

Robert Bork (1927-2012): Reactionary jurist and opponent of equality

By Patrick Martin
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Former law professor, appeals court justice and failed Supreme Court nominee Robert Bork, one of the most repugnant and reactionary figures in American legal circles for nearly half a century, died last week at the age of 85.

Bork played an important role in the dramatic shift to the right by the American ruling elite, as it has increasingly rejected not only the social reforms of the New Deal and civil rights eras, but the democratic traditions of the American Revolution itself.

A law professor at Yale from the early 1960s, Bork made a name for himself as one of a handful of ultra-right advocates in what was then a predominately liberal milieu. In 1964, he advised Republican presidential hopeful Barry Goldwater to oppose the Civil Rights Act, and he publicly assailed the 1965 Voting Rights Act as unconstitutional.

He denounced the 1965 Supreme Court decision in *Griswold v. Connecticut*, which struck down a state law banning married couples from using contraceptives, claiming that the right to privacy asserted by the court majority could be found nowhere in the Constitution. The privacy right recognized in *Griswold* was the basis for the 1972 *Roe v. Wade* decision legalizing abortion.

Bork extended the position articulated over *Griswold* into a legal doctrine known as “intentionalism” or “originalism,” which he argued that judges should adhere strictly to the “original intent” of those who wrote the Constitution and other founding documents.

While presented with a gloss of scholarship, this doctrine was palpably absurd—the men of 1776 could have no intelligible “intent” in relation to contraceptives, automobiles, nuclear weapons, telecommunications, the Internet, or even railroads, none of which existed in their time.

Originalism serves as a pseudo-legal rationalization for opposing any and all policy measures that represent concessions to social progress or infringe on the power and wealth of the American ruling class.

When Richard Nixon won reelection in 1972, he offered Bork the position of solicitor general, the third-highest post in the Justice Department, where he served as the main representative of the Nixon administration in arguments before the US Supreme Court.

In that position Bork played a critical role in the notorious “Saturday Night Massacre” of October 20, 1973, as Nixon sought to forestall the investigation of the Watergate scandal by Archibald Cox, the special prosecutor he had himself appointed.

When Cox refused to comply with a direct order from Nixon to stop using subpoenas to gain access to White House tapes and other incriminating evidence, Nixon ordered Attorney General Elliott Richardson to fire the special prosecutor. Richardson and his chief

deputy, William Ruckelshaus, refused and instead resigned their positions at the Justice Department, producing a political firestorm in Washington that led directly to the beginning of impeachment proceedings against Nixon.

Bork, as the third-ranking official in the Justice Department, replaced Richardson as acting attorney general and carried out Nixon’s instructions to fire Cox. He also ordered the FBI to seal off the special prosecutor’s office and bar his staff from access to the premises.

This produced a standstill in the investigation until Nixon was compelled to back down and appoint a new special prosecutor, conservative Democrat Leon Jaworski. Some nine months later, the US Supreme Court ordered Nixon to hand over the White House tapes to the Watergate investigations, and within weeks he had resigned as president.

Bork left the Justice Department and returned to Yale with the defeat of Gerald Ford in the 1976 presidential election. But after the election of Republican Ronald Reagan in 1980, he was short-listed for the Supreme Court, beginning with an appointment to the prestigious Circuit Court of Appeals for the District of Columbia.

Reagan selected Bork as his third nominee to the Supreme Court, following Sandra Day O’Connor in 1981 and Antonin Scalia in 1986. The Senate in a unanimous 98-0 vote quickly confirmed Scalia, an arch-reactionary of the same type as Bork, but without the Watergate baggage and with less of a paper trail.

When Bork was nominated to replace retiring conservative Justice Lewis Powell in 1987, however, the Reagan administration had been weakened by the Iran-Contra scandal, and the Republican Party had lost control of the Senate. Bork’s nomination was widely seen as a political provocation, a sentiment summed up in the famous speech given by Senator Edward Kennedy on the floor of the Senate only an hour after the nomination was announced.

Kennedy focused not merely on Bork’s role in Watergate, but on his long record of opposition to every progressive social reform of the previous 25 years. “Robert Bork’s America,” Kennedy declared, “is a land in which women would be forced into back-alley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens’ doors in midnight raids, schoolchildren could not be taught about evolution, writers and artists could be censored at the whim of the government, and the doors of the federal courts would be shut on the fingers of millions of citizens for whom the judiciary is—and is often the only—protector of the individual rights that are the heart of our democracy.”

This denunciation has to be understood in its historical context. Bork was an unabashed opponent of the whole edifice of civil rights

reforms enacted in the 1960s, a man who had denounced these measures as unconstitutional and provided legal ammunition for the defenders of segregation and racial tyranny.

Kennedy was describing a judiciary that was then identified in the popular mind with the reforms of the Warren Court, not the nightmare Supreme Court of *Bush v. Gore*, *Citizens United*, and countless reactionary decisions upholding executions and shredding democratic rights. Moreover, Kennedy was himself operating on a political double standard: he had voted to seat the no less reactionary Scalia on the high court only a year before, a capitulation to the ultra-right whose consequences continue to be felt.

Nonetheless, the opposition of Senate liberals and of civil rights and civil liberties organizations had an impact far beyond their political weight today. Bork's nomination was rejected by the Senate Judiciary Committee—chaired by Joseph Biden, now Obama's vice president—and defeated on the floor of the Senate by a 58-42 majority.

Reagan then nominated another, much younger, right-wing appeals court justice, Douglas Ginsburg, who withdrew after reports confirmed he had smoked marijuana as a law school instructor. Ultimately, the seat went to Anthony Kennedy, a conservative Republican jurist from California, who remains on the court today.

In the aftermath, the Republican ultra-right created a mythology about the debacle, claiming that Bork was a uniquely qualified legal superstar defeated only because of liberal mudslinging. They coined the word “borking” to describe this process.

The truth is nearly 180 degrees the opposite. Bork was the last Supreme Court nominee to be rejected by the Senate. The only failed nominee since then, Harriet Miers in the Bush administration, withdrew in the face of opposition by ultra-right elements in the president's own party who deemed her insufficiently reactionary.

Until 1987, Supreme Court nominations had frequently become the subject of political debate and contention. Nixon's nominations of Clement Haynsworth and Harrold Carswell were both rejected in the Senate in 1969, largely because the conservative southerners were closely linked to the defense of Jim Crow laws.

Lyndon Johnson's nomination of Abe Fortas to be chief justice also failed, and there were threats of a filibuster, ultimately abandoned, against Johnson's selection of Thurgood Marshall as the first black Supreme Court justice.

Since the defeat of Bork, however, a new process has been put in place to insure that no popular opposition will be mobilized against any nominee, no matter how reactionary, for the highest US court. Supreme Court nominees now routinely refuse to discuss any legal issues on the grounds that this would amount to prejudging potential cases, and the Senate hearings have become nothing more than a rubber stamp.

Bork apparently took the failure of his nomination to the Supreme Court as evidence of the terminal decline of American society. He left the Court of Appeals soon afterwards and devoted himself to writing books espousing ever more right-wing and misanthropic views.

Most notable is his 1996 screed, *Slouching Towards Gomorrah: Modern Liberalism and American Decline*, in which he denounced Thomas Jefferson and others of the “founding fathers” whose passionate defense of equality and human rationality he found particularly abhorrent.

He made no effort to square this vitriolic attack on the Declaration of Independence with his claim that judicial decisions should be based on determining the “original intent” of those who wrote the Constitution and other basic documents of the American republic.

In truth, the revolutionary-democratic spirit of the American Revolution is diametrically opposed to the rigid defense of wealth and privilege by Bork and the American ruling class as a whole.

Media retrospectives on Bork were compelled to take note of his long record of foul and retrograde politics, while nonetheless hailing him as “a man of great charm, compassion and intellect” (the *Washington Post*) and an individual for whom there was “no question of his integrity or intelligence (the *New York Times*).

Such praise is testament to the fact that the liberal establishment itself is in basic agreement with the repudiation of democratic rights and the heritage of the American Revolution. It is the Obama administration that is now overseeing the dismantling of the most fundamental principles enshrined in the Declaration of Independence and the Bill of Rights.

The essence of what Bork represented was his opposition to democracy and equality. In his 1996 lecture “Equality, the Rights of Man and the Birth of Socialism,” SEP National Chairman David North called attention to a critical passage in Bork's *Slouching Toward Gomorrah* denouncing the Declaration of Independence.

Bork wrote, “Despite its rhetorical vagueness or because of it, the Declaration of Independence profoundly moved Americans at the time and still does. The proposition that all men are created equal said what the colonists already believed, and so, as Gordon Wood put it, equality became ‘the single most powerful and radical force in all of American history.’ That is true and, though it verges on heresy to say so, it is also profoundly unfortunate.”

As North explained, Bork went on to defend the accumulation of great wealth amidst dire poverty, to sneer at all criticism of inequality as motivated by envy, and to denounce “any form of social policy that places even the slightest restraint upon the exercise of property rights, the extraction of profits and the accumulation of personal wealth.”

This description applies to the basic consensus of the American ruling class, as the political establishment moves to dismantle every remnant of social reform put in place in the 20th century.

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