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APPPOINTMENT CONTROVERSIES AND
THE SUPREME COURT

Stephen J. Wermiel*

Some respected observers of the U.S. Senate confirmation process for the U.S. Supreme Court nomination of Robert H. Bork have warned, with alarm, that the reputation of the Court is threatened by such public spectacles. The Twentieth Century Fund Task Force on Judicial Selection, for example, concluded in a report issued after the Bork hearings that "[t]he confirmation process, in short, has become extremely politized in a way that denigrates the Court and serves to undermine its prestige as well as public respect for the rule of law."1 The effects that controversy over Supreme Court appointments has on public opinion toward the Supreme Court may be examined at several levels in the context of the Bork nomination.

The first and most basic objection to the Task Force's fears is that there is simply no statistical evidence that the confirmation battle over Bork diminished the standing of the Supreme Court. Pollsters for both the Gallup and Harris organizations have found no erosion of support. In one Gallup Poll, taken two years before the Bork nomination, fifty-six percent of those polled had a "great deal" or at least "quite a lot" of respect for the Court. During the Bork controversy, the level dropped to fifty-two percent, within the poll's margin of error, and in 1988, after the controversy, the level was back to fifty-six percent again.2 The Harris Poll, listing only those with a "great deal" of support for the Supreme Court, has hovered at about thirty-two percent in recent years, with a drop of only two percentage points after the Bork controversy.3 In both surveys, confidence in the Supreme Court both before and after the Bork nomination remained above that for the White House or for Congress.

Indeed, since a majority of those polled who had a view one way or the other thought that Bork should be defeated,4 one might argue that

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* Supreme Court correspondent, Wall Street Journal.
1 Twentieth Century Fund Task Force on Judicial Selection, Judicial Roulette 9 (1988). The Twentieth Century Fund is a foundation that funds studies on judicial selection. Members of this Task Force were Walter Berns, Joseph A. Califano Jr., Hugh L. Carey, Lloyd N. Cutler, Philip B. Kurland, Jack W. Peltason, Nicholas J. Spaeth, Michael M. Uhlmann, and Robert F. Wagner. Mr. Califano dissented from this portion of the report.
4 NBC News/Wall Street Journal Poll, Sept. 25, 1987, at 2, col. 3. Of those polled, 34% fa-
the rejection actually helped the Court's credibility. There is some evidence that, not only did the Bork controversy not hurt the Supreme Court, but it did not even tarnish public support for individual senators. Moreover, Bork, the Supreme Court, and the issue of judicial selection in general did not amount to anything more than a blip on the political screen in the 1988 Presidential primaries or general election, although questions about Supreme Court appointments did figure prominently in the 1980 and 1984 elections.

The second and more theoretical objection to the Task Force's report rests in its assumptions about public perceptions of the judicial process. Professor Murphy has divided public support for the Supreme Court into two categories: specific support, which involves public reaction to individual decisions; and diffuse support, which is a residuum of confidence that transcends individual decisions. Precisely what specific support for the Supreme Court means is a difficult question. Some of the Court's more controversial decisions already have a quite tenuous grasp on public opinion. In parts of the "Bible belt," public schools regularly ignore, if not flagrantly defy, the Supreme Court's school prayer decisions by engaging in formal, organized prayer in classrooms during school hours.

To consider another example of this tenuous hold on public support, many police departments slice the *Miranda* decision with a razor-thin edge. In Charlotte, North Carolina, legal advisers to the police department informed officers that they may take a suspect, place him in the squad car, drive him to the police station, and, along the way, may question him about his name, age, family background, and address without advising him of his rights. They explained that, while this may be custody, it is not interrogation, and thus no *Miranda* warnings are required.

The Bork hearings, in a peculiar way, may have modestly fueled this disregard for specific decisions because they provided the television audience viewing the Senate Judiciary Committee hearings with the most highly visible criticism of Supreme Court decisions possibly ever to have occurred in the nation's history. Yet, even this unprecedented degree of public exposure to criticism of the Supreme Court amounted to little more than letting the public in on what lawyers and law professors have

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5 *Id.* Of those polled, 64% said it would make no difference in their vote for their own senator if that senator had voted to confirm Bork.


been doing for years. One need only look at the law reviews to have the credibility of *Roe v. Wade*\(^\text{10}\) cast in serious doubt as a matter of constitutional theory. One need only look at the speeches of then-Attorney General Edwin Meese to have confidence shaken in the criminal procedure rulings of the Warren Court. Surely, no one suggests that law professors refrain from criticism of Supreme Court decisions because it may undermine specific support for the Court.

On the broader level of diffuse support, the Twentieth Century Fund Task Force suggested that the Bork hearings undermined the public's confidence in the Supreme Court.\(^\text{11}\) The Task Force also suggested that the confirmation process is "too visible and attracts too much publicity"\(^\text{12}\) and recommended that Supreme Court nominees no longer testify at their own hearings.\(^\text{13}\) One of the nine task force members, Walter Berns, even suggested that television cameras be banned from the hearings.\(^\text{14}\)

Before we become alarmed over possible erosion of diffuse support for the Supreme Court, let us examine the origin of this support. Professor Murphy observed twenty-five years ago that:

>The "cult of the robe," the concept of the judge as a high priest of justice with special talents for elucidation of "the law"; that sacred and mysterious text which is inscrutable even to the educated layman, forms a sort of institutional charisma which is bestowed on judges with their oath of office.\(^\text{15}\)

There can be little doubt that this judicial myth, as some have described it, helps to retain a core respect for the Supreme Court. But a little demystification is a healthy thing, even if it reaches only a small segment of the population. The Justices appear to have recognized this fact themselves, at least during the years surrounding the bicentennial of the Constitution, when they began giving unprecedented numbers of television and newspaper interviews and talked about the Court in unusually candid terms.\(^\text{16}\) This period of candor appears to have ended, however, and the Court appears to be returning to its reclusive role.

My basic intuition here—and this is why I view the Task Force's warnings with skepticism—is that the public is not ill-served by coming to understand that courts, in their own special way, are political institutions and that their members get there through an overtly political pro-

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\(^10\) 410 U.S. 113 (1973).

\(^11\) See *supra* note 1 and accompanying text.

\(^12\) *Id.* at 8. Mr. Califano dissented from this observation.

\(^13\) *Id.* at 10. Messrs. Califano and Cutler dissented from this position.

\(^14\) *Id.* at 10.

\(^15\) W. MURPHY, *ELEMENTS OF JUDICIAL STRATEGY* 13 (1964). Professor Murphy asserted during the proceedings of this conference that he no longer believes in the theory of the "cult of the robe."

\(^16\) In 1986 and 1987, Justices William Brennan Jr., Harry Blackmun, Lewis Powell, and Sandra O'Connor did televised question-and-answer interviews for Bill Moyers's series on public television, "In Search of the Constitution."
cess. In this regard, the Bork hearings may have been a healthy process. They focused a segment of the public's attention on this time of delicate but shifting political balance on the Supreme Court. That the Supreme Court is on the brink of change is a fact well known to judges, lawyers, law professors, and senators. Those who argue that the Bork hearings undermined the Court's credibility are, in effect, suggesting that this information is too dangerous for the general public to handle or to understand.

Greater public understanding, not less, is needed about the role and functioning of the Supreme Court. While critics of the Bork hearings appear to worry that the public may understand too much, there is, unfortunately, little evidence on the other side that anyone, the Justices included, is worrying about promoting greater comprehension of the Court's role and how it works.