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## Why Principles Matter

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# WHY PRINCIPLES MATTER

Carl Tobias\*

THE nomination of Judge Robert Bork to the United States Supreme Court was one of the most controversial nominations in American history. *Matters of Principle*<sup>1</sup> tells the story of how Judge Bork lost, and Senator Joseph Biden won, this battle for the soul of the Supreme Court. The book is the quintessential insider's account. Mark Gitenstein served as Chief Counsel for the Judiciary Committee at the time of the Bork nomination and played an instrumental role in the Bork proceedings.

*Matters of Principle* recounts in consummate detail what occurred once President Ronald Reagan attempted to consolidate the Supreme Court's conservative trend by nominating Robert Bork. The book is a fast-paced, eminently readable account of the fight over Bork's nomination. Gitenstein explains difficult concepts, such as the right to privacy and unenumerated rights, in ways that non-lawyers can readily understand. For example, he shows how Senator Biden extracted the idea of a marital right to privacy, into which the government could not intrude, from the landmark privacy case of *Griswold v. Connecticut*,<sup>2</sup> involving a state prescription on the sale of contraceptives.

The author frequently invokes historical events involving the Supreme Court and the confirmation process, such as President Franklin Roosevelt's notorious court-packing plan, that afford valuable insights on the Bork nomination. *Matters of Principle* also includes many trenchant observations gleaned from interviews with most of the relevant players, such as Senators Orrin Hatch and Arlen Specter, and Terry Eastland and William Bradford Reynolds, then principals at the Justice Department.

Gitenstein provides as well a blueprint for Supreme Court selection that holds considerable promise for reducing the contentiousness that has attended recent confirmation processes, notable those of Judge Bork and Justice Clarence Thomas: The author makes clear that the fractious nature of the process is not attributable solely to the phenomenon of divided government or to some latter-day politicization. Rather, he suggests that Presidents Reagan and Bush exceeded the scope of whatever mandate the American people had given them by forwarding to

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1. MARK GITENSTEIN, *MATTERS OF PRINCIPLE* (1992).

2. 381 U.S. 479 (1965).

the Senate Judiciary Committee the names of candidates who were more conservative than the electorate considered appropriate.

Gitenstein explains that Senator Biden and other members of the Senate Judiciary were attempting to establish and maintain certain principles which would guide the nomination process. For instance, they subscribed to the notions that the Supreme Court should be politically balanced, reflecting the popular will, and that nominees be in the mainstream of American legal thought, not at its margins.

Consultation is the antidote which the author prescribes for the contentiousness that currently plagues the process. Gitenstein argues that nominations would proceed much more smoothly were the President to submit several names to the Senate Judiciary Committee before formally nominating candidates. This procedure has considerable potential for eliminating or ameliorating the assumption of intractable positions which occurs when individuals are nominated without consultation. If prior consultation were employed, it seems likely that consensus candidates would emerge and that much bitter political infighting could be avoided.

President Clinton, in submitting the names of his initial two Supreme Court nominees, Judge Ruth Bader Ginsburg and Judge Stephen G. Breyer, apparently subscribed to Gitenstein's prescription. The Chief Executive carefully considered numerous potential candidates and reportedly consulted with both Democratic and Republican members of the Senate Judiciary Committee before officially nominating Judges Ginsburg and Breyer. The procedures employed seem to have fostered the prompt, uncontroversial confirmation of the two jurists.

*Matters of Principle* informs comprehension of the Supreme Court nomination process, a process often obscure and little understood. The book also provides much food for thought as the Supreme Court commences the 1994 Term with Stephen Breyer as the newest Justice, whose smooth confirmation the Clinton Administration's consultation facilitated, and as the administration continues refining its policy of federal judicial selection. Mark Gitenstein affords as well valuable suggestions for improving the nomination process in the future, regardless of which party controls the White House.

# **Comments**

