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The Law Book: From Hammurabi to the International Criminal Court, 250 Milestones in the History of Law (Sterling)

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1973

The Endangered Species Act

"And of every living thing of all flesh, two of every sort shalt thou bring into the ark, to keep them alive with thee." Thus was Noah commanded according to Genesis 6:19. By the early 1900s, a new kind of conservationist movement had developed. New organizations, including the National Audubon Society and the New York Zoological Society, had been founded, and Congress enacted the country's first federal wildlife-protection law, the Lacey Act, in 1900. But it wasn't until Congress passed the Endangered Species Conservation Act of 1969 that endangered species began to enjoy protection from eradication. For the first time, the law covered invertebrates as well as species outside America. That act also gave rise to the eighty-nation Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).

The 1973 CITES helped catalyze further conservationist action, resulting in Congress's passage of the Endangered Species Act of 1973. Holly Doremus, an expert on endangered species and biodiversity protection, observes that it "was, and remains, a landmark, the strongest mandate for protection of the biota on the globe." The act protected the habitats and ecosystems of endangered wildlife against incursions by commercial development. It required the secretary of the Interior to publish and maintain a list of all species "in danger of extinction throughout all or a significant portion of its range" as well as those likely to become endangered within the foreseeable future. The act prohibited hunting, capturing, or in any way harming any endangered species and banned their import and export. Importantly, through administrative regulations, it also proscribed the adverse modification or degradation of species' habitats. Substantial civil and criminal penalties serve as a means of enforcement.

Critics point to significant economic and societal costs occasioned by limitations it has imposed on development, but the Act has been a great success. A 2012 study by the Center for Biological Diversity noted that 110 species "have seen tremendous recovery while protected under the Act," and only 10 of the 1,400 species protected by the Act have been declared extinct (8 of them likely extinct before protection). Scientists estimate that at least 227 species would have gone extinct in the Act's absence.

SEE ALSO The National Environmental Policy Act (1970); The Rio Conference (1992).

The official symbol of America, the bald eagle teetered on the verge of extinction until being listed as endangered (through 1995) and then threatened (through 2007). As a result of the Endangered Species Act, it is now flourishing.

1974

Presidential Subpoena Compliance

Richard Nixon (1913–1994), **John Sirica** (1904–1992), **Leon Jaworski** (1905–1982)

President Theodore Roosevelt famously declared, "No man is above the law." Some seventy years later, the Supreme Court applied that dictum directly to a sitting president. The 1972 burglary of the Democratic Party's Watergate offices led to the appointment of a special prosecutor to investigate. When President Nixon refused to turn over tapes of conversations recorded in his White House office, a new special prosecutor, Leon Jaworski, obtained a subpoena ordering him to do so. U.S. District Judge John Sirica denied Nixon's motion to quash the subpoena, rejecting his claim of executive privilege. After Nixon went to the Court of Appeals for the District of Columbia, Jaworski took the unusual step of seeking immediate Supreme Court review.

Given the importance of the issue and a need for speedy resolution, the Supreme Court agreed to hear the appeal without the benefit of an intermediate appellate decision. Less than three weeks after arguments in the case, the Court unanimously affirmed Judge Sirica's decision. (Justice William Rehnquist—formerly a high-ranking member of the Nixon Justice Department and who had involvement with the special prosecutor—recused himself.)

The Court rejected the president's argument that his claim of executive privilege was not reviewable by the judiciary, citing *Marbury v. Madison*'s famous pronouncement that "it is emphatically the province and duty of the judicial department to say what the law is." Reaching the merits of the case, the Court found, for the first time, "constitutional underpinnings" for a claim of executive privilege but refused to define that privilege as absolute. Unless the president can identify specific dangers that can arise from disclosure of information claimed to be subject to the privilege, a prosecutor's particularized showing of need will overcome the privilege. As a result, Nixon was ordered to provide the tapes for the District Court's private inspection.

Nixon turned over the disputed tapes shortly after the Court's July 24, 1974, decision. Transcripts were made public on August 5. Three days later, President Nixon became the only sitting U.S. president to resign from office.

SEE ALSO The Power of Judicial Review (1803); Presidential Immunity (1997).

President Richard M. Nixon on July 8, 1971, three years before he announced his resignation from office to avoid impeachment over the Watergate scandal.

1987

Robert Bork's Supreme Court Nomination

Lewis F. Powell Jr. (1907–1998), **Ronald Reagan** (1911–2004), **Robert Bork** (1927–2012)

Between 1789 and 1986, the Senate confirmed 109 presidential appointments to the Supreme Court, rejecting eleven nominees. (Fifteen nominations were either withdrawn or not acted upon.) But the tenor of the process changed forever when the Senate rejected President Ronald Reagan's nomination of Robert Bork.

In August 1981, President Reagan nominated Sandra Day O'Connor, who became the first female justice to serve on the Supreme Court—a historic appointment that helped diversify the Court. Five years later, the Senate unanimously confirmed Bork to the U.S. Court of Appeals. But when Justice Lewis F. Powell Jr., a moderate, announced his retirement in June 1987, President Reagan faced what the *New York Times* called "a historic opportunity to shape the future of the court." The future he envisioned included Bork, former U.S. solicitor general, a Yale Law School professor, and an acknowledged conservative intellectual.

"Many qualified observers of judicial personnel considered Bork to be the most meritorious nominee to the high bench since FDR's selection of Felix Frankfurter in 1939," writes Supreme Court scholar Henry J. Abraham, but intellect wasn't the paramount consideration. Instead, the process devolved into partisan politics less than an hour after starting. Bork's record both offended and frightened liberal interest groups; they in turn undertook a smear campaign the likes of which had never before been seen.

Writing in 1992, U.S. Court of Appeals Judge Roger J. Miner described Bork as perhaps "the last of the straight shooters. He answered honestly, directly, without guile and with some intellect, all the questions put to him." As a result, his nomination failed by a vote of 58–42. As Judge Miner noted, Bork "accurately predicted that direct answers would never again be the norm." No one wanted to be "borked," a neologism meaning to defame or vilify, particularly in the media, to prevent an appointment to public office. Bork's *New York Times* obituary described that repudiation as "a historic political battle whose impact is still being felt."

SEE ALSO The Judiciary Act of 1789; The Power of Judicial Review (1803); Confirming Clarence Thomas (1991).

Robert Bork speaks to the press in the White House briefing room during his fight for Senate confirmation.

1991

Confirming Clarence Thomas

Clarence Thomas (b. 1948), **Anita Hill** (b. 1956)

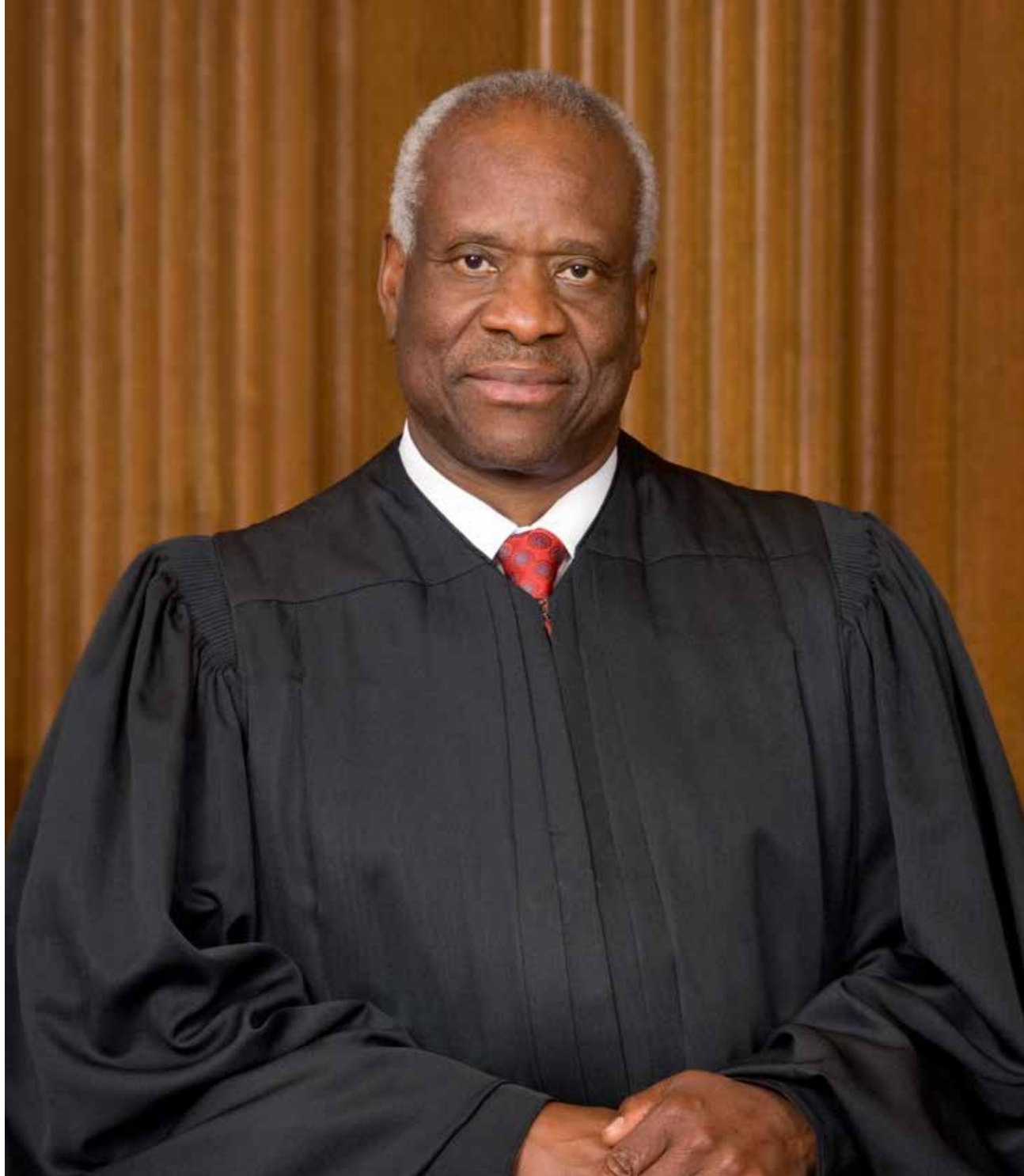
Between 1987 and 1991, the U.S. Senate Judiciary Committee conducted confirmation hearings on the nominations of five Supreme Court nominees: Robert Bork, Douglas Ginsburg, Anthony Kennedy, David Souter, and Clarence Thomas. The Senate rejected the Bork nomination. Ginsburg withdrew from consideration after acknowledging that he had smoked marijuana as a law student and professor. After largely uneventful hearings, Kennedy and Souter each were confirmed. Thomas was confirmed as well, but his hearings were anything but uneventful.

After nine days of testimony, just two days prior to the Senate vote, news broke that Anita Hill, a law professor and one of Thomas's former colleagues while he headed the Equal Employment Opportunity Commission, had come forward with allegations of sexual harassment. The Judiciary Committee held three additional days of hearings—"a circus sideshow" according to law professor Kim A. Taylor—that were likely the most watched Supreme Court confirmation hearings ever held. Communications expert Dianne Rucinski estimates that they were aired on cable and network TV as well as radio to as many as twenty-seven million homes.

Partisan politicking peppered three days of he-said-she-said testimony that Thomas himself characterized as "a national disgrace. From my standpoint as a black American, it is a high-tech lynching for uppity blacks who in any way deign to think for themselves, to do for themselves." The Senate confirmed Thomas by the closest vote of the century: 52–48.

Increased national consciousness made a lightning rod of the issue of sexual harassment, galvanizing action. Supreme Court scholar Henry J. Abraham observes: "many women made the Judiciary's supposedly callous treatment of Anita Hill a major campaign issue in the 1992 elections. . . . When the political dust had cleared, four more women had joined" the Senate. Political communication expert Dianne Bystrom also points to record-breaking numbers of sexual harassment inquiries made to and charges filed with the EEOC in the years immediately following.

SEE ALSO The Judiciary Act of 1789; Robert Bork's Supreme Court Nomination (1987).



Associate Justice of the U.S. Supreme Court Clarence Thomas in his official portrait, taken on September 24, 2007.

1997

Presidential Immunity

Bill Clinton (b. 1946), **Paula Jones** (b. 1966), **Kenneth Starr** (b. 1946)

In 1982, the Supreme Court established that a president enjoyed absolute immunity from suits seeking to hold him liable for conduct in his official capacity. But could a sitting president be sued for unofficial conduct occurring prior to his presidency? In 1997, the Supreme Court unanimously held in *Clinton v. Jones* that such a suit was permissible because presidential immunity does not extend "beyond the scope of any action taken in an official capacity." The underlying suit, filed shortly after President Bill Clinton took office in 1993, stemmed from the claims of Paula Jones, a former Arkansas state employee, that Clinton had sexually harassed her in 1991 while he was governor of Arkansas.

Almost as important as the Court's legal holding rejecting absolute presidential immunity was the decision's impact on Clinton's legacy. In reviving Paula Jones's sexual harassment lawsuit, the Supreme Court set in motion a series of discoveries and events that ultimately led to the second impeachment of an American president.

During a 1998 deposition in the *Jones* case, President Clinton lied about the sexual nature of his relationship with White House intern Monica Lewinsky. Kenneth Starr, the independent counsel investigating Clinton's suspected involvement in the Whitewater real estate scandal, considered pressing perjury and obstruction of justice charges. When President Clinton testified before a grand jury—famously saying, "It depends on what the meaning of the word 'is' is"—he again denied having had a sexual relationship with Lewinsky.

Less than a month later, Starr presented his report to Congress, detailing grounds for impeachment. In December 1998, the House voted to impeach Clinton. In January 1999, the Senate began a trial on the two articles of impeachment voted by the House. Clinton was acquitted when the Senate couldn't achieve the constitutionally required two-thirds majority for conviction.

Before leaving office in January 2001, Clinton paid more than $800,000 to settle the Jones case. He also paid a $90,000 contempt fine for his perjury in that case. To avoid criminal prosecution for perjury and obstruction of justice after he left office, Clinton admitted to having lied under oath, paid an additional fine of $25,000, and surrendered his Arkansas law license for a period of five years.

SEE ALSO Impeaching President Andrew Johnson (1868); Presidential Subpoena Compliance (1974).

Two tickets, dated January 14, 1999, to the Senate Impeachment Trial of the President of the United States.

2008

The Legality of Gun Control

District of Columbia v. Heller, McDonald v. Chicago

After the assassinations of President Kennedy, Malcolm X, Martin Luther King Jr., and Senator Robert Kennedy in less than five years, Congress passed the Gun Control Act of 1968, setting important restrictions on gun purchases. The confluence of these factors triggered a gun control debate that would continue for decades.

Between 1988 and 1992, notwithstanding that it had one of the strictest gun control laws in the country, the District of Columbia was called the murder capital of the United States, averaging roughly seventy-two murders per one hundred thousand residents in each of those years. It held that status again in 1996, 1998, and 1999. Dick Heller, a security officer authorized to carry a gun but not keep it at home, challenged the constitutionality of the D.C. statute. The Court of Appeals for the District of Columbia Circuit struck down the law. Hearing the case, the Supreme Court observed that "few laws in the history of our Nation have come close to the severe restriction of the District's handgun ban," which it found unconstitutional in that it violated the "inherent right of self-defense . . . central to the Second Amendment right." The Court's decision vindicated the individual-rights view of the Second Amendment, which, it held, protected an individual's right to own a gun for personal protection.

Two years later the Court ruled in *McDonald v. Chicago* that the Second Amendment applies to the states, thereby requiring state gun control laws to accommodate Second Amendment rights. But since the *Heller* and *McDonald* decisions, America has witnessed an unimaginable spree of mass shootings, many involving schools and children. A December 2012 report from *ABC News*, days after twenty-seven people were shot and killed at Sandy Hook Elementary School in Newtown, Connecticut, noted that since the 1999 massacre of thirteen people at Columbine High School, there have been thirty-one school shootings in the U.S. There were an additional eight school shootings in 2013 and 2014, with a total of thirteen deaths. Those events have heightened the gun debate, prompting new laws, which likely will lead to new legal challenges. Whether the Supreme Court will revisit the meaning of the Second Amendment remains to be seen.

SEE ALSO The U.S. Constitution (1787); The Bill of Rights (1791); Militias and the Right to Bear Arms (1939).

Supreme Court precedents that uphold citizens' rights to own and possess firearms in the face of restrictive state statutes haven't ended the debate over the Second Amendment.