a grass-roots triumph of hard work and canny organizing, fought fairly and squarely on the issues. As one who was heavily involved in the effort here in Texas, I would like to try to set the record straight on how and why we won.

I. We influenced public opinion, and ultimately Senators, by moving quickly to define the terms on which debate and discussion of the Bork nomination took place. Bork was nominated because he was the most prominent national critic of forty years of Supreme Court decisions. During the last seven years President Reagan and Attorney General Meese have often been rebuffed by the Congress and by the Supreme Court itself in their efforts to follow through on the Right's social agenda, and the Bork appointment was designed to ensure that the administration's impact in these areas would *be* felt long after January 20, 1989....

While the White House was telling skeptical Senators they had virtually a constitutional duty to rubber-stamp a President's choice, opponents of the Bork nomination were arguing that judicial philosophy was not only an appropriate area of inquiry, but the central question before the Senate. The critical factor in the success of this effort was the decision to focus on the broad issue of the role of the Supreme Court in American society....

The question then became whether Bork was in the "mainstream" of American jurisprudence, or outside it. The White House and Bork tried to overcome his career of strident attacks on the Court and on virtually every major rights decision of the past generation by painting him as a judicial moderate in the mold of retiring Justice Powell. This juxtaposition of the new Bork with the extremist of old redefined the debate yet again. This time it was about Bork's candor and credibility, and the outcome of that debate was fatal to the judge's chances.

2. Despite Bork supporters' efforts to portray him as the victim of a cabal of "special-interest" groups, the opposition to the nomination was extremely broad-based. To be sure, the ACLU, People for the American Way, the AFL-CIO, and various women's and pro-choice groups played a leading role. But in Texas and elsewhere, there was also strong participation by Hispanic and black organizations, disability-rights groups, church leaders, professional clubs, and many others far from the administration's stereotype—the Association of Flight Attendants, the American Public Health Association, the Federation of Temple Women, and others are not so easily characterized as left-wing zealots....

3. We did our homework. Reading !Airs. Garment's charges of a "dirty" anti-Bork campaign, you would think we won by dredging up rumors and old personal scandals. While there was some unfortunate, desperate mudslinging at Senators Biden, Kennedy, Metzenbaum, and others, there was almost none of this aimed at Judge Bork.. .

What did Bork in was an intensive research effort into his record —a voluminous body of writings and opinions available for examination to anyone who was interested. Bork's opponents compiled it early, analyzed it carefully, and circulated it widely. The message was quickly and effectively communicated to Senators that there should be no rush to judgment on Judge Bork.

Bork was already a disturbing fig-

ure to many Americans who remembered his role in firing Archibald Cox, and the news that he had been derisive of important Supreme Court decisions on privacy and civil rights served to mobilize, almost instantly, the large and politically sophisticated constituencies of women and minority groups. As one who traveled around Texas sneaking on other matters in the first few weeks following the nomination, I can testify to the extraordinary level of palpable fear among members of these groups. What struck me most is that it was not confined to a relatively small circle of civil-rights and feminist activists, but shared by many who had never been particularly politically aware or active. Women were deeply concerned about the real possibility that their reproductive freedom might be curtailed. Blacks were getting the word that Bork had been a critic of the Civil Rights Act of 1964, and had restrictive views of freedom of speech and assembly that would have banned many of the nonviolent protest tactics of the Southern civil-rights movement.

These groups and others came together, state by state, in coalition efforts. In Texas, for example, more than fifty groups came together. They generated thousands of letters and calls to Senators' offices, held press conferences in virtually every major city, obtained the support of hundreds of statewide and local officeholders, and hit the media with everything from letters to the editor to radio talk-show calls.

4. Opponents of the Bork nomination simply outstrategized the White House and the pro-Bork forces in the Senate. Sensitive to the "special-interest" charge, the civil-rights groups opposing Bork kept a relatively low public profile. Well-regarded legal and political establishment figures like former Republican cabinet member William Coleman and former Representative Barbara Jordan came to symbolize the opposition, and none of the organizations in the anti-Bork coalition even testified at the hearings. Arriving at this collective decision required the anti-Bork groups to overcome pressures from their more militant internal constituencies and act instead in their overall best interests. In contrast. the right-wing groups supporting the nomination were plagued by infighting all along.

The Bork fight has made it clear that progressives and civil-rights advocates—not to mention self-styled conservatives—have underestimated the degree of public support for basic constitutional values like privacy and equality. The debate over Bork became a bicentennial referendum on the Constitution, and there was a massive public rejection of the Reagan/Meese doctrine that the Court should protect only those rights explicitly found in the text, and leave most personal freedom and equality issues to the will of political majorities. .

GARA
LAMAItCHE Executive Director
Texas Civil Liberties Union
Austin, Texas

To THE EDITOR OF COMMENTARY:

. . . Relatively accurate from the conservative pro-Bork perspective, Suzanne Garment's article did not address the Right's own failure to get the case for Bork to the people. No one . . . denies that the actions of an organized liberal coalition were nothing less than highly charged politics cast in life-or-death terms. Nevertheless, both the Right and Left were aware, well before the August recess, that a crusade instead of a confirmation was about to take place. . . .

That conservatives chose to take the high moral ground . . , shows that they miscalculated the circumstances of the nomination and they continued to do so until it was too late to mount a saving offensive....

Justice Thurgood Marshall of the present Court was one of the most practiced Supreme Court lawyers ever to be nominated for the tribunal. He, too, was eminently qualified at the time of his nomination, and he, too, was a victim of highly charged politics. . . . His President and his backers, however, were ready for either a confirmation or a crusade and for that reason *he* sits where Bork aspired to be. At the time, the Marshall hearings were just as contemptible as the present-day Bork bashing. The outcome of those hearings can be attributed to a strong-willed administration, convinced that it was pursuing the correct path and willing to expend all of its political capital. No such conviction existed among those who spent the August recess soaking up sun in California....

Judge Bork is an able jurist deserving of a seat on the Supreme Court. But to view the tactics used to defeat him as wrong and as an offense against the normal judicial confirmation process, as Mrs. G. went suggests, requires a memon lapse concerning the "results-o$_r$i. ented" politics of the Reagan *ad.* ministration. Not since Presiden$_t$ Johnson has an administratio$_n$ pushed confrontation over comp$_{ro}$. mise, and successfully, on such a regular basis. In its zest to make fundamental changes . - the Present administration has continually inserted politics and ideology int$_o$ what had previously been viewed as nonpartisan government functions....

Blame the liberal Left? No. In. stead, blame those who .. . allowed an honorable man to be sacrificed. ANDRE J. GINGLIts
Laurel, Maryland

To THE EDITOR OF COMMENTARY:

I had been looking forward to an excellent analysis of the Bork sode in the pages of COMMENTARY, and Suzanne Garment certainly did not disappoint me. I was pleased that she correctly identified the most dangerous element in the whole affair, namely, the anti-intellectualism displayed in the attacks on Judge Bork....

It was clear 'that, in attacking Bark, the Left was trying to do exactly what it has always accused the Right of trying to do, namely, to create a litmus test for Supreme Court Justices, one based not on such traits as character, intelligence, and experience, but rather on whether a judge arrives at the "correct" conclusion according to late 20th-century popular social theory. Simply put, the defeat of Bork was a victory for sloganeering and platitudes over reason and intellect. Thus were we treated to such gushy profundities as that Bork's views were "not in tune with the 80's," implying that the trends of a given time are the measure of right and wrong....

A common *to quoque* used by Bork's opponents in their defense is that it was the President who politicized the nomination process and created the litmus tests, not they. This argument falls flat on analysis. Whatever litmus test the President used applied to nominees from his administration and *only* from his administration. It in no way affects nominees from any future administration, Republican or Democratic. Reagan chose nominees whose philosophy he agreed with. as did Jimmy Carter. So will all future Presidents. As for the Supreme Court, at any given time it is likely

to consist of Justices nominated by the past five or six Presidents. Because we generally elect very different Presidents over a span of twenty-five to thirty years, this makes it likely that at any given time we will have an ideologically diverse Court consisting of Justices nominated by Republicans and Democrats, liberals and conservatives. Leaving the choosing to the President is the best way of achieving ideological diversity on the Court.

The Senate, on the other hand, consists of two opposing parties in perpetual political strife, with one party in control and the other generally having at least enough power to mount a filibuster. What this means is that any judicial nominee who does not exhibit the most inoffensive centrist philosophy is certain to receive heated opposition from one side or the other, frequently enough to kill his nomination—if the Senate insists on voting on the basis of politics and ideology-

It is thus not hard to see why Senators have tried in the past (with some lapses, to be sure) CO avoid using ideology as a criterion for confirmation, and instead concentrated on questions of character and experience. For the worst litmus test of all would be one in which every nominee had to travel the path of least resistance, a narrow tightrope in the middle of the road, where any past statement or ruling, no matter how intelligently argued, that bothered too many people on either side of the Senate chamber would result in possible rejection. The result of this would be a Court made up of monolithic robots....

Ironic, isn't it, how groups which have so often attacked the use of "fear and passion" in political campaigns where the victims were liberals, had no objections to the very same kind of tactics on this occasion, where politics is not even supposed to *be* a force? ...

R.K. BECKER

Racine. Wisconsin

To THE EDITOR OF COMMENTARY:

Suzanne Garment points out that the deepest hatred of the Left is reserved for public figures who champion conservative ideas with a genuine intellectual skill. That is well illustrated in an editorial that appeared in the Detroit *Free Press* (October 1, 1987):

Mr. Bork. if confirmed, would use his superb legal scholarship in the service of a narrow, potentially dangerous ideology that could reverse hard-won individual freedoms and divide the nation. . . . It would be much easier to oppose Mr. Bork if he were manifestly unqualified for the Supreme Court by lack of intellect or experience. The fact that he is not, and the potential for misuse of his attractive attributes make it all the more crucial chat the Senate vote against his confirmation.

RALPH SLOVENKO

Wayne State University
Law School
Detroit, Michigan

To THE EDITOR OF COMMENTARY:

Suzanne Garment ends her trenchant essay with a reference to the intolerance of the Left. She is on target, as usual. A college classmate of mine, and therefore a friend of more than forty years' standing, stopped by last fall and . . . we talked about the Bork affair. He was exultant that Bork had bitten the dust. I raised the question of procedure: Bork or no, should judicial appointments be handled this way? He agreed with my sense of discomfort with the merely procedural aspect. After he left, I sent him a letter in which I sought to continue the discourse, sketching three or four different ways in which judicial nominations might be handled in order to avoid the type of political campaigning we saw in the Bork affair. I invited him to see if *he* could come up with some fresh ideas too. That was many moons ago. I am still waiting for a reply from my liberal friend. The terrible suspicion arises within me that he is not really dissatisfied with the Bork proceeding.

WILLIAM F. RICKENBACKER

Atkinson, New Hampshire

To THE EDITOR OF COMMENTARY:

. . . The willingness of Judge Bork to discuss his previous writings, to explain them away, and to discuss specific cases may have suggested to his opponents that he was vulnerable... .

Once Bork revealed his vulnerability, he encouraged his political opponents to make demands that. if not rebuffed. will turn the Supreme Court into the grand marshal of that liberal coalition against Bork that has raised hypocrisy to the level of political art form.

DAVID ZUKERMAN

Bronx, New York

To THE EDITOR OF CONIMENTAID,

Like many others, including in$_t$ self, Suzanne Garment deplores di$_t$ overtly political campaign again$_v$ Judge Bork. However, the politi$_c$. nation of Bork's nomination, wits its attendant distortion and trivial. ization, occurred as a natural co$_n$. sequence of the constitutionalin. tion of moral issues like abortion and privacy....

The real dysfunction in our p$_a$ litical culture is not so much *the* politicization of the Supreme Court. or the polarization it has caused, as it is the illusion, naturally creat• ed by constitutional decisions, that permanent solutions to such fundamental questions as abortion and privacy may be found. How can i$_n$ imagine that *such* questions can, or should, ever cease to *be* debated?

In their scramble to win the war of the Supreme Court, both the Left and the Right have lost sight of an important point: part of lis. ing in a pluralistic democracy is accepting that one's political victories are inherently qualified and temporary. I believe that if we aft relearned this, polarization would subside, political conflict would return to its natural course, and out political institutions would be able to cope with the task of governmg once again. a

RALPH GAEBL111

Jenkintown, Pennsylvania

To THE EDITOR OF COMNIENTART.

Suzanne Garment's article ps vides the kind of telling commentary which should awaken A thoughtful Americans. The Senate through its rejection of Robert O. Bork, has now made it dear tint_ it approves of the Supreme Comfy deciding cases by using reason' which have nothing whatever w d with the Constitution. In caber *words, it* is perfectly all right wit, *the* Senate if the Supreme Coal imposes its will and functions ass policy-making body. The Amerind' people . . . and the concept of self government have thus been dealt' real blow....

The balance conceived for nor system of government is in real doP ger. When it becomes a practice for national policy de^{f}t sions to be made by nine unelecoes Justices with life tenure and $^{\circ}$sr elected Senators do not possess !be courage to act to correct theior balance. some serious cluesa$^{dis.}$ should he asked by the people- of them should be, Is this coup to he governed by the United Saw.

Supreme Court? Second, What is it about the Supreme Court that qualifies it to govern? ...

The defeat of Judge Robert Bork, as portrayed in Mrs. Garment's article, is in fact a real defeat for the kind of self-government people like to believe we have. At the very least, we should pull the veil away and admit that government by the judiciary does exist.

Suzanne Garment, thank you for your incisive analysis. Would that others who need to know might understand the message.

THOMAS A. **BUSTIN**
Gainesville, Florida

SUZANNE GARMENT writes:

Of all these letters, Harry V. Jaffa's clearly contains the most far-reaching criticism of Robert Bork's jurisprudence. The assumptions we make about the influence on the Framers of a particular contractar-ian philosophy must have a great effect on our thinking about almost every topic that became controversial during the Bork nomination hearings. Would that the discourse in those proceedings had been about the matters Mr. Jaffa has raised.

I hope he will not take it amiss if instead of dealing directly with his argument, which others are better qualified to address, I merely call attention to an important piece of information in his first sentence: Mr. Jaffa supported Judge Bork's nomination to the Supreme Court. During the confirmation fight, people with far less serious complaints against Bork took a far narrower view of the tolerance appropriate to the citizens of a pluralist democracy in a situation like this one.

Before any discussion of this broad subject, though, comes the job of clearing away some factual underbrush. A few of these letters say things about Bork and the anti-Bork campaign that are not correct.

Herman Schwartz summarizes Bork's views on free speech by saying that Bork thinks the Constitution protects political speech but not art and literature. But over the past fifteen years, as Mr. Schwartz neglects to tell his readers, Bork has come to the view that if we want to protect free speech in the political arena, we must protect art and literature as well. He takes the position, in fact, that constitutional protection extends to anything in the arts short of obscenity.

Neither does Mr. Schwartz inform his readers that Bork has put his judicial opinions where his mouth is. During the time he served on the Court of Appeals Bork's free-speech record was exemplary from the point of view of civil libertarians on issues involving non-political as well as political speech.

Mr. Schwartz summarizes Bork's views on the equal-protection clause by telling his readers that Bork thinks it probably should have been kept to racial and ethnic categories and should not have been extended to women. But Mr. Schwartz does not mention Bork's long-held and express view that the equal-protection clause applies to what its language says it applies to —"any person," which most certainly includes women. What Bork has consistently objected to is a particular interpretation of the equal-protection clause under which the courts must put people into ever-multiplying special categories and give different treatment to the different categories under the same equal-protection clause.

In my article I quoted a TV ad by People for the American Way charging that Bork "defended poll taxes." I said that this was not so, and that what Bork disagreed with was a particular line of reasoning the Supreme Court majority used in addressing the poll-tax issue in the *Harper* decision. In their letter, Arthur J. Kropp and William L. Taylor of People for the American Way reject my characterization. "Neither People Eor the American Way nor any other Bork opponents that we know of," they say, "ever charged that Bork favored poll taxes."

Well, what about that TV phrase, "defended poll taxes"? "Bork," they give as their justification, "challenged the authority of the Supreme Court ... to take the only effective actions that were available . . . to enfranchise black citizens."

But the ad said "defended poll taxes." The ad did not say "took actions that had the effect of perpetuating poll taxes," or "revealed at the least a gross insensitivity to the socioeconomic conditions surrounding the operation of poll taxes," or anything else of the sort. The ad said "defended poll taxes." The phrase conveys the plain, ordinary, clear meaning that Bork did something deliberately or actively or at least consciously in behalf of poll taxes. That meaning is what gives the sentence in the TV ad its emotional force and persuasive power. But it is not true.

The same People for the American Way ad claimed that Bork "doesn't believe the Constitution protects your right to privacy." I said this was not so. Messrs. Kropp and Taylor reject this accusation, too. They justify their radical characterization of Bork's views by charging that he once called a couple's desire not to have children "indistinguishable for constitutional purposes" from a company's desire to " 'void a smoke-pollution ordinance.' "

When Messrs. Kropp and Tay-lar cite this scary quotation, they are withholding some relevant information. Bork used it in an article to illustrate the absurdities of an older, discredited legal era when conservative jurists were guided by ideas of substantive due process that have been resurrected by some on the Left today. Messrs. Kropp and Taylor have turned Bork's meaning on its head. Thus, instead of successfully documenting the "privacy" quotation used in their TV ad, they have managed to compound misrepresentation with more misrepresentation. Once again, what they said on TV about Bork is not so.

More briefly: Messrs. Kropp and Taylor say I distorted reality by picturing Bork as a "lonely gladiator angering liberals" at Yale. As proof of their charge, they produce the names of four other more or less conservative Yale law professors, living and dead. With all due respect, anyone who can make this argument in good faith has not spent much time at Yale with his eyes open. Messrs. Kropp and Taylor must not have noticed, for instance, the unseemly promptness and angry force with which some of Bork's liberal Yale colleagues placed themselves in the visible forefront of the fight against him.

On the same subject, I said in my article that part of the opposi-
• don to Bork grew out of political struggles taking place within the universities. Messrs. Kropp and Taylor deny that this could be so, saying of me: "She trivializes and cheapens the Bork confirmation process to suggest that the struggle was that kind of petty power play." I introduce this sentence into evidence on the question of how much Messrs. Kropp and Taylor know about campus politics.

They also seem to accuse me of saying that the "normal" senatorial politics of the South, when white Southerners vote in their usual numbers and in their usual patterns, are "the racial politics of a Jesse Helms." I can assure them, if indeed *they are* truly worried about this possibility, that I meant no such thing.

Samuel Rabinove thinks Bork underwent a "confirmation conversion" when he said that the Bill of Rights is incorporated into the Fourteenth Amendment. Mr. Rabinove says he holds this opinion because *Bruce* Fein, a legal activist of the Right, criticized Bork for changing positions on the issue. In fact, Bork has long said that while the "interpretivists" have a good argument when they claim the Bill of Rights was not incorporated, recent evidence on the question has thrown their position into more doubt. Either way, the factors of time, precedent, and practice woven into the very fabric of our society have *done* the job of incorporation quite satisfactorily. Bork's position *does* not please the Right. But it is no conversion, either.

On a larger matter, the letter-writers express an interesting variety of opinions on whether the Senate hearing was admirable or contemptible. Sheldon F. Gottlieb and Robert S. Nayberg complain that Bork's testimony was good but badly covered by the press and that the Senators seemed incapable of conducting the serious questioning appropriate to the occasion. Martin Katz, by contrast, thinks Bork's own performance was the problem.

In a similar vein, letter-writers cite the anti-Bork votes of Senators Stennis, Stafford, Specter, and Warner as proof that the Senators cast their votes for high-minded reasons and that therefore the Senate could not have been responding in any decisive part to outside pressures when it rejected Bork. I am not going to discuss the motives and behavior of the particular Senators mentioned. There is not the slightest doubt that some Senators cast their votes for principled, unfettered reasons. As for some others, though, I call readers' attention to the letter from Gara LaMarche describing in detail the vigorous, organized, and politically sophisticated efforts of one wing of the anti-Bork forces to make its voice heard in the Senate. They should then ask themselves how plausible it is for anti-Bork partisans to claim that the Senators never heard those voices.

Another theme in several letters is the question of whether the Rea gan administration got what it deserved, first by introducing politics into the selection of federal judge, and then by conducting those politics badly in Bork's case. As Andre J. Gingles points out forcefully, full-blown political storms have af. fected judicial selection periodical. ly throughout the life of the republic. The Reagan administration did more, critics contend, because it introduced politics as an explicit, routine criterion for choosing judges. Some of those in the Reagan effort say, when asked about this, that their efforts have been peanuts compared with the concerted pressure and systematic target numbers that the Carter administration applied to get more women and minority. group members onto the federal bench.

Insofar as they gave excessive legitimacy to politics rather than to merit as a standard for judicial selection, what the Reagan and Carter administrations did was bad. But for Messrs. Kropp and Taylor to use this recent history as the justification for what they did to Bork is at least as bad. The Carter and Reagan administrations, after all, did their work within the old framework of the bar associations and local legal establishments. Peopie for the American Way, in a great leap forward, took the Supreme Court confirmation process into the age of national media campaigns and grass-roots organizing. This change makes a big difference in the way issues are framed, the sophistication with which they are addressed, and the limits to partisanship. Once again Mr. LaMarche's letter provides evidence.

The letter from R. K. Becker provide& a more elegant comment on this matter. Presidents have always tried, within limits, to put like-minded people on the federal bench. Out of these appointments by different Presidents with different views comes, in the short or the long run, judicial diversity. But the anti-Bork people had a more ambitious goal. By calling Bork "out of the mainstream," they tried to establish that no judge with his views should ever be on the Supreme Court, no matter what the administration.

This claim took the anti-Bork partisans into the realm of intolerance, and several letter-writers find *this* change the most ominous part of the Bork episode.

It is. The most disturbing feature of the letter by Messrs. Kropp and