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Judge Robert H. Bork was, like St. Thomas More, a man for all seasons. His brilliance, wit, charm, and sense of humor helped him to revolutionize constitutional law. Judge Bork was the first and, for a time the only, academic to challenge the judicial activism of the Warren and Burger Courts. Two years before the decision in *Roe v. Wade*,¹ Judge Bork wrote a seminal law review article entitled *Neutral Principles and Some First Amendment Problems*,² which laid the intellectual groundwork for the originalism of Justices Antonin Scalia and Clarence Thomas. Judge Bork's criticisms of judicial activism were withering and effective. He transformed constitutional law just as earlier in his career he had transformed antitrust law, which he infused with the idea of promoting consumer welfare. Judge Bork was the rare academic whose work caught on, was read, and had a huge impact on the real world. He wrote and spoke eloquently, elegantly, wittily, and from the heart.

Judge Bork was a man of action as well as a man of ideas. He was thus a kind of platonic philosopher king—a label he would have vigorously resisted. Judge Bork was both an intellectual and a statesman. He began his service as Solicitor General of the United States under Presidents Nixon and Ford—a position from which he argued the government's cases before the Supreme Court. As Solicitor General, Judge Bork played a key role in persuading the Supreme Court to reinstitute the death penalty in *Gregg v. Georgia*.³ Judge Bork became Acting Attorney General of the United States in 1973 after the Saturday night massacre—a key moment in the unfolding of the Watergate scandal. His integrity helped to hold the Justice Department together in one of its most trying moments.

In September and early October of 1973, Judge Bork played a central role in forcing Vice President Spiro Agnew to resign

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1. 410 U.S. 113 (1973).

2. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1 (1971).

3. 428 U.S. 153 (1976).

from office. These events are recounted with great wit and verve in Judge Bork's memoir about his service as Solicitor General, *Saving Justice: Watergate, the Saturday Night Massacre, and Other Adventures of a Solicitor General*, published posthumously in 2013.⁴ Solicitor General Bork insisted in September and early October of 1973 that Vice President Agnew be indicted for taking bribes, and he refuted Agnew's legal argument that a sitting Vice President could not be indicted. The end result was Agnew's resignation and plea of *nolo contendere*, and Gerald R. Ford's appointment to be President Nixon's new Vice President. This event was of critical importance to the outcome of the Watergate scandal because it eliminated Vice President Agnew as President Nixon's impeachment insurance. Since the only person Nixon's enemies hated more than Nixon was Agnew, it was vital to get Agnew out of the Vice Presidency before removing Nixon himself.

On October 20, 1973, ten days after the Agnew resignation and in the midst of the war between Israel on the one hand and Egypt and Syria on the other, Bork played the starring role in a chain of events, which came to be known as the Saturday Night Massacre. The then-Attorney General, Elliot Richardson had promised to appoint a special prosecutor to investigate the growing Watergated scandal as a condition of his Senate confirmation to be Attorney General. Richardson foolishly picked Archibald Cox, a former Kennedy Administration official who was very close to Senator Ted Kennedy to conduct what should have been an impartial and apolitical criminal investigation.

In July of 1973, it became known that Nixon had tape recorded all conversations and meetings held in the Oval Office, and Special Prosecutor Cox demanded to see all the tapes. Nixon refused, and when Cox insisted on seeing them, Nixon ordered Attorney General Richardson to fire Cox. Richardson resigned rather than carrying out this order because he felt Nixon was ordering him to violate the pledge he had made at his Senate confirmation hearings. Nixon then asked Deputy Attorney General William Ruckelshaus to fire Cox, and when Ruckelshaus refused, Nixon fired him. Solicitor General Bork, who was third in line in the Justice Department hierarchy, then became Acting Attorney General. Richardson and Ruckelshaus urged Bork to fire Cox and not resign so that the integrity of the Justice Department could be preserved. Richardson, Ruckelshaus, and Bork all feared at the time that if Bork were

4. ROBERT H. BORK, *SAVING JUSTICE: WATERGATE, THE SATURDAY NIGHT MASSACRE, AND OTHER ADVENTURES OF A SOLICITOR GENERAL* (2013).

to resign, the White House might appointed a legal hack like White House staffer Fred Buzhardt to be Acting Attorney General, and Buzhardt might have ended the whole Watergate investigation.

Bork became Acting Attorney General on October 10, 1973. He fired Cox, asked all of Cox's staff to stay on and finish their jobs, and then hired Leon Jaworski, a former American Bar Association President who had prosecuted some Nazi war criminals, to complete the Watergate investigation after Cox's firing in a professional and nonpartisan way. Leon Jaworski's criminal investigation pursued the Nixon Tapes, and ultimately the Supreme Court ordered that the tapes be produced on July 24, 1974.⁵ It immediately became public that the tapes revealed that Nixon was guilty of the crime of obstruction of justice. Facing certain impeachment and removal from office, Richard Nixon became the first and only President in American history ever to be forced to resign from office and to accept a pardon for his crimes. Judge Bork thus played an absolutely critical role in the complicated series of events that led to Gerald R. Ford becoming President after Richard M. Nixon in August of 1974.

Political leftists vilified Judge Bork during this period and, indeed for the rest of his career, for firing Archibald Cox, as Nixon had ordered, but Bork's critics overlook the central role he played in forcing Vice President Agnew to resign, in keeping Cox's staff from quitting, and in seeing Cox's investigation through to a successful culmination under Leon Jaworski. The fact of the matter is that it was Robert Bork who saved the Justice Department from a grave threat to the rule of law in 1973, and no-one has ever given him the credit he deserves for this!

President Ronald Reagan appointed Bork to the United States Court of Appeals for the District of Columbia Circuit near the beginning of his administration on February 9, 1982. Judge Bork was the leading and most famous of a number of law professors whom President Reagan appointed to the federal appellate courts including Antonin Scalia, Richard Posner, Ralph Winter, Frank Easterbrook, J. Harvie Wilkinson III, Stephen Williams, Douglas Ginsburg, and Pasco Bowman. Bork stood out among all these legal giants, and he was widely rumored to be a leading candidate for an appointment to the Supreme Court.

5. *See* United States v. Nixon, 418 U.S. 683, 714 (1974).

Ironically, when Bork first met Nixon the morning after the Saturday Night Massacre, the first words out of Nixon's mouth were something to the effect of "you will get the next seat that comes up on the Supreme Court." Bork explains in his memoir that he did not have the heart to tell Nixon that after the Saturday Night Massacre neither he nor anyone else who Nixon might nominate could ever be confirmed.

Bork was considered for a Supreme Court appointment when President Gerald R. Ford appointed Justice John Paul Stevens, but he was passed over this time because of his role in the Watergate scandal. Ford was the only man ever to hold the presidency not having been elected President or Vice President by the American people, and he was in a very weak position politically. Bork was considered again for appointment to the Supreme Court when President Reagan filled his first Supreme Court vacancy in 1981, but this time he was passed over in favor of Sandra Day O'Connor because Reagan had vowed as a candidate to name a woman as his first Supreme Court pick. From 1981 to 1986, Bork seemed like the apparent front-runner for the next Supreme Court nomination, but when Chief Justice Warren Burger retired in 1986, Bork was passed over so that William Rehnquist could be elevated to be Chief Justice, while Antonin Scalia was appointed to the resulting vacancy. At this point, Bork was fifty-nine years old whereas Scalia was fifty.

Judge Bork served on the United States Court of Appeals for the District of Columbia Circuit with great distinction from 1982 to 1988, writing many eloquent opinions. He wrote an important opinion in *Dronenburg v. Zech*,⁶ which was joined by then-Judge Antonin Scalia and which rejected the whole *Griswold v. Connecticut*⁷ line of Supreme Court "right to privacy" cases. This opinion made it clear that Bork and Scalia would both vote to overrule *Roe v. Wade*⁸ if they were appointed to the Supreme Court. Judge Bork's opinion in the case was a classic judicial exposition of originalism, which was the philosophy of judging that Bork and Attorney General Edwin Meese III both espoused.

On July 1, 1987, President Reagan nominated Judge Bork to the United States Supreme Court to replace retiring swing Justice Lewis F. Powell, Jr. The political landscape had shifted sharply and precariously from the preceding summer when Justice Scalia was confirmed by a vote of ninety-eight to zero

6. 741 F.2d 1388 (1984).

7. 381 U.S. 479 (1965).

8. 410 U.S. 113 (1973).

on September 17, 1986. President Reagan was enmeshed in the Iran-Contra scandal, and the Republican Party had lost its majority control over the Senate in the 1986 midterm elections. Moreover, whereas Scalia's effective replacement of Warren Burger with William Rehnquist moving up to Chief Justice did not change the liberal-conservative balance on the Supreme Court, it was feared that Bork's replacement of Powell could lead to a constitutional revolution. This fear was totally unwarranted because it assumed that Rehnquist, Byron White, Sandra Day O'Connor, Antonin Scalia, and Bork were five sure votes to overrule *Roe v. Wade* and possibly to strike down affirmative action programs as well. In fact, O'Connor provided a critical fifth vote to retain *Roe v. Wade* in *Planned Parenthood of Southeastern Pennsylvania v. Casey*⁹ and she provided a critical fifth vote to retain affirmative action in *Grutter v. Bollinger*.¹⁰ Neither Reagan nor his enemies yet realized that the Powell seat was not in fact the swing seat.

Judge Bork's nomination in this politically charged climate triggered a massive nationwide campaign by his supporters and opponents unlike any the nation had ever previously seen. The ferocity and viciousness of the campaign against Bork was stunning and more like a presidential campaign than it was like any prior Supreme Court confirmation process. Senator Edward Kennedy's disgraceful behavior in the confirmation process caused Judge Bork's name to become a verb: To "Bork" someone meant to engage in a vicious exercise in character assassination. Senator Kennedy was a close friend of Archibald Cox, the Watergate special prosecutor who Bork had fired on Nixon's orders, and he was opposed to the rule of law both in his own personal life and in the nation's courts.

The Bork confirmation fight turned into a gigantic but vicious circus in part because the judge had written so many speeches, articles, and a book, all of which were critical of various Supreme Court decisions. The same paper trail that made Bork the leading legal intellectual of his generation also gave his many result-oriented enemies ammunition, which they could use to attack him. Throughout it all, Bork maintained his grace, his wit, his eloquence and his composure. Bork became a hero to millions of Americans who were horrified to see the modern day equivalent of the killing of St. Thomas More—the original man for all seasons.

9. 505 U.S. 833 (1992).

10. 539 U.S. 306 (2003).

After leaving the bench, Judge Bork became a prolific author. He wrote a book on originalism and constitutional law, *The Tempting of America: The Political Seduction of the Law*,¹¹ which became a New York Times bestseller, and he wrote an additional book about social and moral decay in American culture, *Slouching Towards Gomorrah: Modern Liberalism and American Decline*.¹² Judge Bork also wrote three additional books in his retirement prior to the posthumous publication of *Saving Justice*,¹³ which books included: *Coercing Virtue: The Worldwide Rule of Judges*;¹⁴ *A Country I do not Recognize: The Legal Assault on American Values*;¹⁵ and *A Time to Speak: Selected Writings and Arguments*.¹⁶ He left behind a vast legal legacy and a committed movement of followers.

Judge Bork was succeeded on the D.C. Circuit by Justice Clarence Thomas who was deeply influenced by Bork's thinking and who has had himself a stellar judicial career. One of Judge Bork's closest protégés in the Solicitor General's office, Ray Randolph became a highly distinguished judge on the D.C. Circuit, and another important Bork protégé from the SG's office, Judge Frank Easterbrook, is now the highly esteemed Chief Judge of the United States Court of Appeals for the Seventh Circuit. Bork's former law clerks include Harvard Law Professor John Manning, University of Virginia School of Law Professor John Harrison, and George Washington University School of Law Professor, Brad Clark. Judge Bork's writing has had a huge impact in academia where it helped inspire not only conservative originalists but also some liberal originalists at Bork's old home at Yale Law School, such as Akhil Reed Amar and Jack Balkin. Judge Bork's intellectual imprint on constitutional law and antitrust law is incalculable.

I was lucky to be a student in the very last class that Judge Bork ever taught at Yale Law School, which was a seminar on the theory of judicial review. It was one of the very best classes I ever took. I will never forget the way then-Professor Bork en-

11. ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990).

12. ROBERT H. BORK, *SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE* (2003).

13. See BORK, *supra* note 4.

14. ROBERT H. BORK, *COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES* (2003).

15. ROBERT H. BORK, *A COUNTRY I DO NOT RECOGNIZE: THE LEGAL ASSAULT ON AMERICAN VALUES* (2005).

16. ROBERT H. BORK, *A TIME TO SPEAK: SELECTED WRITINGS AND ARGUMENTS* (2008).

gaged with me, the respect with which he treated his students, and the fun of having lunch with him or talking with him as a law clerk. Judge Bork was not only famous, prolific, and hugely successful, but he was also a wonderful and fun companion in good times and bad. Even in his retirement the Judge continued to have an enormous impact on politics, as occurred when he condemned the nomination of Harriet Miers to the Supreme Court, thus paving the way for the appointment, instead, of a brilliant conservative intellectual, Samuel Alito. Judge Bork's loud public opposition to George W. Bush's nomination of his crony Harriet Miers was of a piece with Bork's speaking truth to power during the Watergate scandal. Robert Bork was brave and effective as well as being wise and witty.

Judge Bork converted to Catholicism in 2003, and this seems like a fitting point on which to end because of the extraordinary degree to which Judge Bork's life was a living out of the seven cardinal and theological virtues as I understand them: wisdom, bravery, restraint (or temperance), justice, faith, hope, and love.

Judge Bork exhibited great practical wisdom throughout his life, as anyone who reads *Saving Justice*¹⁷ or *The Tempting of America*¹⁸ will quickly realize. He was an intellectual who transformed antitrust law and constitutional law, but he was also a savvy wielder of political power during the 1973 Watergate crisis, during his Supreme Court confirmation fight, and during then-Judge Sam Alito's nomination instead of Harriet Miers to the U.S. Supreme Court. He loved to live in the tidal zone where ideas and power meet, and he had a strong sense of duty and character that guided his brilliant mind in practical ways. Judge Bork had no patience for armchair philosophizing or speculation, and he also had no patience with the career-climbing politicians who he repeatedly knocked heads with in Washington, D.C. I have never known a man more devoted than Judge Bork to practical wisdom, and I fully expect I never will.

To say that Judge Bork was brave is akin to saying that Jesus was and is love. *Saving Justice*¹⁹ repeatedly illustrates Judge Bork's bravery during the Watergate scandal, and the whole nation saw his bravery on display during the confirmation fight over his nomination to the Supreme Court. Judge Bork is obviously one of the bravest public servants this nation has ev-

17. See BORK, *supra* note 4.

18. See BORK, *supra* note 11.

19. See BORK, *supra* note 4.

er had. But, it should be added that Judge Bork's bravery was on display in many other areas of his life as well, such as during his service in the marines or when he was ridiculed by his colleagues at the Yale Law School for his unfashionable views or by academics for his ideas about antitrust law or originalism, all of which turned out to be true.

The third cardinal or classical virtue is temperance or restraint, and Judge Bork epitomized restraint during his career as a lawyer. He thought lawyers, and Attorneys General, and Presidents, and Supreme Court Justices should all follow the law and not make it, and it was his public advocacy of judicial restraint, which led his enemies to try to burn him at the stake. Judge Bork's enemies knew that he could not be seduced by money or power from his duty to follow the law, and it was for this virtue that they especially hated him. If he would only have kowtowed a little bit toward the intelligentsia, they might have accepted him, but they knew from Watergate, from his revolutionizing of antitrust law, and from his service on the D.C. Circuit that he would always keep his passions in check to his duty to follow the law.

The fourth and final classical virtue is justice, and if ever there was a just man it was Robert Bork. Every federal judge is required to swear the following oath when he or she embarks on their judicial duties:

I . . . do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent on me . . . under the Constitution, and laws of the United States. So help me God.²⁰

Judge Bork was passionately committed to the vision of justice that this oath epitomizes, and this is the reason why he fought like such a tiger for the rule of law during Watergate and in his confirmation ordeal. Judge Bork would not agree to let Spiro Agnew or Richard Nixon off the hook if they were guilty of crimes just because they were powerful and well-connected. Nor would Judge Bork let Supreme Court Justice Harry Blackmun off the hook for his poorly reasoned and morally atrocious opinion in *Roe v. Wade*. It did not matter to Judge Bork that Justice Blackmun was a powerful man, or that he had even more powerful friends in the senate and in academia.

20. 28 U.S.C. § 453 (2006).

Robert Bork cared about doing justice, and he knew that that required him to criticize *Roe v. Wade*.

The next three virtues are faith, hope, and love, all of which are interrelated and which are indispensable supplements to the four Greek and Roman virtues already discussed.²¹ Throughout his life, Judge Bork had a rock hard moral character of the kind that is often associated with faith, and this faith eventually led him in 2003 to convert to Catholicism with its associated religious faith. But, Judge Bork was always throughout his life a firm believer in the idea that there was right and wrong, and he held to his faith in that idea in the face of all temptations and obstacles with a tenacity that none can surpass.

Judge Bork was also full of hope because notwithstanding all the setbacks he suffered and notwithstanding his own occasionally wry prophecies of doom, he never gave up hoping that the rightness and force of his ideas could help him prevail. I am sure that if I had ever told Judge Bork that he was full of hope he would have denied it, but I am equally sure that it was true.

Finally, Judge Bork was full of love, expressed with kindness and consideration for everyone around him. He was a wonderful teacher because of the love he had for learning and for his students; he was a wonderful judge to clerk for because of the devotion and affection with which he took up the role of mentor; and he was a wonderful and loving friend in his retirement. Many leftists did not understand in 1987 why Judge Bork was loved so passionately by his supporters, nor did they appreciate that that love would still be evident even after twenty-five years. The answer is not only that Judge Bork was a kind, witty, fun, and entertaining person to be with who you could always count on to help you in a crunch. Judge Bork was all of those things, but there was something more as well. Judge Bork loved the law and the nation and the lawyers he knew too much to take the pieces of silver that the intelligentsia would have given him if only he had backed down from speaking truth to power.

Judge Bork will be sorely missed by all of us who believe in liberty, the rule of law, and constitutional government. We must carry on with the same love, hope, faith, wit, dignity, intellect, character and devotion to principle that he exuded throughout his life.

21. See *I Corinthians* 13:13 ("So faith, hope, love remain, these three; but the greatest of these is love.").