The Judicial Performance of Robert Bork In Administrative and Regulatory Law

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This memorandum analyzes Judge Bork's most important regulatory and administrative law opinions as a judge on the D.C. Circuit. Because of the large number of opinions he has written, and the somewhat amorphous character of the fields themselves, I have limited my inquiry to the following: In administrative law, I have reviewed Judge Bork's opinions dealing with standing to challenge administrative agency decisions; reviewability; agency decisionmaking procedures; and the scope of judicial review. In regulatory law I have examined opinions reviewing the decisions of federal economic, health, safety, and environmental regulatory agencies, excluding labor cases.

While my overall assessment of Judge Bork's work in these areas is based on a review of all of his opinions in these

categories, I have limited detailed discussion in this memorandum to those opinions that are most important or have aroused greatest controversy. My criterion for selection was whether the opinion was singled out for discussion in one or more of the following: Public Citizen Litigation Group's Report on the Judicial Record of Judge Robert H. Bork; The AFL-CIO Ececutive Council Statement in Opposition to the Nomination of Judge Bork; and the Biden Report. There are 13 administrative and regulatory law opinions that meet this criterion.

I have undertaken to analyze these opinions and assess their quality in order to evaluate charges that Judge Bork holds and enforces radical views, is biased in favor of certain parties and against others, disregards proper principles of judicial decisionmaking in order to reach a foreordained result, and lacks otherwise appropriate judicial qualifications.

I have not attempted a quantitative analyses of his votes (regardless of whether or not he wrote an opinion) in all regulatory and administrative cases in order. The Public Citizen and the AFL-CIO report attempt to make out a case of bias by examining Judge Bork's votes in decisions where the court was divided. This technique suffers from seveal deficiencies. First, it tends to exaggerate differences between Judge Bork and his colleagues by ignoring votes in

which the court was not divided. The record has shows that overall Judge Bork has agreed with his colleagues -- even those that are recognized as among the most liberal federal circuit judges in the country -- in a very high percentage of cases. Second, by simply tabulating votes, this approach ignores the most direct and valuable evidence of a judge's mind and character, his own written opinions.[1] A judge may join a colleague's result for a varity of reasons falling well short of full agreement with the views expressed in a colleague's opinion or even with the precise disposition of the case. It is for this reason that I have focused on Judge Bork's opinions. I must, however, note that even the unrepresentative sample of opinions that I have reviewed -- opinions singled out by critics of Judge Bork's nomination as establishing his bias -- demonstrate the falsity of the Biden Report's claim (p.39) that Judge Bork "defers to the government when an individual or public interest group brings suit, and he defers to big business when it is suing the government." In nearly a third of these cases, Judge Bork upheld the position of individuals or public interest groups against the government or the position of the government against industry.

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1 The Public Citizen Report analyzes a number of Judge Bork's opinions, but in many instances the account of the case and of Judge Bork's position is incomplete, distorted, or otherwise seriously misleading.

My analysis of these opinions leads me to conclude that the overall quality of Judge Bork's judicial work is very high indeed. The principles of reasoning that he employs are sound. His opinions show great analytical power. They also display the rare willingness and ability to lay bare and grapple forthrightly with the fundamental issues that underlie a controversy.

Judge Bork has been accused of arrogance, and indeed there are times when his criticisms of a colleague with contrary views in a case seem unnecessarily preemptory. But his opinions in cases such as NRDC v. EPA and Jersey Central Power Co. v. FERC show that he has the capacity to rethink positions initially taken and to abandon them when convinced by further exchange and reflection that he was wrong. Judge Bork's opinion for a unanimous en banc court in NRDC v. EPA is a particularly outstanding example of his capacity for open-mindedness and intellectual growth; it also reveals that Judge Bork has the statecraft to build consensus within a large and often divided court.

Regulatory and administrative law cases require reviewing judges to determine whether administrative decisions comply with statutory, procedural, and other applicable legal requirements; whether agency fact findings are adequately supported by evidence of record; and whether agencies' exercise

of policy discretion has been sufficiently explained and justified to pass muster as not "arbitrary and capricious."

Such determinatives necessarily involve substantial room for judgment. The exercise of that judgment -- especially by able and strong judges like Judge Bork and his colleagues on the D.C. Circuit -- will inevitably and properly be influenced by an individual judge's overall view of the appropriate role of litigation and judges in the governance of a democratic society. Judge Bork's view is that the basic and most important function of courts is to protect established liberty and property interests against unconstitutional or unauthorized coercive invasion by government. Otherwise, decisions about the society's collective goals and values and how best to implement them should ordinarily be left to the political and administrative branches unless there is constitutional or statutory warrant for courts to intervene. This view has lead Judge Bork, in cases where the correct result is legitimately debatable and the judicial exercise of judgment is therefore necessary and proper, to limit judicial review to cases involving claims of specific harm from particular government decisions; to limit the right of litigants not themselves subject to coercive government action to demand extensive administrative hearings; to require clear or persuasive statutory authority for the exercise of coercive power by administrative agencies; and to decline to impose or enforce on administrators affirmative obligations not established by statute.

Judge Bork's avowal of these positions have not gone unchallenged. They are often contrary to the views of some of Judge Bork's colleagues on the D.C. Circuit who for the past 15 years have sought to expand judicial review, impose additional procedural formalities on agencies, amd enlarge the courts' role in ensuring that agencies affirmatively embrace and carry out certain social objectives. Judge Bork's positions are also in many cases contrary to the agenda of advocacy groups such as Public Citizen. I personally disagree with a number of Judge Bork's decisions. But I nonetheless respect them because they cogently present a candid, well-reasoned, powerful and important point of view on the role of courts in the governance of the regulatory welfare state.

I must also emphasize that Judge Bork's decisions in administrative and regulatory law are well within the mainstream of current judicial thinking and practice in the federal appeals courts and, especially, the Supreme Court. Over the past decade, the Supreme Court has imposed limits on the expansion of judicial review, curtailed the lower federal courts' imposition of novel procedural requirements on administrators, limited expansive agency claims of regulatory authority, and declined to impose on agencies mandates not statutorily manifest. Justice Powell has played an important role in these developments. Judge Bork's general orientation, as well as his willingness to examine each

case on its merits, are quite similar to those of Justice Powell. The most obvious difference between them is that Judge Bork expresses his conclusions in more pungent language. If we are to judge by his decisions in regulatory and administrative law, claims that Judge Bork is a radical revolutionary of the right are simply ludicrous. I do not believe conformity a particular virtue. But if we are to take the Supreme Court's current administrative and regulatory jurisprudence as the benchmark, it is not Judge Bork but some of his more liberal colleagues on the D.C. Circuit who seem out of line.

II Judge Bork's Opinions

In discussing Judge Bork's opinions, I deal first with three cases that seem to have attracted the greatest attention and criticism. I then consider the remaining opinions are arranged according to the types of issues presented.

NRDC v. EPA involved an environmental group challenge to EPA standards for control of vinyl chloride (VC) emissions from chemical plants under Sec. 112 of the Clean Air Act. That section requires the EPA Administrator to set emission limitations for VC and other hazardous pollutants "at the level which in his judgment provides an ample margin of safety to protect the public health." EPA initially set a VC

standard requiring the maximum degree of control that it believed to be technologically attainable and economically achievable by industry. In response to environmental group litigation, it proposed to issue a more stringent standard, but later rescinded the proposal after concluding that compliance was technologically and economically infeasible. This recession was challenged by environmental groups.

It is not known whether the adverse health effects of VC involve safety thresholds. The association between VC concentrations, particularly at lower levels, and health effects is quite uncertain. Science is unable to determine whether VC concentrations will cause adverse health effects only if they exceed a certain level, and, if so, what that level is. This uncertainty is characteristic of most pollutants subject to regulation under Sec. 112.

In an initial panel opinion, 804 F.2d 710 (1986), Judge Bork rejected claims by the government that 1977 amendments to the Act had impliedly ratified EPA's position that Sec. 112 standards could be based directly cost and technology. He also rejected claims by environmental groups that emission standards (incorporating the margin of safety required by the statute) must be set by reference to health considerations alone. He pointed out that if health protection were the only consideration, standards should, in the face of uncertainty, be set at zero. It is undisputed that such stan-

dards would cause a massive shutdown of many basic industries, a result which, Judge Bork concluded, Congress could not have intended. On the other hand, the dominant goal of Sec. 112 is clearly to protect health. How the EPA is to set standards in this situation presents a "paradox" which Judge Bork sought to unravel. He concluded, based on the above analysis, and a careful review of the Act's language, history, and structure, that the statute should not be read as precluding EPA discretion to consider cost and feasibility in determining the margin of safety in setting standards in those cases where the existence and location of safety thresholds is uncertain and the standard is set within the area of uncertainty. Finding that the initial VC standard satisfied these criteria and was therefore within EPA's lawful discretion, Judge Bork upheld EPA.

Judge Wright entered a strong dissent. Pointing out that most Sec. 112 pollutants are characterized by wide uncertainty regarding health effects and safety thresholds, Judge Wright argued that the practical effect of Judge Bork's resolution would be to give EPA considerable latitude to set standards directly on the base of cost and technology. Judge Wright argued that this result would be inconsistent with the overall structure of the Act and the language of Sec. 112.

On rehearing en banc, Judge Bork wrote a new opinion for a unanimous court. While adhering to his earlier rejection of

the positions advocated by EPA and the environmental groups, he reformulated the limits imposed on EPA's discretion by the Act. The Administrator must first determine what level of VC concentrations is "safe," based exclusively on health considerations. A "safe" level does not necessarily mean zero; ours is not a risk-free society and EPA has latitude to determine what level of risk is "acceptable." The standard may not exceed this "safe" level, regardless of cost or feasibility. EPA has discretion, however, to take cost and feasibility into account in selecting the appropriate margin of safety, which would in turn determine how far below the "safe" level the standard would be set. Health is thus the first and basic criterion for setting standards, with cost and technological feasibility factored into the safety margins. Because EPA's VC standard and current interpretation of the Sec. 112 were inconsistent with this reading of the statute, Judge Bork set aside the EPA's recession of its proposed more stringent standard and remanded for further proceedings consistent with his opinion.

Judge Bork's performance in this case is impressive. His opinions lay bare the dilemma posed for agencies and courts by congressional language that refers only to health protection in authorizing regulatory standards that which cannot reasonably be set on the basis of health considerations alone. Judge Bork's rejection of EPA's claim of implied congressional ratification is plainly correct. His conclu-

sion that Sec. 112 does not bar the EPA from giving some consideration to cost and technology presents a closer question but is also sound. Although other sections of the Act providing for health-based standards have been interpreted as excluding or at least not requiring EPA consideration of cost and technology, their role in the Act is quite different from that of Sec. 112.

The panel opinion's effort to define middle position to resolve the dilemma is commendable, but its formulation is subject to the shortcoming noted by Judge Wright. The reformulation in the en banc opinion is probably the best accommodation that can be made between the the statutory primacy of health protection, the pervasiveness of scientific uncertainty, and the consequent inevitable need to give some consideration to cost and feasibility.

Judge Bork displayed intellectual candor in facing up to the dilemmas posed by the case and perserverance in trying to solve the riddle. After his initial solution was challenged by a strong dissent and rehearing en banc was had, he rethought his position and developed a new and better approach endorsed unanimously by his colleagues.[2] This record

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2 The analysis of the case by Public Citizen and the AFL-CIO deal only with the panel opinion and fail to discuss the en banc opinion.

speaks very favorably as to Judge Bork's intellectual capabilities, his open-mindedness, and his capacity for statecraft.

McIlwain v. Hayes, 690 F.2d 1041 (1041) was one of two Bork opinions singled out for criticism in the Biden report as evidence of "pro-business" bias and was also criticized in the Public Citizen report. Individuals and health advocacy groups sued the Food and Drug Administration, challenging delays in manufacturer safety testing of food color additives. Judge Bork's panel opinion upheld the FDA, Judge Mikva dissenting.

In 1960 Congress amended the Food Drug and Cosmetic Act to shift the responsibilty for testing the safety of color additives from the FDA to industry. The amendments provided that established color additives could remain on the market pending completion of safety testing for two and one-half years, and for such further periods as the FDA administrator "from time to time" finds "necessary to carry out" the testing program, if such postponements are consistent with completion of the testing "as soon as reasonably practicable." After FDA had several times extended the testing deadline, plaintiffs brought suit in 1980 to challenge a further extension.

Although the testing program had by then been in progress for twenty years, far longer than Congress had anticipated,

Judge Bork found that the FDA's further postponement was authorized by the statute and was not an abuse of discretion. The facts of the case were crucial to his conclusions. The delays were due to the development of new and more sophisticated testing methodologies. The additives had passed successive rounds of increasingly demanding tests, with no evidence of adverse effects. The FDA, however, determined that they should be subjected to new, more sensitive tests before receiving final clearance. A variety of unforeseen practical problems in carrying out the testing had also contributed to the delay.

On these facts, Judge Bork found that the successive FDA postponements fell squarely within the language of the statutory provision authorizing such postponements. FDA's determinations that the postponements were necessary were amply supported by the facts and reasonable. Judge Bork's opinion is well reasoned and the result is clearly correct. The only alternative would be to ban long-established color additives that had passed every safety test to which they had been subjected, a result plainly contrary to the statutory scheme.

Judge Mikva's dissent castigates the FDA for engaging in a "charade of regulation" and the court for putting its "imprimatur on this disgraceful track record." Judge Mikva, however, never comes to terms with the facts carefully ad-

duced by Judge Bork, nor does he show how FDA's actions are contrary to the terms of the statute or otherwise unreasonable. The language and logic of the dissent seems more appropriate for a floor statement by a member of Congress than for a judicial opinion.

Jersey Central Power & Light Co. v. FERC, 810 F.2d 1168 (1987)(en banc) is also criticized in the Biden report as well as the Public Citizen Report. Judge Bork wrote the opinion for an en banc court, requiring the Federal Energy Regulatory Commission (FERC) to hold a hearing on Jersey Central's claim that FERC's refusal to allow it increased rate revenues would be confiscatory, violating its statutory and constitutional rights. Four judges dissented in an opinion by Judge Mikva.

The case is a difficult one because relevant Supreme Court precedent provides inadequate guidance and because the FERC determinations being reviewed were murky and unhelpful. Jersey Central had made a concededly prudent investment of nearly $400 million in a nuclear plant that was later cancelled because of changed market conditions. The company sought rates that would enable it to recover (a) the cost of this investment and (b) the carrying charges on the debt and preferred stock portions of the investment by including the unamortized portion thereof in its rate base. It made detailed assertions to the effect that its financial condi-

tion was precarious and that the rates sought were necessary to restore financial integrity. Relying on past decisions, FERC allowed recoupment of the investment but refused to include any part thereof in Jersey Central's rate base. It did not grant Jersey Central a hearing or otherwise respond to its claims of financial hardship. Jersey Central then petitioned FERC for an evidentiary hearing on its claim that the end result of FERC's ruling violated applicable statutory and constitutional requirements by denying it a reasonable return on its investment, and sought a rate of return on investment higher than that allowed by FERC. FERC denied the petition on the grounds that its ruling accorded with established FERC ratemaking policies; that the request for a higher rate of return was an impermissible modification of the relief originally sought; and that Jersey Central's allegations of hardship failed to provide a basis for relief.

Judge Bork first wrote a panel opinion upholding FERC, but reversed himself in a subsequent panel opinion and required FERC to grant Jersey Central a hearing on its claims after both parties asserted that the first opinion had misconstrued relevant Supreme Court precedent. His en banc opinion reached the same result as the second panel opinion.

It is established law that government refusal to allow regulated monopolies a reasonable return on their investment is an unconstitutional taking of property. Rate regulatory

statutes have been read to incorporate the principle of reasonable return on investment. Giving this principle workable content has not, however, been easy. FPC v. Hope Natural Gas Co., 320 U.S. 591 (1944), repudiated earlier judicial efforts to impose a particular rate-making methodology on regulators, holding that so long as the "end result" was reasonable, they enjoyed wide discretion. While Hope cut back on judicial review of ratemaking, it also contemplated that regulators would remain subject to constitutional and statutory constraints of reasonableness. Subsequent Supreme Court decisions have reaffirmed this expectation without providing much guidance as to how it is to be implemented.

Both Judge Bork and the en banc dissent agree that the Hope "end result" test requires courts to review the reasonableness of rate regulation, and that in a proper case a regulatory agency must hold an evidentiary hearing on a utility's claims that a given rate decision is unreasonable and confiscatory. They differed on whether Jersey Central had made an adequate case for a hearing. Judge Bork concluded that the facts alleged by Jersey Central made out a prima facie case that failure to grant it additional revenues was confiscatory, and that FERC could not summarily disregard these allegations. The dissent made two basic arguments. First, Jersey Central's request for a hearing and for a higher return was premature because it might file further proceedings with FERC seeking such relief; the only

issue thus far decided by FERC was whether Jersey Central's part of its investment in the cancelled plant should be included in its rate base. Second, in order to obtain a hearing, Jersey Central must allege more than hardship. It would have to show that the particular decision challenged would cause insolvency, and that rate relief would not exploit consumers.

The underlying problem is how courts can ensure that regulated monopolies receive a reasonable return on investment without disrupting orderly administrative decisionmaking or requiring ratepayers to bail out incompetent and unlucky management. The best way to achieve these objectives would be for courts to allow regulators wide discretion in selecting a methodology for regulating rates but require adherence to a given methodology once selected.[3] But the Supreme Court has not followed this course and has instead adopted an amorphous "end result" test.

Judge Bork's ruling that Jersey Central's demand for a hearing was ripe for decision is well supported. As he points out, FERC had not argued that Jersey Central should exhaust further agency proceedings, and had squarely rejected its demand for a hearing on the reasonableness of the rates al-

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3 See S. Breyer, Regulation and Its Reform, Ch.2 (1982)

lowed. Under established administrative law principles, the hearing issue was properly before the court, even if other avenues of relief might have been available before FERC. Moreover, it does not appear that any such alternative relief would in fact have been available to Jersey Central.

Whether Jersey Central's allegations were sufficient to entitle it to a hearing is a closer question. Judge Bork may have been too quick to suggest that Jersey Central's allegations made out a prima facie case of unconstitutional action by the Commission. But the dissent can be faulted for imposing its own elaborate, more restrictive test of unconstitutionality, a test which has no support in prior decisions. Given the murkiness of the precedent, the better course was to hold Jersey Central's allegations sufficient to entitle it to a hearing. This would enable the court, in accordance with basic administrative law principles established in SEC v. Chenery Corp. 318 U.S. 80 (1943) to have the benefit of a full factual record and FERC's considered views before attempting to define more precisely the constitutional standard and the corresponding showing required to obtain a hearing in future cases. As pointed out in Judge Starr's concurring opinion, this was essentially the course adopted by Judge Bork for the majority.

While it has been criticized as a radical and unprecedented pro-business initiative, the position adopted in Judge

Bork's Jersey Central opinion is entirely consistent with precedent and represents a reasoned and reasonable resolution of a difficult case.[4]

Judge Bork's guarded approach to standing is reflected in Northwest Airlines, Inc. v. FAA, 795 F.2d 195 (1986). Judge Bork's opinion for the court held that Northwest lacked standing to challenge in court FAA's decision authorizing a former Northwest pilot, whom Northwest had discharged for drunkenness,to fly commercial planes. Northwest claimed that the safety of its flights would be endangered and the efficacy of its disciplinary program would be undermined if the pilot were allowed to fly again. Invoking several relevant Supreme Court decisions, Judge Bork ruled that the causal connection between the government's action and the asserted injury to Northwest was too indirect and conjectural to support standing. He also ruled that North-

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4 Judge Bork's opinion represents far less an innovation than the position taken by Justice Powell, concurring in Industrial Union Dept. AFL-CIO v American Petroleum Institute, 448 U.S. 607, (1980). Justice Powell would have required OSHA to engage in cost-benefit analysis in setting standards for occupational exposure to toxic standards in order to protect the competitiveness of American industry and avoid asserted constitutional problems. Justice Powell's position, unlike that of Judge Bork in Jersey Central, lacked foundation in constitutional precedent or in the language or history of the OSHA statute. Justice Powell's willingness to require use of cost-benefit analysis in setting environmental standards should also be contrasted with the far more guarded approach taken by Judge Bork in NRDC v. EPA.

west's claim that it might, as a result of the reauthorization, be required to rehire the pilot was premature.

This last ruling was plainly correct. As to standing, there are basically two lines of Supreme Court precedent on judicial review of administrative decisions, a more permissive line represented by United States v. SCRAP, 412 U.S. 669 (1973), and a more recent and more restrictive line initiated by Justice Powell in Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26 (1976). Simon requires that a litigant establish specific injury traceable to the challenged government action and also show that victory on the merits would eliminate the injury. Judge Bork generally follows the latter line of cases, which easily support his standing rulings in Northwest. My own view is that the injury in fact test is misguided and that it should not in any event be viewed as constitutionally required by Article III. In using the injury in fact test and equating it with Article III, however, Judge Bork is adhering to positions that have been adopted by the Supreme Court.[5]

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5 Judge Bork's opinion for the court in Haitian Refugee Center v. Gracey, 809 F.2d 794 (1987), elaborates the causal "traceability" "redressability" elements of the injury in fact test and insists that they are grounded in Article III and separation of powers principles. The case involved a challenge by the Center, which counselled Haitian refugees, to the legality of a Presidential order instructing the Coast Guard, with the assistance of the INS, to interdict Haitian refugee boats on the high seas and determine whether any of the passengers qualified for admission to the United States as refugees. Plaintiffs intended that the interdiction violated international law, the Constitution, and federal immigration statutes. In a powerful, elaborate, and

Northwest Airlines shows that restrictions on standing can work to the disadvantage of business as well as public interest litigants. It should also be noted that Judge Bork has followed more liberal standing principles in cases governed by D.C. Circuit precedent that employed such principles. See Center for Auto Safety v. Thomas, 806 F.2d 1071, 1080 (1986)(Bork, J. concurring).

The scope of right to intervene in administrative proceedings was at issue in Bellotti v. Nuclear Regulator Comm'n., 725 F. 2d 1380 (1983). Following a determination that Boston Edison's management of its Plymouth nuclear plant was seriously deficient, the NRC imposed substantial fines on Boston Edison and amended its license to require development of a plan for improved management. The Massachusetts Attorney General moved to intervene and sought an adjudicatory

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closely reasoned opinion relying heavily on recent Supreme Court precedent, Judge Bork found that plaintiffs failed to meet the "traceability" and "redressability" requirements respecting their own alleged injury and also lacked third party standing to assert claims of the refugees themselves. He further found that plaintiffs' associational interests were not protected by the legal provisions which they invoked. Judge Buckley's concurring opinion agreed that plaintiffs lacked standing but disagreed with portions of Judge Bork's analysis of causation requirements. Judge Edwards, concurring in part and dissenting in part, believed that the Center had standing but had failed to state any claim on which relief could be granted.

hearing by the NRC on additional issues, including the continued operation of the plant and the implementation of Boston Edison's plans for improvements. Judge Bork wrote the court's opinion upholding the NRC's failure to grant the requested intervention, Judge Wright dissenting.

Section 189(a) of the Atomic Energy Act grants a right of intervention to any person "whose interest may be affected" by a licensing proceeding. Judge Bork reasoned that whether a person's interest was affected by a proceeding depends on the issues presented. Here the NRC had limited the issues to the imposition of a fine and the preparation of a plan. The Attorney General had not shown any stake in these issues, but rather sought to assert Massachusetts' interest in additional issues that he sought to interject into the proceeding. The question was one of authority to define the agenda in a licensing proceeding. Judge Bork found that under the Commission's regulations this authority rested with the Commission, and that it had acted reasonably in limiting the issues here. Allowing would-be intervenors to set the agenda would create the potential for "turning focused regulatory proceedings into a public extravaganza." If in a licensing proceeding the Commission proposed to relax existing safety requirements, those near the plant could intervene because their interest would be affected by the proposed action. But if the Commission, as here, proposed to increase safety requirements which they thought inadequate,

their remedy was not intervention in the licensing proceeding but a separate petition to the Commission to take further measures.

Judge Wright wrote a powerful dissent, arguing that the majority's approach unjustifiedly restricted the intervention rights granted by section 189(a). Here the violations by Consolidated Edison were serious, and the Attorney General, as a representative of residents of the state, had a strong interest in ensuring that adequate corrective steps were taken. Judge Wright argued that the Commission had means other than denial of intervention to avoid unduly protracted or diffuse proceedings, and that petitioning the Commission was not an adequate alternative because the applicable procedures and scope of judicial review were far less extensive than in licensing proceedings.

The essential issue is whether intervention rights should be defined by a relatively clear but restrictive test, such as that adopted by Judge Bork, or whether a more flexible and permissive test should be applied, as urged by Judge Wright. The former has the advantages of clarity and predictability. As the Supreme Court emphasized in Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978), which limited the authority of federal courts to impose new procedural requirements on the NRC, these are important considerations. Also, liberal intervention could threaten the Commission's

ability to make best use of its limited administrative resources and take prompt enforcement action. On the other hand, Judge Bork's distinction between Commission actions that relax existing safety requirements and those that impose new ones seems unduly mechanical. And his willingness to give the Commission almost total discretion to limit the issues in a proceeding is troubling. My own view is that Judge Wright's position is the better one. Judge Bork's approach, however, is supported by substantial considerations that were endorsed by the Supreme Court in Vermont Yankee.

The reviewability of an administrative decision was at issue in Robbins v. Reagan, 780 F.2d 37 (1983). The federal government allocated $2.7 million to rehabilitate a shelter for the homeless operated by CCNV, a local community group. CCNV asserted that additional monies were needed in order to create the "model shelter" assertedly promised by the government, and refused to participate further unless they were provided. The government thereupon withdrew the $2.7 million allocation. CCNV brought suit demanding that the government expend the monies necessary to create a "model shelter."

The per curiam majority held that the withdrawal was reviewable because the general purposes of the Community Services Health Block Grant, as well as requirements that government action be non-arbitrary and factually supported, provided

"law" that the court could apply to decide the validity of the withdrawal. The majority then ruled in favor of the government on the merits. It also upheld the district court's injunction against closing the shelter until alternative housing was developed, on the ground that this course had been proposed in an internal government memorandum on which the court had relied in concluding that the government's withdrawal decision was reasonable.

Judge Bork, dissenting, argued that the controversy was not subject to review. He disagreed that the government's withdrawal was in issue, finding that CCNV had deliberately limited its challenge to the government's refusal to provide the funds needed for a "model shelter." Applying criteria set forth in Heckler v. Chaney, 105 S.Ct. 1649 (1985), he found this refusal unreviewable because relevant statutes provided no standards for judging its legality. Judge Bork also asserted that the injunction was improper because the entire controversy was not reviewable and because the government was under no legal obligation to CCNV to keep the shelter open. It had made no such commitment to CCNV, and CCNV had not sued to enforce any such commitment.

The majority and Judge Bork disagree in their conceptions of the case and their readiness to use judicial power to attempt to help solve the problem of the homeless. The majority was willing to reach out and uphold injunctive relief

through means that are difficult to justify under the traditional view that the courts' responsibility is to adjudicate the controversy presented by the parties. Judge Bork would adhere more closely to the traditional view. His position is cogently reasoned and consonant with precedent.

Agency authority to impose regulatory requirements was at issue in Middle South Energy, Inc. v. FERC, 747 F.2d 763 (1984), and Planned Parenthood Fed'n of America v. Heckler, 712 F. 2d 650 (1983). Judge Bork wrote the court's opinion in the first case and a concurring opinion in the second. Both rejected agency claims of authority to impose novel regulatory requirements.

FERC has authority under the Federal Power Act to suspend changes in existing wholesale electric rates pending a Commission determination of their reasonableness. FERC and its predecessor, the Federal Power Commission, had long construed the statute not to grant suspension authority over initial rates. This distinction has long been traditional in rate regulation. Trans Alaska Pipeline Rate Cases (TAPS), 436 U.S. 631, (1978) read somewhat similar statutory provisions governing pipelines as giving the ICC power to suspend initial rates. FERC thereupon asserted that it had such power.

Judge Bork rejected this assertion, distinguishing TAPS primarily on the ground that the relevant language of the

ICC and FERC statutes was different, and that the most natural and sensible reading of the FERC statute was to limit its suspension authority to changes in existing rates. In dissent, Judge Ruth Bader Ginsburg acknowledged that the case was "close" but would give controlling weight to the goal, stressed in TAPS, of protecting consumers against excessive rates, a goal which applied to initial as well as changed rates. She also argued that the language of the FERC statute could be stretched to cover initial rates.

The case is a classic standoff between two approaches to statutory interpretation: the language of the statute versus its general purpose as understood by the courts. The former approach leads to Judge Bork's conclusion, the latter supports Judge Ginsburg's result. There is no obvious way to reconcile the two in the circumstances of the case at issue. Insistence that Congress take clear responsibility for grants of regulatory authority tips the balance in favor of Judge Bork's position.

In Planned Parenthood, HEW had issued regulations requiring that family planning services receiving federal funds under Title X of the Public Health Act notify parents when contraceptives were prescribed to minors. HEW asserted that this requirement was authorized by 1981 amendments to Title X which provide that recipients "encourage family participation" to "the extent practical." Judge Wright's panel

opinion concluded that the amendments did not give authority to HEW to impose the notification requirement; Judge Bork agreed with his analysis on this issue. This ruling, however, left open the possibility that HEW might seek to reimpose a notification requirement by disclaiming reliance on the 1981 amendments and relying instead on its general Title X authority. Judge Wright, however, found that Title X affirmatively barred HEW from imposing a notification requirement because the House in 1978 had failed to adopt an amendment to Title X requiring notification. He found that this failure to amend the statute amounted to an implicit congressional reification of HEW's established policy of maintaining client confidentiality. He therefore affirmed an injunction against the notification regulations.

Judge Bork dissented on this point, arguing that Congress had never resolved the notification issue. Accordingly, Title X did not mandate confidentiality. It did not follow, however, that HEW had statutory authority to require notification. Under SEC v. Chenery Corp., 318 U.S. 80 (626), the court should not decide that issue until HEW had decided whether to reissue the regulations on the basis of some claim of authority other than the 1981 Amendments. The regulations should therefore be remanded rather than permanently enjoined.

Judge Bork's concurrence is an outstanding and sophisticated application of administrative law principles. Judge

Wright's conclusion that Title X requires confidentiality because the House, many years after enactment of Title X, failed to adopt an amendment requiring notification is illogical and unsound. As Judge Bork notes, such holdings undermine political accountability by supposing that Congress has legislated on a subject by not legislating. Once it is concluded that the statute does not affirmatively bar HEW from adopting a notification requirement, Chenery compels the position adopted by Judge Bork.[6]

Judge Bork's opinions in Middle South and Planned Parenthood require relatively clear statutory warrant for administrative assertions of regulatory authority. This insistence is fully supported by the prevailing approach of the Supreme Court over the past decade, as reflected in decisions such as Midwest Video Corp. v. FCC, 440 U.S. 689 (1979) and Industrial Union Department AFL-CIO v. American Petroleum Institute, supra. As Planned Parenthood illustrates, this insistence serves to protect individual as well as business interests.

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6 Judge Bork's conclusion that remand is the appropriate disposition of the case is, however, subject to question. Remand would be appropriate if the case were brought as a statutory review proceeding, but it was in fact brought under the general federal question jurisdiction of the district court. In these circumstances, the appropriate remedy was to enjoin enforcement of the regulations unless and until HEW decided to repromulagte them under a different rationale. The difference between this remedy and remand is, however, not material.

Three of Judge Bork's opinions involved challenges to agency deregulatory initiatives or agency failure to take regulatory initiatives favored by private parties.

Oil, Chemical & Atomic Workers v. American Cyanamid Co., 741 F.2d 444 (1984) involved a union challenge to an Occupational Safety and Review Commission ruling that a Cyanamid policy on sterilization of women workers did not violate its obligation, under the "general duty" provision in the OSHAct, to furnish each of its employees "employment and a place of employment which are free from recognized hazards" causing serious physical harm. The policy in question prohibited women of childbearing age from working in a plant containing airborne lead in concentrations harmful to fetuses unless the women submitted proof of sterilization. The lead concentrations in the plant did not violate any applicable OSHA standards and it was not economically feasible to reduce them.

In an opinion for a unanimous court, Judge Bork upheld the Commission's determination that Cyanamid's policy was not a "hazard" because the Act was directed at processes and materials which cause injury or disease by operating directly on employees. Judge Bork found this interpretation to be supported by the statute's language and legislative history and consonant with relevant precedent. He noted that

Cynamid's policy put its women employees to "unhappy choices" and the case raised "moral issues of no small complexity" but concluded that the Act was not addressed to the problems raised by the policy and was ill-suited to resolve them. If the company's policy were deemed a "hazard," the company would face the option of either discharging all women in the plant (or transferring them to other positions at lesser pay), or shutting down the plant. Giving women the option of continued employment on proof of sterilization was arguably the best solution to this dilemma. Congress had not remotely considered such issues when it enacted the statute and the court was "not free to make a legislative judgment."

Judge Bork's well-crafted opinion acknowledges the painful and far-reaching implications of the case but provides good reasons for insisting on the limited authority of judicial office. The most appropriate resolution of the problem presented might be to require the employer to offer alternative employment without diminution of pay, but this would effectively require a statutory amendment.

TRAC v. FCC, 801 F.2d 502 (1986) involved FCC regulatory policies for teletext, a new broadcast technology that utilizes the intervals between regular television broadcast signals to transmit signals that can be converted into text messages on viewers' screens. The FCC declined to require

teletext broadcasters to adhere to the same requirements imposed by the FCC on regular television broadcasters regarding (1) reasonable access by political candidates to the medium; (2) "equal time" for all candidates if broadcasters permitted any candidate to use the medium; (3) "fairness doctrine" requirements that broadcasters present a range of differing views on issues of public importance.

Judge Bork's panel opinion reversed FCC ruling (2) as inconsistent with statutory requirememts. It sustained rulings (1) and (3), upholding the FCC's determination that regular broadcasting afforded adequate opportunities for candidate access and for discussion of opposing views on public issues, and its finding that obliging teletext to meet the same requirements as regular broadcasters would stifle the development of this promising new technology. Judge MacKinnon entered a very brief dissent on this last point, which had not been litigated by petitioners; he stated his belief that teletext would not be unduly burdened.

In the course of his opinion Judge Bork rejected FCC arguments that teletext was a "print" medium constitutionally immune from regulation under Supreme Court precedent striking down government regulation of newspaper content. The Court had, however, upheld the constitutionality of FCC regulation of broadcast content on the ground of the physical scarcity of the radiomagnetic spectrum. Judge Bork

doubted that broadcasting regulation could be upheld on scarcity grounds, noting that the machinery and other resources needed for printing were also scarce. But he concluded that the Supreme Court had nonetheless adopted the distinction and that teletext must therefore be classified as broadcasting because it used the airways.

Judge Bork also rejected petitioners' argument that the fairness doctrine is a statutory requirement rather than a discretionary Commission policy, rejecting claims that a 1959 amendment to the Act dealing with "equal time" issues amounted to a backhand congressional adoption of the doctrine. He found that the Commission had adequately supported its finding that application of the doctrine to teletext would be unduly burdensome.

Judge Bork's opinion is thorough, well-reasoned, and persuasive. His discussion of the Supreme Court's print/broadcasting distinction was not, as some have claimed, gratuitous; it was a necessary step in resolving the FCC's contentions. Judge Bork's analysis is also a powerful and indeed devastating demonstration of bankruptcy in a distinction which he must nonetheless follow and does so conscientiously. His refusal to find that the fairness doctrine is mandated by the Act reflects sound principles of statutory interpretation and a healthy insistence on politically responsible policymaking. The opinion's treatment of

regulatory burdens on teletext seems excessively brief, but this may simply reflect petitioners' failure to litigate the issue.

The final decision in this trio is Black Citizens for a Fair Media v. FCC, 719 F.2d 407 (1983), in which a public interest group and individuals challenged the FCC's decision to drastically curtail the information that most applicants for broadcast license renewal are required to file in their applications. The Commission asserted that a combination of other required public filings by broadcasters regarding their broadcast promises and performance, monitoring by public interest groups such as petitioner, and random inspections by FCC staff would ensure adequate compliance by licensees with their public service requirements and enable the FCC to determine, as it is required to do by statute, that renewal serves "the public interest, convenience and necessity".

Petitioners asserted that the alternatives relied upon by the FCC were not adequate to ensure broadcaster compliance with public service obligations, and that the basic justification for the FCC's policy change -- to relieve the Commission and broadcasters of the administrative burdens of paperwork -- was impermissible. Judge Bork's opinion for the majority disposed of these contentions rather easily. Administrative burdens are surely a relevant consideration

and petitioners were unable to discharge the necessarily heavy burden of establishing, in advance of any operating experience, that the Commission's predictions regarding the efficacy of the alternatives upon which it relied were unreasonable.

Judge Wright's dissent provided a far stronger challenge. The Communications Act provides that "the Commission shall determine in the case of each application filed with it . . . whether the public interest . . . will be served by the granting of such application." He argued that this provision obliged the Commission to make a case by case determination of each applicant's performance, that the Commission in the past had so understood its obligations, and that it could not properly make such determinations unless applicants submitted more information than the Commission now required. Judge Bork's response was that the Commission enjoyed considerable statutory discretion in carrying out its responsibilities, that its past practices could therefore be changed, and that the Commission had provided well-reasoned justifications for the changes in issue. Judge Bork's position is amply supported by other recent decisions in the D.C. Circuit and the Supreme Court that allow the FCC considerable flexibility to cut back broadcast regulatory requirements that it had previously imposed, and that reject arguments by Judge Wright and several of his colleagues that such requirements are mandated by the Communications Act. See, e.g., FCC v. WNCN Listener Guild, 450 U.S. 582 (1981).

The basic issue presented in San Luis Obispo Mothers for Peace v. NRC, 789 F.2d 26 (1986)(en banc) was whether the NRC's acted arbitrarily in failing to consider the potential complicating effects of an earthquake in response plans for a radiological emergency when it licensed the Diablo Canyon nuclear plant in California. Judge Bork wrote the opinion for an en banc court. Chief Judge Wald wrote a dissenting opinion for four justices.

Judge Bork convincingly refuted petitioners' claims that the Commission's failure to consider earthquakes violated its own regulations and that the petitioners should have been allowed to discover transcripts of a closed Commission meeting. Whether the Commission's refusal to consider earthquakes in connection with emergency response plans was reasonable presented a closer question. In licensing the plant, the Commission had found that an earthquake of magnitude 7.5 or greater could initiate a radiological emergency at the plant, but concluded that the likelihood of such an earthquake was too small ("so small as to be rated zero") to be a factor in the licensing decision, a determination upheld in a previous D.C. Circuit decision. Relying on this determination, the Commission held that the emergency plans need not consider the occurrence of a 7.5 magnitude initiating earthquake. Further, it held that the plans need not consider the possibility that an earthquake (whether greater

or less than 7.5 magnitude) might occur at the same time as a radiological emergency initiated by other means because the likelihood that both events might occur simultaneously (1/6,500,000 during the life of the plant) was too low. Judge Bork upheld these determinations.

Chief Judge Wald entered a strong dissent arguing that emergency plans should by their very nature be based on worst case assumptions. Accordingly, they should deal with the possibility that an earthquake less than 7.5 magnitude would, contrary to the Commission's predictions, initiate a radiological emergency. Also, in considering the possible complications of an earthquake in connection with an emergency initiated by other causes, the plan must be based on the premise that such an emergency would occur. If the occurrence of an emergency was assumed, the simultaneous occurrence of a serious earthquake was not so improbable that it need not be considered. Finally, Judge Wald thought the Commission's refusal to consider earthquakes, which she attributed to its desire to expedite licensing of an already long-delayed plant, was at odds with its consideration in other cases of infrequent natural events such as 100-year floods, although she admitted that petitioners had failed to demonstrate decisional inconsistency by the Commission.

The issues presented by cases such as this present great difficulties for reviewing courts in reviewing highly tech-

nical issues of potentially great policy importance. Judge Bork would accord rather more deference to the fact findings and policy judgments of the Commission than would Chief Judge Wald. In this he has the support of the Supreme Court, which in Baltimore Gas & Electric Co. v. NRDC, 462 U.S. 87 (1983) rejected an analagous challenge to NRC determinations regarding the likelihood of releases from stored radioactive wastes.