THE ESSAYS AND THEIR AUTHORS

TAB

"TAKE THE TROUBLE TO UNDERSTAND"

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Since the nomination of Judge Robert Bork to the Supreme Court of the United States, considerable careless comment has issued from groups who believe his nomination to be a threat to their particular interests. Rather than reason with his considerable intellect, these critics have used conclusionary and selective tabulations of his writings to brand him "anti-labor," "anti-feminist," "anti-First Amendment," and, in particular, "anti" the social objective of the writer.

The shallow debate spawned by these "reports" has sparked a voluntary response from a large and wide-ranging number of legal scholars who seek to raise the intellectual level of the "Bork" debate, a debate that could become a far more constructive discourse about the unique role of the Supreme Court in this the bicentennial year of our Constitution.

To date, this group has delivered four essays to the Senate Judiciary Committee which analyzes the alleged shortcomings of Judge Bork with respect to the special concerns of certain of his critics.

For those Senators and commentators who are willing to "take the trouble to understand"--to borrow words of Judge Learned Hand--these essays can move the discussion to a higher plane. They will learn that Judge Bork's critique of Roe v. Wade does not make him a "radical, judicial activist." Rather, it places him with the great majority of legal experts who have commented on the case. Professor Mary Ann Glendon of the Harvard Law School faculty points out the decision has been soundly criticized equally by those who favor pro-choice and those who oppose abortions: by Judge Ruth Bader Ginsberg, Professor Paul Freund, Archibald Cox, and by the Deans of the Stanford and Yale Law Schools. Writing carefully about "The Probable Significance of the Bork Appointment for Issues of Particular Concern to Women," Professor Glendon more broadly opines:

> [I]t is clear not only that the fears expressed by some women about the Bork nomination are unfounded, but that Judge Bork is likely to be a strong supporter of women's rights.

Those in the labor movement who have accused Judge Bork of having an "agenda of the right wing" and "an overriding commitment to the interests of the wealthy and powerful" might

ponder the careful analysis of Judge Bork's labor opinions prepared by Professor Thomas Campbell of the Stanford Law School in which he asks and then answers:

> Do Judge Bork's labor decisions place him within the mainstream of debate on American labor law? The answer is unequivocally yes.

Compare too the scholarship of Michael McConnell in his analysis of the "First Amendment Jurisprudence of Judge Robert Bork" with the strident advocacy on this subject done for Senator Biden and in the opposition published by the A.F.L.-C.I.O. In their highly selective use of targets to criticize Judge Bork, they ignore cases such as Lebron, where Judge Bork's opinion protects the First Amendment rights of an artist to post his "rather malicious anti-Reagan poster" in public buses. They and others prefer to criticize a 1971 article in which then Professor Bork expressed a "tentative" view that would limit First Amendment protection to "political expression" rather than tell us of his judicial opinions that, according to Professor McConnell, show that "Judge Bork's commitment to freedom of speech, even outside the political arena, now extends as far, or farther, than current constitutional doctrine."

By carefully analyzing Judge Bork's opinions, Daniel Polsby refutes the irresponsible allegations that Judge Bork is "out of

the mainstream," an "activist seeking to deny individual rights claimants access to the courts." Professor Polsby concludes:

> Judge Bork's views of standing... are in close accord with those Judges of many different ideologies: Justices Frankfurter, Roberts, Black, Douglas and Scalia and Judge J. Skelly Wright.

The common cry of those who avoid reasoned analysis is that a Justice Bork would lead a wholesale reversal of prior constitutional decisions. Yet they can offer nothing in support of this extraordinary accusation. No opinion. No speech. No article. No one can reliably predict whether any Justice would be willing to reverse a particular decision like Roe v. Wade, but a fair reading of Judge Bork's published views place him among those who have demonstrated more, rather than less, respect for constitutional precedent.

Why then the fierce opposition to the Bork nomination? No doubt the anxiety level of many has been raised by the oft-repeated notion that somehow his appointment to the Court is far more likely to "turn the Court," more than the last three or the next three appointments. No doubt, too, many cannot move their focus from the articles written by young Professor Bork of the 1960's and the early 1970's. His biting and witty pen then advanced a number of controversial themes and apparently left scars in some segments of the academic community. His articulate challenges to conventional thinking set forth ideas considered

radical by many. Although he called them "tentative and exploratory" then and has since expressly discarded several of them, he is perhaps thought by some to be carrying a secret agenda of his own.

Those earlier expressed views are, of course, relevant to the present debate, but his judicial fitness can be better judged by the more than 100 well-crafted opinions that he has rendered during his five years on the Circuit Court. It is to these opinions that the present debate should turn and to which the accompanying essays are directed.

What we should all fear in the weeks ahead is that the Senate confirmation process will be reduced to a call to arms by ideologues and partisan politicians who will use profession of support or opposition to Judge Bork's nomination as a litmus paper test for their individual causes or campaigns, rather than for an examination of the formidable qualities and experience that Robert Bork can bring to the Supreme Court.

As a long-time admirer of Judge Bork and a former colleague of his at the Justice Department, I suggest that the strong and inquiring mind that he displayed as a professor, together with the quality and restraint evidenced in his judgeship, hold the promise of new distinction for the Court. If only the Senate

will now take the same "trouble to understand" the man, as he has taken over the years to develop his distinct, sometimes controversial, but intellectually sound judicial philosophy.

THE FIRST AMENDMENT JURISPRUDENCE OF JUDGE ROBERT BORK

Since discussion of Judge Bork's judicial philosophy is usually couched in terms of "judicial restraint," it is important to make clear what the label of "restraint" properly means. It does not mean that that the government always wins; it is therefore not synonymous with pure majoritarianism. Nor, however, does it mean that judges are empowered to countermand the decisions of our representative institutions on the basis of the judge's own social, political, or economic philosophy. Rather, the term "judicial restraint" refers to an attitude toward judicial review as a means for protecting the fundamental values and principles expressed in the Constitution.

Civil liberties, in this country, have not been the product of the imaginations of high-minded judges, but of careful, consistent, legitimate enforcement of the Bill of Rights, the Fourteenth Amendment, and other provisions of the Constitution. The philosophy of "judicial restraint," in Judge Bork's words, means that the judge's responsibility "is to discern how the framers' values, defined in the context of the world they knew, apply in the world we know."[1] Judicial restraint thus entails vigorous enforcement of constitutional limits on governmental power (meaning limits that can emerge from a fair reading of the text, structure, history, and purposes of the document), coupled with a rigorous refusal to interfere with democratic government

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1/ Ollman v. Evans, 750 F.2d 970, 995 (D.C. Cir. 1984) (en banc) (Bork, J., concurring).

when no limits can honestly be found in the Constitution.

The First Amendment provides an ideal illustration of how Judge Bork's philosophy of judicial restraint protects our civil liberties, at the same time that it preserves the balance between representative government and judicial review.

Ollman v. Evans[2] contains the fullest statement of Judge's Bork's approach to interpreting the Bill of Rights. The case involved a defamation action filed against two newspaper columnists. As seen by most of his colleagues, the key issue was whether statements in the column were "fact" or "opinion"; if "fact" the statements were libelous, if "opinion" they were protected. The trouble is that the distinction between "fact" and "opinion" is so uncertain that even a distinguished panel of judges could reach nothing resembling a consensus on the question. The deeper trouble is that a newspaper columnist, faced with such an uncertain test and a potential penalty of $1 million in compensatory damages and $5 million more in punitive damages if he guesses wrong, writes at his peril. And as Judge Bork commented, libel actions under such circumstances "may threaten the public and constitutional interest in free, and frequently rough, discussion."[3]

Judge Bork's solution was to turn to the "judicial tradition

2/ Ibid.

3/ Id. at 993. See also McBride v. Merrell Dow & Pharmaceuticals, Inc., 717 F.2d 1460, 1466-67 (D.C. Cir. 1983) (Opinion by Bork, J.) (warning that "[e]ven if many [libel] actions fail, the risks and high costs of litigation may lead to undesirable forms of self-censorship," and recommending liberal use of summary judgment procedures to weed out meritless claims).

of a continuing evolution of doctrine to serve the central purpose of the first amendment."[4] In simpler terms, Judge Bork expanded the protections for freedom of the press beyond those yet recognized by the Supreme Court. In Judge Bork's view, certain instances of "rhetorical hyperbole," even if technically the statement of fact, must be protected as well as obvious statements of opinion. This "extraordinar[y]" degree of press freedom is not extended, Judge Bork says, because the press is "free of inaccuracy, oversimplification, and bias, but because the alternative to that freedom is worse than those failings."[5]

While this demonstrates that Judge Bork's protection of civil liberties can be aggressive,[6] how does it square with his posture of judicial restraint? To answer this question, we must observe what Judge Bork did not do. His Ollman opinion exemplifies Judge Bork's jurisprudence in its rejection of two common, but ultimately unsatisfactory, ways of reading the

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4/ 750 F.2d at 995.

5/ Id. at 995. For another decision in which Judge Bork voted for the defendant in a defamation suit, see Roland v. d'Arazien, 685 F.2d 653 (D.C. Cir. 1982).

6/ It is a sign of the partisan lengths to which the controversy over Judge Bork's nomination has gone that one oft-cited study of his judicial record disparages the Ollman opinion's importance to civil liberties on the ground that in libel cases "the party advocating a broad view of the First Amendment is most likely to be a business." Public Citizen Litigation Group, The Judicial Record of Judge Robert H. Bork 73 (1987). So much for press freedom. (Compare id. at 16, where Public Citizen counts Judge Bork's vote in favor of a labor union as "pro-business" on the ground that a labor union engages in the "'business' of representing workers"). The same study, while purporting to find that Judge Bork invariably votes against assertions of constitutional liberties in split decisions, conveniently leaves Ollman out of its scorecard.

Constitution.

First, Judge Bork did not engage in extra-constitutional creation of rights. As he puts it, "There is not at issue here the question of creating new constitutional rights or principles, a question which would divide members of this court along other lines than that of the division in this case."[7] This, he has stated elsewhere,[8] would be judicial "fiat," and "not law in any acceptable sense of the word." What distinguishes legitimate constitutional interpretation, according to Judge Bork, is the "'insistence that the work of the political branches is to be invalidated only in accord with an inference whose starting point, whose underlying premise, is fairly discoverable in the Constitution.'"[9] In Ollman, there was no doubt that the First Amendment's freedoms of speech and press protect what the Supreme Court has called "uninhibited, robust, and wide-open" debate on public issues.[10] The issue in Ollman was not imposition of the judge's values, but how the core principles are to be protected.

Second, Judge Bork rejected the notion that the Constitution is frozen in time, and that it carries no meaning other than the specific applications that its framers envisioned for it.[11] "The

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7/ 750 F. 2d at 995.

8/ Robert H. Bork, "Foreward," at ix, in G. McDowell, The Constitution and Contemporary Constitutional Theory (1985).

9/ Robert H. Bork, "The Constitution, Original Intent, and Economic Rights, 23 San Diego L. Rev. 823, 826 (1986), quoting J. H. Ely, Democracy and Distrustl-2 (1980).

10/ New York Times v. Sullivan, 376 U.S. 254, 270 (1964).

11/ This has been a consistent theme in Judge Bork's writings. See, e.g., 23 San Diego L. Rev. at 826 ("[I]ntentionalism . . .

fourth amendment," he observed, "was framed by men who did not foresee electronic surveillance. But that does not make it wrong for judges to apply the central value of that amendment to electronic invasions of privacy."[12] His description of the judicial function is one of the most powerful statements ever made on the subject:

> The important thing, the ultimate consideration, is the constitutional freedom that is given into our keeping. A judge who refuses to see new threats to an established constitutional value, and hence provides a crabbed interpretation that robs a provision of its full, fair and reasonable meaning, fails in his judicial duty. That duty, I repeat, is to ensure that the powers and freedoms the framers specified are made effective in today's circumstances.[13]

Judicial restraint, for Judge Bork, can therefore be summed up as giving a "full, fair and reasonable" interpretation to "established constitutional values." Innovation and social change are the task of the legislature, but aggressive, effective enforcement of our constitutional civil liberties is the duty of the judge.

Similar to Ollman is Judge Bork's concurring opinion in Reuber v. United States.[14] There, the D.C. Circuit was called

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is not the notion that judges may apply a constitutional provision only to circumstances specifically contemplated by the framers. In so narrow a form the philosophy is useless."); see also "Foreward," supra note 8, at x.

12/ 750 F. 2d at 995.

13/ Id. at 996.

14/ 750 F.2d 1039 (1985). It should be noted that although this was a split decision in which Judge Bork voted to uphold an individual's First Amendment challenge to executive action, it is not included in the Public Citizen's calculus. See note 6.

upon to determine appropriate remedies for a free speech claim in "novel circumstances"[15] in which the actual violation was by a private company, at the instigation of federal officials. Declaring that the speech in question was "precisely the kind of speech the first amendment was designed to protect," Judge Bork voted to allow a suit for damages, despite the lack of a statute authorizing the suit or any direct precedent compelling it.[16] Judge Kenneth Starr dissented.

Not every case requires the level of jurisprudential explanation found in Ollman. More typical, perhaps, is Judge Bork's nonpartisan, straightforward protection of free speech rights in cases like Lebron v. Washington Metropolitan Area Transit Authority.[17] In Lebron, an artist opposed to the Reagan Administration sought space from the Washington, D.C., transit authority to display a poster that, according to the authority and the trial court, made the President and his colleagues appear to be laughing at a group of ordinary people. The transit officials declined to sell space to the artist on the ground that

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15/ Id. at 1063.

16/ Id. at 1065.

17/ 749 F. 2d 893 (D.C. Cir. 1984). Again, it should be noted that this decision in favor of an individual's constitutional claim against executive action was not counted in the Public Citizen scorecard. See note 6. The Public Citizen report's claim that libel is "the one First Amendment area in which Judge Bork has voted on the 'free speech side'" (Public Citizen Report, at 73) is transparently false. The same can be said of the claim that "where anybody but a business interest challenged executive action, Judge Bork exercised judicial restraint either by refusing to decide the case or by deferring to the executive on the merits." Id. at 8.

the poster was "deceptive." Judge Bork made short work of that argument. "[C]ourts ought not to restrain speech where the message is political and is 'sufficiently ambiguous to allow a discerning viewer' (or reader) to recognize it as" what it is.[18] Judges Bork and Scalia would have gone on to hold that "a scheme that empowers agencies of a political branch of government to impose prior restraint upon a political message because of its falsity is unconstitutional."[19]

As both legal scholars and the Supreme Court recognize, even First Amendment rights are not absolute. Judge Bork has participated in decisions rejecting free speech claims, both where the government's countervailing interest was sufficiently strong and where the speech crossed over into conduct that could be regulated on a content-neutral basis. While in some of these cases a different balance might have been struck, in each Judge Bork's position was supported by established precedent and joined either by his more liberal colleagues or by a majority of the Supreme Court.

Probably the most difficult case was Finzer v. Barry.[20] In Finzer, members of the Young Conservative Alliance of America sought to picket the Nicaraguan and Soviet embassies to protest their oppressive policies. Longstanding federal law, however, prohibits hostile demonstrations within 500 feet of embassies in

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18/ Id. at 898.

19/ Id. at 898.

20/ 798 F.2d 1450 (D. C. Cir. 1986).

Washington. Uncontradicted declarations by State Department security officials in the case stated that enforcement of this provision is necessary to fulfill American obligations under international law and to receive protection for American diplomats in foreign countries. In a divided opinion, Judge Bork declined to hold the statute unconstitutional. Based on a scholarly analysis of the history of international law and the understanding at the time of the framing of the relation between international law and the Constitution, as well as the alternative avenues for protest available to the plaintiffs, Judge Bork concluded that the federal statute gives "first amendment freedoms the widest scope possible consistent with the law of nations."[21] Given the unfortunate experience with embassy security in recent years, it is difficult to fault a judge, even in a free speech case, for refusing to go against the combined judgment of the Congress and the officials charged with security precautions that a contrary decision "would endanger American diplomatic personnel who live and work in other countries."[22]

Finzer and Lebron also illustrate the admirable nonpartisanship of Judge Bork's First Amendment jurisprudence. In Finzer, Judge Bork declined to grant constitutional protection to anti-Soviet and anti-Sandinista speech, with which he presumably agrees, while in Lebron, Judge Bork voted to protect a rather malicious anti-Reagan poster, with which he presumably

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21/ Id. at 1463.

22/ Id. at 1453.

disagrees. Whether one concurs with the specific decisions or not, one cannot help but be reassured that Judge Bork decides such cases without regard to his own opinions on the content of the speech.

In accord with current constitutional doctrine, Judge Bork has generally voted to uphold reasonable, content-neutral regulation of the use of public property, even when there is an incidental effect on speech. In Juluke v. Hodel,[23] Judge Bork joined an opinion by Judge Harry Edwards upholding regulations governing the size and construction materials of placards and the placement of parcels on the sidewalk in front of the White House. And in Community for Creative Non-Violence v. Watt,[24] Judge Bork voted to uphold National Park Service regulations prohibiting camping in Lafayette Square (in the center of Washington, D.C., across from the White House), in a challenge by people who wished to sleep in the park during a demonstration against homelessness. While Judge Bork was in the minority, his position was vindicated by the Supreme Court, which reversed the court of appeals.[25]

Several specific First Amendment issues warrant further discussion: (1) free speech and press rights of broadcasters; (2) non-political speech; and (3) religion. In each of these areas, Judge Bork is either as protective or more protective of civil

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23/ 811 F.2d 1553 (D.C. Cir. 1987). To similar effect is White House Vigil v. Watt, 717 F.2d 568 (D.C. Cir. 1983).

24/ 703 F.2d 586 (D.C. Cir. 1983) (en banc).

25/ 468 U.S. 288 (1984).

liberties than current Supreme Court doctrine. In a sense, this is not surprising. The First Amendment is one of the most explicit and most basic of the constitutional provisions safeguarding individual liberty. In keeping with Judge Bork's commitment to constitutionalism, protection of First Amendment principles is one of the most vital of a judge's responsibilities.

Broadcast speech

Judge Bork has been in the forefront of extension of free speech and press rights to broadcasters. It has long been an oddity that newspapers and other print media (and derivatively their readers) enjoy full editorial freedom under the First Amendment, while radio, television, and other broadcast media (and their listeners) are subject to editorial second-guessing by the Federal Communications Commission. The Supreme Court approved of this double standard in 1968,[26] on the theory that there is a "scarcity" of airwaves that justifies regulation of the content of broadcasting. While this theory has been much criticized by First Amendment advocates,[27] its empirical validity

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26/ Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

27/ See, e.g., Bazelon, "FCC Regulation of the Telecommunications Press," 1975 Duke L.J. 213; Karst, "Equality as a Central Principle in the First Amendment," 43 U. Chi. L. Rev. 20, 49 (1975); Krattenmaker & Powe, "The Fairness Doctrine Today: A Constitutional Curiosity and an Impossible Dream," 1985 Duke L.J. 151. Justice William O. Douglas, noted First Amendment proponent, opposed the Supreme Court's approval of FCC regulation of broadcast content and stated that the "Fairness Doctrine has no place in our First Amendment regime." CBS Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 154 (1973) (concurring opinion).

has been weakened by the proliferation of broadcast and cable stations, and the comparity paucity of major newspapers. The Supreme Court has thus suggested, more recently, that Congress or the FCC might "signal . . . that technological developments have advanced so far that some revision of the system of broadcast regulation may be required."[28]

In the meantime, Judge Bork has voted, with Judge J. Skelly Wright, that the scarcity rationale for regulation does not apply to cable television.[29] He also authored an opinion for the court affirming the FCC's decision not to apply content-based regulation to a new broadcast medium, called teletext.[30] In the course of that opinion, Judge Bork held that the FCC's "fairness doctrine" was a creature of administrative rule and not mandated by statute,[31] a holding which has stimulated efforts by congressional defenders of the fairness doctrine to amend the law.

Judge Bork's opinion also points out weaknesses in the Supreme Court's scarcity rationale for broadcast regulation, and

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28/ FCC v. League of Women Voters, 468 U.S. 364, 376 n.11 (1984).

29/ Quincy Cable TV v. FCC, 768 F.2d 1434 (1985). This decision gains additional support from the Supreme Court's subsequent decision in City of Los Angeles v. Preferred Communications, Inc., 106 S. Ct. 2034 (1986).

30/ Telecommunications Research & Action Center v. FCC, 801 F.2d 501 (D.C. Cir. 1986). The court held that the FCC's "fairness doctrine" need not be extended to teletext, though certain related provisions of the Communications Act apply.

31/ Id. at 517-18.

suggests: "Perhaps the Supreme Court will one day revisit this area of the law and either eliminate the distinction between print and broadcast media, . . . or announce a constitutional distinction that is more usable than the present one."[32] Presumably this is a hint that Judge Bork will join the majority of the Supreme Court in responding to recent "signals" from the FCC that the fairness doctrine has been overtaken by technological change. If so, the decision is likely to be highly controversial. It pits together two divergent views of free speech and press. Under one view, free speech and press are guaranteed by the government leaving them alone; under the other, free speech and press are enhanced by government intervention to ensure that powerful speakers do not dominate the process. While each view has its supporters, it is fair to say that the former is the predominant view, both historically and among First Amendment scholars. Judge Bork thus reflects the predominant civil libertarian strain of thought on this contentious issue.

Non-political speech

In one of the most important and often-cited articles in legal scholarship, Judge Bork, then a professor at the Yale Law School, defended the proposition that Constitutional protection should be accorded only to speech that is explicitly political. "There is no basis for judicial intervention," he argued, "to

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32/ Id. at 509. Compare Bollinger, "Freedom of the Press and Public Access," 75 Mich. L. Rev. 1, 10-12 (1976) (criticizing the scarcity rationale, while defending the results of the Court's decisions on other grounds).

protect any other form of expression, be it scientific, literary or that variety of expression we call obscene or pornographic."[33] Since that article in 1971, Judge Bork says, "I have eaten my words time and time again."[34] More specifically, he has stated:

> I do not think . . . that that First Amendment protection should apply only to speech that is explicitly political. Even in 1971, I stated that my views were tentative and based on an attempt to apply Prof. Herbert Wechsler's concept of neutral principles.[35] As the result of the responses of scholars to my article, I have long since concluded that many other forms of discourse, such as moral and scientific debate, are central to democratic government and deserve protection.[36]

Judge Bork's decisions on the D.C. Circuit demonstrate conclusively how far he has come. In FTC v. Brown & Williamson Tobacco Corp.,[37] for example, Judge Bork wrote an opinion for the court protecting commercial advertising from an overbroad prohibition. Judge Bork noted that "[b]oth consumers and society have a strong interest 'in the free flow of commercial information.'"[38] In McBride v. Merrell Dow and Pharmaceuticals,

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33/ Bork, "Neutral Principles and Some First Amendment Problems," 47 Ind. L.J. 1, 20 (1971).

34/ Panel discussion on "The Political Process and the First Amendment," Stanford Law School Mar. 7, 1986.

35/ In the article itself, Professor Bork characterized his views as "ranging shots, an attempt to establish the necessity for theory and take the argument of how constitutional doctrine should be evolved by courts a step or two farther." 47 Ind. L.J. at 1.

36/ ABA Journal (Jan. 1984).

37/ 778 F.2d 35 (D.C. Cir. 1985).

38/ Id. at 43, quoting Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 763 (1976).

Inc.,[39] Judge Bork wrote an opinion for the court extending constitutional protection against defamation suits to a scientific dispute over drug research.[40] His support for first amendment protections for broadcasters, already discussed, perforce applies beyond the area of political speech. It is fair to say that Judge Bork's commitment to freedom of speech, even outside the political arena, now extends as far or farther than current constitutional doctrine.

This is not to say that Judge Bork has repudiated the underlying intellectual construct of his Neutral Principles article. On the contrary, both the constitutional theory and the crux of the First Amendment analysis remain important to his thought today. The statement of constitutional theory stands as one of the most influential in modern constitutional theory, stating, as it does, a comprehensive theoretical challenge to the noninterpretivist jurisprudence of the Warren Court era. Indeed, many of the ideas expressed in that article have become part of the new accepted wisdom in constitutional interpretation, whether as point of departure or as stimulus to critical reexamination. Similarly, the crux of Judge Bork's First Amendment analysis -- that the most fundamental aspect of free speech is its relevance to political discourse and hence to democratic governance -- is a

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39/ 717 F.2d 1460 (D.C. Cir. 1983).

40/ McBride is a good illustration of why Judge Bork was moved to expand free speech protections beyond explicitly political speech: the dispute in McBride, while scientific, had obvious ramifications for public policy.

continuing theme of First Amendment scholarship. Judge Bork's change of mind since 1971 has been to recognize that the protections of the First Amendment extend well beyond its political core.

Nor is this to say that all forms of expression are now constitutionally protected, in Judge Bork's view. He remains persuaded, for example, that the government has the authority to regulate pornography. While this position is highly controversial in some circles, it commands wide acceptance on the Supreme Court and among the country. Moreover, recent research into the effects of violent and degrading portrayals of women and children in pornography has sparked increased efforts, on the part of feminists and traditionalists alike, to control pornography within constitutional bounds. It can be predicted that Judge Bork's philosophy of judicial restraint will not interfere with this effort.

Religion

One of the most confused and unsatisfactory areas of modern constitutional doctrine is that related to the problems of religion and government. Scholars, lower court judges, and even many of the current Justices have complained that the Court's doctrine is indeterminate and often inconsistent, and that it often ill serves the underlying constitutional purposes of religious freedom. Judge Bork could be any one of dozens of scholars -- right, left, or center -- when he observes, quoting Justice Antonin Scalia, that the law in the religion area is in

"a state of utter chaos and unpredictable change."[41]

Judge Bork has not participated in any significant case raising issues under the Free Exercise or Establishment Clauses of the First Amendment. Judge Bork joined a unanimous per curiam judgment in Murray v. Buchanan,[42], which simply followed controlling Supreme Court precedent. He voted against rehearing en banc in Goldman v. Weinberger,[43] along with Judges Robinson, Wright, Tamm, Wilkey, Wald, Mikva, and Edwards. The Supreme Court ultimately affirmed by a vote of 5-4, with Justices Powell, Stevens, White, Rehnquist and Chief Justice Burger in the majority.[44] It is impossible to know whether or not Judge Bork's vote reflected his views on the merits of the case.

Nonetheless, in several public appearances Judge Bork has offered comments on the Religion Clauses that, if adopted, might well bring greater coherence to this doctrinal area, as well as better protect religious liberties. He has not proposed specific alternative doctrine. Indeed, he has warned that "we ought to be wary of formulating clear rules for every conceivable interaction of religion and government."[45] Instead, he relies principally on a "relaxation of currently rigidly secularist doctrine." This,

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41/ Bork, "Religion and the Law," address at the University of Chicago (Nov. 13, 1984), at 2.

42/ 720 F.2d 689 (D.C. Cir. 1983).

43/ 739 F.2d 657 (D.C. Cir. 1984).

44/ 106 S. Ct. 1310 (1986).

45/ Speech Before the Brookings Institution (Sept. 12, 1985), at 11.

he says, would "permit some sensible things to be done."[46]

Judge Bork cites the example of Aguilar v. Felton.[47] Aguilar involved one of the cornerstone programs of the Great Society: Title I remedial education assistance for deprived children in inner city neighborhoods. In passing the program, Congress specifically determined that remedial help was needed, and should be provided, to eligible poor children whether they attend public or nonpublic school. This was in recognition of the large numbers of needy children who, for reasons of religious choice or educational opportunity, choose to attend inner city parochial schools. The program allowed full-time public school remedial education specialists to travel from school to school, public and nonpublic alike, to provide special training in English, math, and related areas to eligible children on the premises of their own school. When challenged under the Establishment Clause as an aid to religion, Judge Henry Friendly, for the court of appeals, commented that the program had "done so much good and little, if any, detectable harm."[48] By a 5-4 vote, the Supreme Court held the program unconstitutional.

As Judge Bork commented, Aguilar illustrates the "power of the three-part test[49] to outlaw a program that had not resulted

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46/ Ibid.

47/ 105 S. Ct. 3232 (1985).

48/ 739 F.2d 48, 72 (2d Cir. 1984).

49/ This is a reference to the Supreme Court's three part test for an establishment of religion: the statute must have a "secular purpose," must have an effect that "neither advances nor inhibits religion," and must not entail "excessive entanglement" between church and state. Lemon v. Kurtzman, 403 U.S. 602, 612-

in any advancement of religion but seems entirely worthy."[50] In his critique of Establishment Clause doctrine, Judge Bork relies heavily on the work of Jesse Choper, Dean of the law school at the University of California at Berkeley, as well as historical researches suggesting that modern doctrine is at odds with the original purposes of the Religion Clauses. If renewed emphasis were placed on protecting religious choice, instead of the mechanistic three-part test, then programs like that in Aguilar would be permissible and even desirable. This jurisprudence would protect religious minorities, including those with no religious faith; but it would do so by accommodation of differences rather than by an artificial secularization of society.[51]

Much of the constitutional problem, Judge Bork has suggested, stems from the "extra-constitutional intellectual tradition" that asserts that government has the power to act only to prevent physical harm to others.[52] In this, he joins an emerging majority of the Supreme Court, which in recent cases has rejected claims that laws are unconstitutional because they reflect the moral and religious beliefs of the community.[53] It

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13 (1971).

50/ "Religion and the Law," supra, at 4.

51/ Some commentators have assorted that Judge Bork would permit restoration of spoken prayer in the public schools. However, nothing in his record supports this assertion and, given his theoretical premises, it is at the very least highly implausible.

52/ "Religion and the Law," supra, at 11.

53/ Harris v. McRae, 448 U.S. 297, 319-20 (1980); Bowers v. Hardwick, 106 S. Ct. 2641 (1986).

is a mistake to attempt to separate moral beliefs from law, according to Judge Bork, since so much of what we value in the American legal tradition -- not least its libertarian impulse -- is a product of moral tradition. "Our constitutional liberties arose out of historical experience and out of political, moral, and religious sentiment," he has stated. "They do not rest upon any general theory. Attempts to frame a theory that removes from democratic control areas of life the framers intended to leave there can only succeed if abstractions are regarded as overriding the constitutional text and structure, judicial precedent, and the history that gives our rights life, rootedness, and meaning."[54] In these brief remarks, Judge Bork shows the essential unity of three great themes in American constitutionalism: individual liberties, moral community, and democratic governance. Whether one agrees with his specific conclusions or not, it is impossible not to recognize the major contribution that Judge Bork has made to contemporary legal discourse.

54/ Bork, Tradition and Morality in Constitutional Law 8 (AEI 1984).

THE PROBABLE SIGNIFICANCE OF THE BORK APPOINTMENT FOR ISSUES OF PARTICULAR CONCERN TO WOMEN

BY MARY ANN GLENDON
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In the media discussions that followed the announcement of the nomination of Judge Robert H. Bork to the Supreme Court of the United States, there have been frequent suggestions that the Bork appointment would be harmful to the interests of women. Indeed, a document published by the National Women's Law Center has gone so far as to claim that Judge Bork's presence on the Supreme Court would threaten all the legal gains that women in the United States have made in the 20th century. It is difficult to discover the basis for this disquiet about the Bork nomination. Judge Bork has written only one opinion dealing with a sex-based equal protection claim and, in that case, he did not reach the merits.[1] Nor has he devoted any of his scholarly writings to women's rights as such. Much has been made of a dissent in which Judge Bork criticized the majority for taking the positions that voluntariness can never be a defense in a sexual harassment case and that an employer is automatically liable for sexual harassment by a supervisor even if the employer knew nothing of the conduct and had a clear policy against it.[2] But Judge Bork's position on these questions, about

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1. Cosgrove v. Smith, 697 F.2d 1125 (D.C. Cir. 1983) (concurring in part and dissenting in part).

2. Vinson v. Taylor, 753 F.2d 141, rehearing denied, 760 F.2d

(footnote continued)

which reasonable men and women differ, seems to afford a very slender basis for predicting how he would be likely to regard the vast range of legal issues affecting important interests of women.

The best way to make a reasonable assessment of what the Bork appointment is likely to mean for women is to examine the implications for these matters of his general approach to judicial decision-making. When this is done, it is clear not only that the fears expressed by some women about the Bork nomination are unfounded, but that Judge Bork is likely to be a strong supporter of women's rights. One can make this prediction with some confidence because the most important legal gains that American women have made in the 20th century have been through legislation. And the hallmark of Judge Bork's legal philosophy, as expressed both in his scholarly articles and judicial opinions, is his commitment and deference to the process of decision-making by the people through their elected representatives.

This memorandum examines, item by item, how Judge Bork's legal philosophy and judicial methodology bear upon those issues which have been of greatest concern to women who have expressed reservations about the Bork nomination.

Protection Against Sex-Based Discrimination. Women have obtained, and are continuing to gain, important protections

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1330 (Bork dissenting) (D.C. Cir. 1985); aff'd sub nom., Meritor Savings Bank v. Vinson, 106 S. Ct. 2399 (1986). On review, although affirming, the Supreme Court substantially agreed with Judge Bork's reasoning on the issue of the employer's liability.

against discriminatory treatment through the Civil Rights Act of 1964 and a host of other laws and ordinances at the federal, state, and local levels. These advances, which have grown out of a process of bargaining, education, and persuasion within legislatures, are safest with judges who, like Judge Bork, respect that process and decline as a matter of principle to substitute their personal views for those of the elected branch of government. As a judge, Robert Bork has consistently joined in opinions vigorously enforcing the Equal Pay Act and other statues forbidding discrimination on the basis of gender.[3] As a scholar, he has explained the philosophical basis for his commitment: individual rights are always most secure when they rest on consensus -- the kind of consensus that emerges in legislation in a vital and self-confident democracy.[4]

On the frontiers of sex-discrimination law, a battle is being waged over whether pornography is and should be treated as a form of discrimination against women. On this vital issue, women have an important ally in Judge Bork who has taken the position that pornography is not protected under the First Amendment to the Constitution.

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3. Ososky v. Wick, 704 F.2d 1264 (D.C. Cir. 1983); Laffey v. Northwest Airlines, 740 F.2d 1071 (D.C. Cir. 1984); Palmer v. Shultz, 815 F.2d 84 (D.C. Cir. 1987).

4. Bork, Styles in Constitutional Theory, 26 So. Texas L. Rev. 383, 395 (1985).

Affirmative Action. Some have seen Judge Bork's refusal to embrace formal, abstract, concepts of sex equality as a threat to women's struggle for equal treatment. In fact, however, Judge Bork's nuanced and differentiated approach to equality aligns him with leading feminist legal theorists who are insisting, with increasing vigor, that women have been harmed by excessively rigid notions of equality that require women and men to be treated precisely the same under all circumstances.[5] These scholars, many of them troubled by recent research which reveals how formal equality has contributed to the ever-worsening economic circumstances of women and children upon divorce, argue that in many situations meaningful equality requires that women's special roles in procreation and child-raising be taken into consideration. As a prominent feminist law professor, Herma Hill Kay, has put it, "The focus has shifted from a recounting of similarities between women and men to an examination of what differences between them should be taken into account under what circumstances in order to achieve a more substantive equality."[6]

Formal equality is now seen by many feminists as having benefited mainly business and professional women, and having taken insufficient account of the situations of the majority of American

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5. E.g., Lucinda Finley, Transcending Equality Theory, 86 Colum. L. Rev. 1118 (1986); Herma Hill Kay, Equality and Difference: A Perspective on No-Fault Divorce and its Aftermath, 56 U. Cincinnati L. Rev. 1 (1987); Mary Becker, Prince Charming: Abstract Equality, 1987 Supreme Court Review (forthcoming).

6. Kay, note 5 above at 2.

women who are struggling to combine family roles with labor force activity. In this view, legislative change, tailored to particular situations, is more likely to be effective in improving the lives of most women than the development of an abstract single standard of equal treatment regardless of circumstances.[7] What is needed from the judiciary is respect for legislative judgments in this area, not judges who are eager to impose their own views of what equality means.

Judge Bork's dissenting opinion in Franz v. United States, to the effect that visitation rights of a non-custodial father should not be elevated to constitutional status so as to justify forcing the revelation of the whereabouts of his former wife and three children who had been relocated under the Federal Witness Protection Program demonstrates his sensitivity to the needs of women in areas where continuing differences in family roles would make strict equality unjust and harmful.[8] As Judge Bork pointed out, constitutionalizing the visitation rights of a non-custodial parent would wreak endless havoc in ordinary divorce cases.

Abortion. Judge Bork, like the great majority of legal experts who have written about Roe v. Wade, from Ruth Ginsburg to Paul Freund to Archibald Cox, has criticized the reasoning of that

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7. Becker, note 5 above.

8. 707 F.2d 582 (D.C. Cir. 1983); Judge Bork's partially concurring and partially dissenting opinion is reported at 712 F.2d 1428 (1983).

decision.[9] Disapproval of Roe v. Wade among legal scholars spans the entire political spectrum, and is as strong among those who identify themselves as pro-choice as among those who oppose abortion. The basic criticism of Roe, in which Judge Bork has joined, is that the Supreme Court, without any constitutional basis for doing so, took the decision about the conditions under which abortion should be permitted away from state legislatures (which, as it happens, were rapidly moving toward replacing old strict abortion laws with new liberal ones at the time Roe was decided.)

One cannot, however, infer from the widespread opposition of legal experts to Roe that the Roe critics would now favor overturning that decision. Judge Bork, for example, is committed to the view that even a wrongly decided case should not be overruled if it has become so firmly imbedded in the fabric of the legal system that a great number of governmental arrangements and private expectations have grown up around it.[10] It is thus by no

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9. Archibald Cox, The Role of the Supreme Court in American Government (New York: Oxford University Press, 1976), 53-55, 114; Alexander M. Bickel, The Morality of Consent (New Haven: Yale University Press, 1975), 28; John Hart Ely, "The Wages of Crying Wolf: A Comment on Roe v. Wade," 82 Yale Law Journal, 223, 297 ff. (1973); Richard Epstein, Substantive Due Process by Any Other Name: The Abortion Cases, 1973 Supreme Court Review 159; Paul A. Freund, "Storms over the Supreme Court," 69 American Bar Association Journal 1474, 1480 (1983); Ruth Bader Ginsburg, Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade, 63 North Carolina Law Review 375 (1985).

10. Philip Lacovera, A Talk with Judge Robert H. Bork, District Lawyer, May-June 1985, pp. 29, 32.

means certain that Judge Bork would be in favor of overruling Roe 14 years after it was decided. He has in fact been an outspoken opponent of what he regards as impermissible attempts to overturn the abortion cases, testifying against a proposed Human Life Bill and against legislation that would deprive the courts of jurisdiction over such issues.

In the view of Judge Bork and most Roe critics, the problem with Roe is exactly the same as that with the now wholly discredited line of cases in which the Supreme Court in the early part of this century struck down state laws designed to promote the health and safety of factory workers, especially women and children. That problem is the readiness of judges to substitute their own views of good social policy for the decisions of the elected representatives of the people. In the case of Judge Bork, there is every reason to believe that he would scrupulously refrain from over-stepping the legitimate bounds of the judicial role. His record of service on the District of Columbia Circuit Court of Appeals shows that he is neither a judicial maverick nor a dramatic innovator. Not a single one of the more than 100 majority opinions he has authored has been reversed by the Supreme Court. Furthermore, in his five years on the Court of Appeals, during which he has joined in over 400 opinions, he has written only 9 dissents and 7 partial dissents.

Bork's Judicial Voice as a "Feminine" Voice. Since the appearance of psychologist Carol Gilligan's book, "In a Different

Voice,"[11] a number of legal scholars have been engaged in trying to discern whether and how the legal system is being or might be affected by the special insights and life experience brought to it by increasing numbers of female legal professionals.[12] As the question is usually put, it is whether a system traditionally dominated by individualistic, abstract, and formal ways of thinking is being opened up to modes of discourse which accord a greater place to the connections between people as well as their separateness and autonomy. A characteristic of the "different voice" is said to be that it tries to understand and appreciate the "other" through continuous dialogue. Whether or not one considers that this group of traits is distinctively feminine, it is worth noting that Robert Bork as a judge has adopted a somewhat different mode of discourse from that which predominates among the mainly white, male, American judiciary. In his separate opinions, Judge Bork, like Justice Sandra Day O'Connor, is ever restlessly seeking to engage other judges in dialogue, carrying out in practice the conviction he expressed in a 1982 speech that "intellect and discussion matter and can change the world."[13]

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11. Carol Gilligan, In a Different Voice: Psychological Theory and Women's Development (Cambridge, Mass.: Harvard University Press, 1982).

12. E.g., Kenneth L. Karst, "Women's Constutition," 1984 Duke Law Journal 447.

13. Catholic University Speech, March 31, 1982, p. 24 (unpublished). See, for an analysis of the modes of discourse on the current Supreme Court, Frank I. Michelman, Foreword: Traces

(footnote continued)

Where do Misconceptions about Judge Bork come from? It is not altogether clear why a judge whose career on the bench has been as uneventful and conventional as Judge Bork's has attracted so much criticism upon his nomination to the Supreme Court. Much of the opposition to Judge Bork seems to be based on a rather uncritical acceptance of the assessments of some of his law review articles by a few academics who are in the mainstream neither of American life nor American legal thought. In determining how much weight to give to these evaluations, it is worth noting that there is one group of individuals in American society towards whom Judge Bork has not been very deferential in his writings. That group is what he has called "the professoriate," a small but influential corps of constitutional law professors at leading schools who deeply mistrust popular government. As Judge Bork has pointed out many times with gentle humor in his law review articles, there is no group in America whose political and social attitudes are so faithfully mirrored in the Supreme Court's more controversial decisions than this professorial elite.[14]

It is not self-evident, however, that women's interests coincide with those of this group. The legislative -- as

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of Self-Government, 100 Harvard L. Rev. 4, 28-36 (1986). Michelman finds Justice O'Connor, more than her fellow justices, to be committed to resolving disputes by dialogue, by "open and intelligible reason-giving, as opposed to self-justifying impulse and ipse dixit." (Id. at 34). This is the mode to which Judge Bork, too, seems inclined.

14. Bork, note 4 supra, at 394.

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14. Bork, note 4 supra, at 394.

imperfectly representative, and as flawed it is at the present time -- is working well for women. Women will undoubtedly fare even better as legislatures become more and more representative. To preserve and consolidate their gains, they will need judges who, like Judge Bork, believe that the basic decisions in a democratic society ought to be made by the people through their elected representatives.

Judge Bork's academic critics have addressed themselves primarily to positions taken in his scholarly writings where he and they have been engaged in spirited debate over the years. But the best indication of what Robert Bork will be like as a Supreme Court Justice is the five-year career of Robert Bork as a Circuit Court Judge. On the District Court for the District of Columbia Court, day in and day out, he has carried out his duties to litigants in actual cases in a prudent and craftsmanlike fashion. As his record of zero-reversals shows, Judge Bork, unlike many of his critics, is able to distinguish between the role of professor in building theory and the role of judge applying practical reason to real-life situations.

ANALYSIS OF JUDGE ROBERT BORK'S LABOR OPINIONS

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AUGUST 29, 1987

I. Purpose and Sources

The purpose of this review is to analyze Judge Bork's labor law record as a judge on the D.C. Circuit. I analyzed every case meeting the following criteria: (1) Judge Bork issued an opinion (whether majority, dissent, or concurrence), (2) the word "labor" appeared in the opinion, and (3) the substance of the decision was labor law, broadly understood. I have not analyzed every labor opinion on which Judge Bork was a panel member. If he did not choose to express himself separately, I considered any inference to be drawn from his silent concurrence in another's opinion to be insufficient.

To this list of cases, I then added those which were identified by the AFL-CIO's memorandum of August 17,1987, pages 4 and 5. That list provided two additional citations, opinions in which Judge Bork wrote, involving labor, but, oddly, without using the word "labor." I was grateful for having the AFL-CIO's memorandum, in that it allowed me to supplement my own research technique.

However, I do have a criticism of the AFL-CIO's listing. The AFL-CIO criteria for including a case were rather strict; as a result, five labor law opinions written by Judge Bork were not included. In my sequential discussion below, I note when a case was not on the AFL-CIO list. (Conversely, because I had the AFL-CIO list, no case on that list is omitted from my consideration.)

My criterion was rather simple: I included every opinion written by Judge Bork. The AFL-CIO criteria were quite complex:

> "all panel decisions in which Judge Bork participated and in which a full or partial dissent was written; (2) all panel decisions in which Judge Bork participated and which generated a dissent from the denial of a suggestion for rehearing en banc, even though there had been no dissent among the three panel judges; (3) all en banc decisions in which Judge Bork participated and in which a full or partial dissent was written; and (4) all denials of suggestions for rehearing en

banc in which a dissent was filed and in which Judge Bork took a written position."
AFL-CIO memo, authored by L. Gould, W. Kamiat, August 17, 1987.

As a result of these criteria, the AFL-CIO list includes two cases in which Judge Bork did not write. AFGE v. FLRA, 778 F.2d 850 (D.C. Cir. 1985) (Bork joining Wald, R. Ginsburg dissenting); and Simplex Time Recorder v. Secretary of Labor, 766 F.2d 575 (D.C. Cir. 1985) (Bork joining Davis (Fed. Cir.), Wald dissenting in part). In my view, these two cases provide no insight into Judge Bork's independent thinking. Yet they are listed as two of five cases identified by the AFL-CIO as "Cases in which Bork voted for employer and against union/employees."

One final note on the AFL-CIO dichotomy: "union/employee" suggests an identity that is not always present. The union does not always stand up for employees. Indeed, one of the cases the AFL-CIO memo lists as "in favor of union/employees," NTEU v. FLTA, 800 F.2d 1165 (D.C. Cir. 1986), discussed below, involved an employee's rights pitted against a union, which had denied the employee legal representation because he wasn't a union member. Judge Bork's opinion was pro-union, and anti-employee.

II. Survey Results

I address two specific questions in what follows. First, does the pattern of Judge Bork's labor writings demonstrate any clear bias along union, management, employee, or deference to administrative agency, lines? Second, do his opinions appear within the mainstream of American labor law jurisprudence?

In answer to the first question, ten cases fit the criteria outlined for my study. The numbers refer to my own sequencing of the cases in the description that follows.

OUTCOME PRO MANAGEMENT: Cases 1, 3, 5, 6, 7, 9
OUTCOME PRO UNION: Cases 4, 8, 10
OUTCOME PARTIALLY FOR MANAGEMENT,
PARTIALLY FOR UNION: Case 2.

MAJORITY OPINION WITH NO DISSENT: Cases 1, 2, 5
MAJORITY OPINION FROM WHICH
THERE WAS A DISSENT: Cases 3, 4, 6, 10
DISSENTING OPINIONS: Case 7
CONCURRING OPINIONS: Cases 8, 9.

CASES DEFERRING
TO THE ADMINSTRATIVE AGENCY: Cases 1, 6, 7, 8
CASES OVERRULING
THE ADMINISTRATIVE AGENCY: Cases 2, 3, 4, 9, 10
CASES DEFERRING IN PART TO,
OVERULING IN PART, THE
ADMINISTRATIVE AGENCY: Case 5.

Having offered this breakdown, I hasten to add that it must be approached with caution since the sample size is small. It would be quite unfair, for instance, to conclude that Judge Bork tends to overrule administrative agencies more than affirm them, since the cases presented might have been unusually deserving of being overruled.

With so small a sample size, only the most startling of patterns can be credited. And, as is apparent, there is no such startling pattern. There is a reasonable representation of opinions in each category.

The second question is much more important. Do Judge Bork's labor law decisions place him within the mainstream of debate on American labor law? The answer is unequivocably yes. As will be seen in what follows, I disagree with several of the opinions Judge Bork has written. But in every instance, his position was quite tenable. No unusual theories were created by Judge Bork; no inconsistent use of precedent, no ignoring of relevant decision law appeared in any of his opinions. Moreover, on more than one occasion, an opinion shows a real brilliance in statutory interpretation and reasoning far above the average of labor law jurisprudence.

III. The Labor Law Opinions of Judge Bork

1. United Transportation Union v. Brock, 815 F.2d 1562 (D.C. Cir. 1987). (NOT INCLUDED ON AFL-CIO LIST)

Judge Bork wrote the opinion for a unanimous panel consisting of himself, Judge Silberman, and Judge Friedman of the Federal Circuit, affirming the judgment of the District Court.

Under the Urban Mass Transportation Act of 1964, federal money may be allocated to municipal transit systems which have taken over private transit

companies. However, the Secretary of Labor must certify that "the interests of employees affected by such assistance" have been protected. 49 U.S.C. sec. 1609 (c). This degree of protection includes "the continuation of collective bargaining rights."

The labor union protested a certification that federal money could be provided to a local system under this statute. Seven years before, the union had been the collective bargaining agent of the employees of the private transit system. When the system was taken over by the local government, the union's representation status ceased, consistent with the fact that the National Labor Relations Act excludes local governments from the definition of employer. Thus, for seven years, the union had not been the bargaining agent for these workers. The union's complaint was that the Secretary of Labor should have insisted that the union be recognized as the collective bargaining agent before approving the federal funds.

Citing the legislative history, and the statute's language, (especially the word "continuation" in the phrase "continuation of collective bargaining rights"), Judge Bork found that the Secretary was under no compulsion to require the resumption of collective bargaining status that had been lost seven years before.

COMMENT:

The opinion seems entirely correct, and relatively mundane. It would have been exceptional to hold that, before any federal funds could be allocated to urban transit systems, a union that had, at one time, been the bargaining representative, had to be recognized once again. Such an onerous requirement would have gone quite contrary to Congress' intent to assist local transit systems in financial need. The reading of the word "continuation" appears correct. Congress was worried about private systems which were taken over by reason of the federal funds, and, then, once becoming municipal operations, lost their right to organize. Such was not the case here, since the right to organize had been lost seven years before.

The best argument the other way was that the union had new evidence of majority status, by reason of signature cards. Under the National Labor Relations Act, an employer is obliged to give evidence of such majority status serious attention, and to bargain if she or he believes the union truly to represent the majority of the employees. However, even the clearest evidence of majority status cannot compel a duty to bargain by an entity that is not an employer under the

Act. Here, the city employer was not under the Act, and the receipt of federal funds did not make it so. It would be quite unusual to construe the receipt of UMTA funds as an implicit exception to the definition of employer under the National Labor Relations Act.

The decision, in my view, is utterly noncontroversial.

2. National Treasury Employees Union v. Federal Labor Relations Authority, 810 F.2d 1224 (D.C. Cir. 1987). (NOT INCLUDED IN AFL-CIO LIST)

Judge Bork wrote the opinion for a unanimous panel consisting of himself, Judge Ruth Bader Ginsburg, and Judge Gesell of the U.S. District Court, District of Columbia. The opinion affirms in part, reverses in part, and remands to, the Federal Labor Relations Authority.

The Federal Service Labor-Management Relations Act, 5 U.S.C. sec. 7103(a)(12) (1982), establishes a duty to bargain by federal employers, but excludes certain specified management rights, among them the right to assign work.

The union representing the auditors of the IRS proposed two rules for deciding how office audits should be assigned. (Office audits are conducted at IRS offices; field audits are conducted at taxpayers' offices. Field audits have priority.) First, the union proposed that office audits be assigned on the basis of volunteers, then inverse seniority. The IRS refused to bargain, saying that such an absolute rule could lead to an office audit falling to an individual already busy on a field audit, with the result of delay. This, the IRS claimed, would interfere with its management prerogative to assign work.

The Federal Labor Relations Authority agreed with the IRS on this claim, and Judge Bork's opinion affirmed. Caselaw had developed to sustain the interpretation that the management prerogative to assign work included the right to see to <u>when</u> the work would be done. Hence, the union's proposal lacked the flexibility necessary to preserve the management prerogative.

The union proposed a second rule. "Absent just cause," the rule read, certain union officials were to have preference for office audits. The IRS refused to bargain on this proposal as well, for the same reason;

and the Federal labor Relations Authority held for the IRS. Here, Judge Bork reversed the FLRA. The provision for "just cause" allowed the IRS sufficient flexibility to ensure that work would be done on the timely basis desired; hence, the management prerogative to assign work was not unduly infringed.

The IRS had raised other defenses based on other management rights clauses in the Federal Service Labor-Management Relations Act; as these had not been considered by the FLRA, Judge Bork remanded the case.

COMMENT:

The outcome appears correct on the first ground, bearing in mind that the Federal Service Labor-Management Relations Act affords employers a substantially greater scope for management rights than does traditional labor law under the National Labor Relations Act. Judge Bork affirmed the finding of the agency most expert in the area, consistent with principles of administrative law, where there was adequate caselaw support for that agency's interpretation.

On the second ground, Judge Bork's opinion could be faulted as leaning over backwards in favor of the union. The demand that certain union officials always be given preference in the assignment of office audits appears on its face to diminish management's right to "assign work." Management could still have its way, but only after finding "just cause" to overcome the proposed presumption in favor of union officials.

In remanding, Judge Bork left to the FLRA the opportunity to hold that such a clause infringed management's right to "direct" employees, a separate management guarantee under the Act. Hence, the outcome might eventually be in favor of management.

Nevertheless, on my analysis, the opinion read the phrase "assign work" in a rather restrictive way, so as to afford fewer management rights than Congress may have intended. I would have given more deference here to the FLRA. However, this criticism is slight, and Judge Bork's interpretation is certainly within the realm of respectable opinion on this point of law.

3. Restaurant Corporation of America v. NLRB, 801 F.2d 1390 (D.C. Cir. 1986).

This is a difficult case, in which the majority

opinion was authored by Judge Bork for himself and Judge Scalia, with a partial dissent by Senior Judge MacKinnon. The majority refuses enforcement of an NLRB finding that the employer had violated sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act.

Two employees were discharged for violating the company's absolute no-solicitation rule. One employee had engaged in extensive on-the-job solicitation on behalf of the union. The other employee had engaged in only one instance of on-the-job solicitation, lasting less than five minutes, and the soliciting employee himself was off hours. The company had tolerated six instances of on-the-job solicitation among employees for gifts to celebrate fellow-employees' birthdays, retirements, etc. The ALJ, and the NLRB itself, found that the tolerance of these non-union solicitations made the employer's application of the no-solicitation rule to the two employees in question discriminatory and thus in violation of the Act.

Judge Bork overruled the NLRB. He held that the Board had erred in failing to undertake an analysis of the potential for disruption between the two kinds of solicitation. Secondly, he held that social solicitations are by their nature different and a normal incident of humans working together. Third, he pointed out that all of the Board's cases involved much more extensive non-union solicitation, such as for Tupperware, Avon products, or anti-union propaganda. Judge Bork cited NLRB decisions holding that some non-union solicitation is not enough to prove discriminatory application of a no-solicitation rule. The basis for overturning the Board, therefore, was an erroneous legal standard, and the absence of substantial evidence to sustain its finding.

Judge MacKinnon agreed with Judge Bork as to the employee who had engaged in greater solicitation. But as to the employee who had engaged only in one on-the-job solicitation, Judge MacKinnon would defer more to the NLRB and its Administrative Law Judge. The legal standard is actual disruption, not potential for disruption, in Judge MacKinnon's view. He accuses the majority of creating the potential for disruption standard by relying on dicta from Central Freight Lines, Inc. v. NLRB, 653 F.2d 1023 (5th Cir., 1981). In terms of actual disruption, this employee's actions were equivalent to the birthday, etc., kinds of solicitations. Hence, the Board should be affirmed as to this employee.

COMMENT:

The first question is whether the standard for

interpreting section 8(a)(3) of the NLRA is actual disruption or potential for disruption. Judge MacKinnon appears to have the better argument that actual disruption is the standard. He is correct that the Central Freight opinion's statement is dicta (the Board had charged an overly broad no-solicitation rule in that case, not discriminatory enforcement of a facially acceptable no-solicitation rule). And his citations of NRLB case law indicate a concern with treating equal cases equally in terms of actual effect.

Nevertheless, there is merit to Judge Bork's view. The comparison cannot be entirely one of counting minutes. There is force to his view that certain solicitations, such as for birthday cakes, is of a different kind, almost unavoidable in workplaces. Judge MacKinnon does not rebut that logic, although Judge Bork has no cases to cite in support of it.

Evidently, in Judge MacKinnon's view, an employer who allows birthday cake contribution solicitations on work-time is building a record against himself or herself in the event a union organizer wants to take the same amount of time. This rule would require some careful monitoring of actual time expended. And it involves other difficult questions: are such solicitations to be added together, or on an employee-by-employee basis, in deciding how much time a union organizer must have?

By contrast, Judge Bork's view is clear and easy to apply. Social solicitations are different.

The heart of the problem, however, is that this is probably not a call for the D.C. Circuit but for the NLRB to be making. The statute does not say whether actual or potential disruption is to be measured in determining whether a no-solicitation rule is being enforced discriminatorily. It speaks only of discrimination. If the NLRB wishes to intepret this as treating equal cases differently in view of actual disruption, I would not see that as clearly erroneous. And certainly Judge MacKinnon is right that Judge Bork had only the weakest legal authority to so hold.

Once the legal rule is settled, the issue of substantial evidence poses no serious problems. Judge Bork is entirely correct that, if potential disruption is at issue, the Board's finding lacked any evidence. Of course if the Board's standard of actual disruption is correct, a further inquiry is warranted: Judge MacKinnon undertook such an inquiry and faulted the board with respect to one of the employees, but Judge Bork did not have to take this step.

Hence, I do not criticize Judge Bork for his holding that the NLRB's decision lacked substantial evidence. That was a correct decision, given his view of the legal standard. This opinion is to be faulted, rather, for its establishment on the basis of one other case's dicta, of a legal standard contrary to a reasonable alternative view of the agency most expert in the field. In partial defense, however, this appears to have been a case of first impression on this point. And it is noteworthy that Judge Bork's position was concurred in by Judge, now Justice, Scalia.

4. National Treasury Employees Union v. Federal Labor Relations Authority, 800 F.2d 1165 (D.C. Cir. 1986).

Judge Bork authored the majority opinion for himself and Judge Robinson; Senior Judge Swygert of the Seventh Circuit dissented. The opinion reverses a ruling by the Federal Labor Relations Authority.

The Federal Service Labor-Management Relations Act permits a union to establish itself as the exclusive bargaining agent for a group of employees. This case deals with the duty of fair representation attendant upon that status.

In the private sector, the duty of fair representation was read into the National Labor Relations Act by the Supreme Court as a necessary inference from exclusivity. But the union was responsible under this duty only in so far as it was the exclusive representative; i.e., on matters under the collective bargaining agreement. On other matters (e.g., participation in internal union affairs) the union could distinguish between members and non-members.

The Civil Service Reform Act provides federal employees with a right to appeal a disciplinary action. This right exists wholly apart from what rights might be available under a contract negotiated by management and a union pursuant to the Federal Service Labor-Management Relations Act.

In this case, the union refused to provide a non-member employee with counsel in pursuing his appeal through the procedures of the Civil Service Reform Act. It was the union's policy to provide such counsel for its members, however. The Federal Labor Relations Authority held that the union had violated its duty of fair representation. The union appealed, arguing that it had no such duty as to the statutory right of appeal

under the Civil Service Reform Act, since that process was outside of the collective bargaining context. It is not disputed that, in the private sector, a union's failure to provide counsel in such a setting would not violate duty of fair representation. Thus, the issue was whether the Federal Service Labor-Management Relations Act imposed a greater duty upon a union than was the case under the National Labor Relations Act.

Overruling the FLRA, Judge Bork held that it did not. His reasoning began with the words of the statute, which he found not enlightening either way. He next considered the structure of the statute, which, like the NLRA, distinguished between matters arising under the collective bargining relationship and otherwise. He continued by exploring the origin of the duty of fair representation, finding that its premise was the inability of employees to speak for themselves in those areas where the union's representation was exclusive. Next, he reviewed legislative history. Finding it rather empty, Judge Bork derived more support for his interpretation, since so major a change as to impose duties beyond the commonly understood duty of fair representation would have entailed some debate. Finally, he found support for his interpretation in the difficulty of the test adopted by the FLRA: whether an issue was employment-related, as opposed to whether it was governed by the collective bargaining agreement (the question under traditional duty of fair representation doctrine).

Judge Swygert dissented. He believed the case was controlled by National Treasury Employees Union v. Federal Labor Relations Authority, 721 F.2d 1402 (D.C. Cir. 1983), which held a union to a duty of fair representation in providing an attorney through a collective bargaining grievance procedure. Although the grievance in the earlier case was being pursued under the collective bargaining procedures, Judge Swygert felt the opinion was not premised on this distinction. (In the majority opinion, Judge Bork quoted extensively from this case to demonstrate that it did make frequent reference to the collective bargaining context.)

COMMENT:

Judge Bork freed federal employees' unions from a major burden, one that would have gone far beyond what their private market counterparts must bear. In so ruling on behalf of the union, Judge Bork refused to give deference to the Federal Labor Relations Authority.

But the issue was one purely of law, so the

deference entitled to the FLRA was at its minimum. I believe this was a correct case in which to overrule the FLRA. It is hard to conceive that Congress intended to impose a greater burden on federal employees' unions than on private employees' unions, without any discussion on the point. And Judge Bork's distinguishing of the earlier D.C. Circuit case seems entirely correct: Judge Swygert's dissent on this point merely states that the earlier case is controlling. It makes no attempt to rebut Judge Bork's extensive quotations from that opinion. It is significant, on this point of dispute, that Judge Robinson joined Judge Bork's opinion.

The structure of Judge Bork's opinion is particularly compelling here. On a difficult issue of statutory interpretation, he goes first to the wording of the Act, then to its structure, then to its legislative history, and then to a practical consideration of the enforceability of alternative constructions.

5. International Brotherhood of Electrical Workers v. NRLB, 795 F.2d 150 (D.C. Cir. 1986).
(NOT INCLUDED ON AFL-CIO LIST)

Judge Bork authored the unanimous opinion for the panel consisting of himself, Judge Scalia, and Senior Judge MacKinnon. The decision affirmed the NLRB's dismissal of a union's unfair labor practice complaint.

The company had for many years granted a Christmas bonus. At its last contract negotiation, the company requested a "zipper clause," containing an integration and a waiver. The integration clause stated that the entirety of the agreement between the two parties was contained in this written document. The union queried what other rights might thus no longer exist, the company refused to supply a list but said it meant absolutely all other agreements or understandings. The union wrote back expressing that it understood this but that it was entitled to a list nonetheless. The issue of the list was taken to the NLRB, but the General Counsel rejected the union's point of view.

Thereafter, the union signed the zipper clause. The contract contained no mention of a Christmas bonus. Later that year, the company unilaterally eliminated the Christmas bonus. The union alleged this was a breach of the employer's duty to bargain before changing terms or conditions of employment; the company pled the zipper clause. The ALJ found for the union,

claiming that any waiver had to be clear and unmistakeable. The NLRB reversed, finding for the company because of the breadth of the integration part of the zipper clause.

In upholding the NLRB, Judge Bork relies upon the clearly expansive language of the integration clause, and the bargaining history. He holds that the question of waiver really is not at issue, hence the NLRB was correct in overturning the ALJ's decision. Waiver would be important only if some rights to a Christmas bonus remained; after the integration clause, they didn't.

COMMENT:

This is a straightforward case. The analysis is correct and well structured, relying first on the words of the agreement, then on the bargaining history. Two small points remain, one slightly troubling, one comforting. First, Judge Bork states he does not need to opine on the correct degree of deference to the Board since his interpretation of the contract is identical. This is a minor departure from the more correct practice of deferring to a fact finding by the NLRB. Second, Judge Bork does not reach in this case for the latent legal question: was the company under an obligation to provide the union with a list of extant agreements that it considered to be covered by the integration clause? This question was not properly presented in the appeal, but many courts would have reached out to decide it, since it is a matter of legal interest and would clearly control the outcome. Judge Bork resisted the temptation to reach out for an issue not presented, and that is commendable.

6. Meadows v. Palmer, 775 F.2d. 1193 (D.C. Cir. 1985).

In an unusual structure, most of the majority opinion for this panel was written by Judge Mikva, joined by Judges Starr and Bork. Only the last portion was written by Judge Bork, joined by Judge Starr, and Judge Mikva dissented from that portion.

The issue on which Judge Bork wrote, therefore, is precisely the issue in controversy. The case involved the reassignment of a federal employee, without loss of grade or step. The employee alleged that the work was, nevertheless, substantially less in content and responsibility, thus constituting a de facto reduction

in rank (although salary remained the same). Judge Bork, joined by Judge Starr, read the Civil Service regulations to require that rank be determined only by reference to numerical grade and actual organizational standing. Judge Mikva read the same regulations to allow reference to responsibility and job description. The regulation at issue reads:

> In law and the Commission's regulations, the term rank means something more than a numerical grade, or class, or level under a classification system or its equivalent in the Federal Wage System. Basically, it means an employee's relative standing in the agency's organizational structure, as determined by his official position assignment.

Federal Personnel Manual Chapter 752.1, cited in 775 F.2d at 1200.

COMMENT:

On Judge Mikva's side of the issue stands one decided case, Fucik v. United States, 655 F.2d 1089 (Ct. Cl. 1981). In distinguishing Fucik, Judge Bork merely states that its "reasoning is contrary to the pertinent regulation and would involve courts in deciding the appropriate grades for particular jobs. We think it better not to follow that course." Judge Mikva argues that content of a job is a necessary part of assessing an employee's relative standing in the agency, as provided for in the Federal Personnel Manual.

Whereas Judge Bork is undoubtedly correct that judges ought not be involved in determining equivalence of job assignments, it is not an unreasonable inference that Congress allowed the Civil Service Commission (and its successors) to do so. Nor need the review be very detailed: one could simply look for gross differences in responsibility and job content, for instance. Then, if there were substantial evidence for the Commission's judgement, a reviewing court could simply affirm.

On Judge Bork's side of the argument is the wording of the regulation. While the first sentence promises to go beyond mere rank, the second sentence says exactly how far beyond mere rank one is to look: no farther than "official position assignment." Hence, I believe Judge Bork was correct that Fucik was wrongly decided. However, given the force of Judge Mikva's reasoning, more elaboration of Judge Bork's majority opinion would surely have been desirable.

7. Prill v. National Labor Relations Board, 755 F.2d 941 (D.C. Cir.), cert. denied, 106 S.Ct. 313, 352 (1985).

The majority opinion in this case was authored by Judge Edwards and concurred in by Judge Wald. Judge Bork dissented. The majority opinion remanded a decision by the NLRB that reversed a recent position of the Board. The majority's basis for remanding was that the Board appeared to believe its new position was mandated by the Act, rather than simply a position more in tune with the Board's expert opinion of how best the Act should be enforced. Since the majority believed the Act did not mandate the new view, SEC v. Chenery Corp., 318 U.S. 80 (1943), required a remand.

The legal issue dealt with what constitutes concerted activity for purposes of section 7 of the National Labor Relations Act. Originally, the Board had required some evidence of activity undertaken on behalf of more than the employee himself or herself. In 1975, the Board altered its position to say that concerted activity could be presumed whenever an employee exercised a right guaranteed under law to protect safety. In the present case, the Board returned to a standard requiring some evidence that the conduct was engaged in with or on the authority of other employees.

Judge Bork dissented. He believed that the Board had not said the statute compelled this outcome, only that it was consistent with the statute. And even if the Board had so said, remand was unnecessary since the error was harmless. The activity at issue here could never be considered concerted under any reasonble interpretation of the statute.

The conduct here involved an employee truck driver who, after numerous mishaps with a particular tractor, refused to drive it any more, or to have it towed back, due to defective linkage and breaks. He was discharged for his complaints and refusal. There was evidence the driver knew another driver had similarly complained about this tractor.

COMMENT:

There is little doubt that the Board can change its position on what constitutes concerted activity. The majority admits this; otherwise, the interpretation of the law could not have changed in 1975. The entire issue in the case turns on whether that is what the

Board did.

Identical language of the Board's decision is debated between the majority and dissent. My own reading is that the Board held that the statute only required a finding that activity be both concerted and protected. With this no one disagrees. The majority interprets the following excerpt to mean that the Board believed the statute compelled its own interpretation that proof of common or representative action was needed.

> "For all the foregoing reasons, we are persuaded that the per se standard of concerted activity is at odds with the Act. The Board and courts always considered, first, whether the activity is concerted, and only then, whether it is protected. This approach is mandated by the statute itself, which requires that an activity be both `concerted' and `protected.' A Board finding that a particular form of individual activity warrants group support is not a sufficeint basis for labeling that activity `concerted' within the meaning of section 7.
>
> "Based on the foregoing analysis, we hold that the concept of concerted activity first enunciated in Allelulia does not comport with the principles inherent in Section 7 of the Act. We rely, instead, upon the `objective' standard of concerted activity--the standard on which the Board and courts relied before Alleluia. Accordingly, we hereby overrule Allelulia and its progeny."

115 LRRM at 1028-1029, cited in Prill, 755 F.2d at 949-950.

It is scarcely likely that any administrative agency would ever reverse its view of a legal matter without saying that the new interpretation was more in keeping with its governing statute. That is all I read the NLRB to have done in this case. Hence, I find Judge Bork's dissent to be persuasive on its first point.

A second point of difference exists on whether the rule now adopted by the NLRB actually was the rule before Allelulia or not. In NLRB v. City Disposal Systems, 104 S.Ct. 1505 (1984), the Court upheld a presumption of concerted activity when a single employee asserts rights granted under a collective bargaining relationship. Both majority and dissent grapple with this case. The majority argues that this

case prevents a return to the pure test of evidence of acting on authority for others. Judge Bork argues that the pre-Allelulia standard never excluded such a presumption, since Allelulia did not deal with collective bargaining rights. Undeniably, City Disposal Systems has had some effect on the law. Hence, the Board (and Judge Bork) may have been too glib in saying all the Board was doing was returning to the pre-Allelulia standard. But Judge Bork carries the day in holding that this is surely no grounds for remand since the present case does not implicate collective bargaining rights.

The last point is whether the action at issue here could ever be held to be concerted. Judge Bork holds no; thus, any Chenery error by the NLRB would be harmless error. But I believe Judge Bork was in error.

If a presumption is permitted without proof of actual collaboration in one area (collective bargaining rights), it could be permitted in another area. The logical leap in the first case is that the exercise of bargaining rights will encourage the bargaining process. So too, it seems to me, the exercise of safety rights by one employee could encourage it by others. It may not be that OSHA explicitly encourages collective activity, but the encouraging effect is as inferrable in the one case as in the other. Hence, I would fault Judge Bork's analysis on this issue.

Overall, the case appears as a rather tedious attempt to slow down the NLRB from changing its decision law. The particular device used here, Chenery, was really not implicated, and Judge Bork deserves high marks for establishing that quite clearly. Also apparent in this opinion is a clear deference to the expert agency, lacking in some of Judge Bork's other labor opinions.

8. Amalgamated Clothing & Textile Workers v. NLRB, 736 F.2d 1559 (D.C. Cir. 1984). (NOT INCLUDED ON AFL-CIO LIST).

The opinion for the court was written by Judge Wright, joined by Judge Mikva. Judge Bork concurred separately. The court's decision upheld the NLRB determination that a representation election in favor of the union had been valid and the Board's choice of remedies for management's failure to bargain.

Judge Bork's separate concurrence states no disagreement with the majority's holding. He raises only two points: (1) the majority announced, as though

it were doctrine, the debatable proposition that delay in an election always favors management; and (2) the majority did not need to criticize the 4th Circuit's opinion in PPG Industries, Inc. v. NLRB, 671 F.2d 817 (4th Cir. 1982).

COMMENT:

On the first point, it is true that "lore" holds that delays favor management. Still, Judge Bork's warning is a valid one, that a decision after delay should not carry any presumption of invalidity. It could well be a more thoughtful decision. It is a useful contribution to prevent "lore" from becoming governing principles of law.

On the second point, Judge Bork is again correct. There was ample evidence to sustain the Board's finding that certain employee conduct was not attributable to the union. The majority did go out of its way to state its disagreement with a fourth circuit opinion which held that conduct sufficient to constitute an employee an agent for management would be sufficient to constitute an employee an agent for the union. The majority states this is not so, since management has less need of agents in a plant than does a union attempting organizing. Judge Bork does not opine on this proposition; he only notes it is not necessary to reach it to decide the case. In this he is quite right.

This is not a particularly instructive opinion. Judge Bork joins the majority in upholding the Board on a rather unexceptional set of facts, but uses a separate concurrence to chide Judge Wright for a bit of obiter dicta.

9. Yellow Taxi Co. of Minneapolis v. NLRB, 721 F.2d 366 (D.C. Cir. 1983).(NOT INCLUDED ON AFL-CIO LIST).

Senior Judge MacKinnon authored the opinion for this panel including himself, Judge Wright and Judge Bork. Both Judge Wright and Judge Bork wrote short concurrences. The decision reversed the NLRB's determination that taxicab drivers under lease were employees for the purposes of the National Labor Relations Act.

The basis for Judge Bork's separate concurrence was simply to urge restraint in Judge MacKinnon's criticism of the NRLB. The Board had, quite evidently,

chosen to ignore controlling circuit court precedent in reaching the decision that it did. The company had sought a contempt citation against the Board, or some other sanction. The court refused such relief, but the majority opinion excoriated the Board's attitude toward circuit court precedent. Judge Bork states that he has not studied the Board's conduct sufficiently to agree or disagree with Judge MacKinnon, but he does agree that the Board was being disingenuous with the facts in this case.

COMMENT:

This case sheds only little light on Judge Bork's labor law philosophy. What can be extracted is that Judge Bork recognizes that an administrative agency may disagree with circuit court precedent, though he does ally himself with the conclusion that the Board went too far in this instance.

10. York v. Merit Systems Protection Board, 711 F.2d 401 (D.C. Cir. 1983).

Judge Bork wrote the majority opinion in this case on behalf of himself and Judge Wright. Judge MacKinnon dissented. The majority opinion overturned the decision of the Merit Systems Protection Board upholding the dismissal of an employee.

The legal issue dealt with the standards for reopening a MSPB decision. The MSPB had originally decided in favor of the employee, mitigating his punishment for forgery and theft from dismissal to a 30-day suspension. The Office of Personnel Management petitioned for rehearing on several grounds, and the MSPB granted rehearing without specifying on which grounds it had acted. The MSPB then reinstated the termination order.

COMMENT:

The majority opinion is an unexceptional application of administrative law principles in the labor context. While several independent bases for reopening were available, and potentially justifiable, the reviewing court was not able to perform its function without knowing on which ground the agency had acted. Should the agency choose the position that it can reopen without giving any reason, that would present a contestable issue of administrative law; but Judge Bork considered it wiser not to rule on that

issue unless it were clear that the agency had actually pitched its authority under it.

The dissent by Judge MacKinnon is unpersuasive here. He would draw the inference that the MSPB reopened because it thought its first decision was wrong. That would be an adequate basis; but it remains true that the MSPB might not have been acting on that premise.

The opinion offers an insight into Judge Bork's desire to hold administrative agency's tightly to an obligation of explaining their decisions; here, with an outcome favorable to the employee.