

## The Original Sin of Robert Bork

Ilya Shapiro

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When Justice Lewis Powell unexpectedly announced his retirement in June 1987, it set the stage for what people already recognized was a pivotal moment in the fight for the Supreme Court. The Robert Bork nomination represents the moment when the scales fell from conservative eyes over what they perceived were unfair tactics in defeating a nominee who would finally, *finally*, start reversing the activism of the Warren and Burger Courts. And not because the nominee was perceived as unqualified, unethical, too much of a crony or assorted parochial concerns that had sunk nominees in the past. This was purely about ideology.

This battle royale came about in part because whoever was nominated would be replacing a "determined moderate" whose resignation "gave President Reagan a historic opportunity to shape the future of the Court." Justice Powell was the key vote on issues ranging from abortion and affirmative action to criminal justice and religion. Senate Democrats, who had a 55 to 45 majority, asked liberal leaders to form a "solid phalanx" to oppose any "ideological extremist" nominee. More specifically, they warned Reagan that there would be a fight if Bork were to be the nominee—even though in November 1986, Senate Judiciary Committee Chairman Joe Biden had said that he would support Bork if "after our investigations, he looks a lot like [Antonin] Scalia [who had been confirmed unanimously earlier that year]...and if the [special-interest] groups tear me apart, that's the medicine I'll have to take."

Bork was the obvious choice, head and shoulders in intellectual reputation and resume alike above other contenders. Then serving on the U.S. Court of Appeals for the D.C. Circuit, to which he was unanimously confirmed in 1982, Bork had been U.S. solicitor general in the Nixon and Ford administrations, the number three man at the Justice Department and the government's lawyer before the Supreme Court. Considered a potential justice for at least 15 years, Bork had once been promised a seat by President Nixon, but Nixon then resigned before he could fulfill that pledge.

Upon learning of Powell's resignation, Reagan asked for a list of potential nominees, which was prepared by his chief of staff, former Senator Howard Baker, along with Attorney General Edwin Meese and White House Counsel A.B. Culvahouse. Baker took the list to key senators, revealing several possibilities but asking for discretion to avoid leaks. Biden, who was on the presidential campaign trail and had now heard from those activist groups, flew back to Washington to meet with Reagan and give advice. "If you nominate [Bork]," a chastened Biden said, "you'll have trouble on your hands."

President Reagan announced Bork's nomination on July 1, describing him as "well prepared, evenhanded and openminded" and highlighting his exceptional academic and professional qualifications. The strategy was to portray Bork as neither a conservative nor a liberal, but as someone who would use his towering intellect to follow the law wherever it led. On pure legal merit, he was widely considered the most qualified nominee since Felix Frankfurter.

Within 40 minutes of Reagan's announcement, Senator Ted Kennedy (D-MA) took to the Senate floor with a condemnation of "Robert Bork's America" as "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."

It was a declaration of war, catching the administration on its back foot. Republicans had hoped to woo Southern Democrats, who were uneasy about the Court's direction on abortion and religion, but the allegations of racial insensitivity put these senators in an awkward position because of their need for Black votes. Coupled with the decline of President Reagan's political fortunes toward the end of his second term and the pent-up frustration that Republican presidents had appointed the last eight justices, liberal groups were spoiling for a fight.

Starting September 15, there would be an amazing 12 days of hearings—five of which involved questioning Bork himself, including a rare Saturday session. This was more than for any other nominee before or since, except Louis Brandeis in 1916—which was perhaps a mirror image of the Bork nomination, with Brandeis perceived as a towering intellect but an extreme social crusader. Senator Paul Simon (D-IL), a member of the Judiciary Committee, later wrote that, despite all the controversy in the preceding two months, and even though he personally opposed the nomination, if a vote had been taken when the hearings began, Bork would have been approved nine to five or eight to six. In other words, Bork was his own worst enemy.

A panel of august introducers began the hearing. President Gerald Ford, who had picked John Paul Stevens for the Supreme Court over Bork, called the nominee "uniquely qualified" and commended his conduct during Watergate. Senate Minority Leader Bob Dole (R-KS) then praised Bork's judicial restraint, likening his jurisprudence to that of Oliver Wendell Holmes—which shows that "restraint" is neither progressive nor conservative, but simply majoritarian. Finally, Senator John Danforth (R-MO), who studied under Bork at Yale Law School and, as state attorney general, hired Clarence Thomas, formally presented the nominee to the committee. (Bork, living in Washington, D.C., didn't have a home-state senator, as would otherwise be traditional.)

As the senators then turned to their opening statements, Ted Kennedy continued his calumny, saying that "Robert Bork has shown that he is hostile to the rule of law and the role of the courts in protecting individual liberty." Senator Pat Leahy (D-VT), who would later chair the Judiciary Committee, called the nominee "an intellectual of the first order...with a more comprehensive and clearly expressed judicial philosophy than any nominee to the Supreme Court in recent history," but expressed concern about Bork's criticism of decisions on free speech, privacy and equal protection. Joe Biden presented a vague theory of a living Constitution and how protected rights expand with the times, to contrast with Bork's view of constitutional meaning and bias against those rights not listed in the Bill of Rights. Republicans generally sided with Bork, with

the exception of Arlen Specter of Pennsylvania, who held his cards close to the vest and became a pivotal player in the Senate debate.

Bork presented his positions, controversial as they were on the substance, in a gruff and standoffish manner, lecturing rather than having a conversation. White House staff tried to get Bork to change, but he couldn't hide his disdain for the process. At the beginning of the hearing, Specter had expressed concern about the previous year's Rehnquist and Scalia hearings not getting to some of the issues, but there were few evasions here. This was all against how a nominee would've been coached by White House and Justice Department staff; *this* nominee didn't want coaching, instead blowing off so-called "murder board" training sessions.

The battle would rage for an entire month, with senators loading up the *Congressional Record* with editorials and other materials. Biden inserted into the record the names of 1,925 law professors who were against Bork, representing about 40 percent of law school faculty members nationwide. Senator Daniel Evans (R-WA) noted that "I have had...over 15,000 letters which probably, if you measure them for and against, give me little solace, for they are split almost precisely evenly." Senators Biden and Strom Thurmond (R-SC), the Judiciary Committee leaders from each party, led the formal debate on the Senate floor, which focused on what the Constitution says about privacy and civil rights. Most senators had decided how to vote, but party leaders knew the vote would be close and maintained their oratory for the sake of any gettable votes. President Reagan himself made national appeals in five of his weekly radio broadcasts, as well as a national TV address.

Robert Bork's nomination was defeated 58 to on October 23, 1987. It was close to a party-line vote, with two Democrats voting in favor and six Republicans opposed. It was the biggest rejection margin ever, and only the fourth Supreme Court nomination to be rejected in the 20th century, spawning a new verb: to be "borked."

*Ilya Shapiro is director of the Robert A. Levy Center for Constitutional Studies at the Cato Institute. This essay is adapted from his forthcoming book, Supreme Disorder: Judicial Nominations and the Politics of America's Highest Court, due out from Regnery later this month.*

*The views expressed in this essay are the writer's own.*