Ronald Reagan Presidential Library
Digital Library Collections

This is a PDF of a folder from our textual collections.

Collection: Bryan, Patricia Mack: Files
Folder Title: [Robert Bork]: Carla Hills Group Analysis of Bork (4)
Box: OA 19247

To see more digitized collections visit:
https://reaganlibrary.gov/archives/digital-library

To see all Ronald Reagan Presidential Library inventories visit:
https://reaganlibrary.gov/document-collection

Contact a reference archivist at: reagan.library@nara.gov

Citation Guidelines: https://reaganlibrary.gov/citing

National Archives Catalogue: https://catalog.archives.gov/

JUDGE ROBERT BORK'S DECISIONS IN WHICH HE WROTE NO OPINION: AN ANALYSIS OF THE REGULATORY AND BENEFIT CASES

By Robert A. Anthony*
Professor of Law
George Mason University
School of Law

A. THE SIGNIFICANCE OF THIS SURVEY

Most of the attention given Judge Bork's judicial record has been directed at the cases in which he wrote an opinion. Such attention is eminently appropriate, since the opinions present a direct expression of his views.

But little attention has been devoted to the more numerous cases in which Judge Bork participated and joined in the decision, but did not himself write an opinion. The assessment of Judge Bork should take these decisions into account.

There are almost 300 such cases. In response to allegations that Judge Bork has favored business against government agencies and favored the agencies against individuals, this survey examines the cases in which Judge Bork's court passed upon agency actions that involved regulatory issues (48 cases) and benefits entitlement (8 cases).

Even though they contain no written Bork opinion, these somewhat neglected cases are informative.

If the primary interest is in the outcomes of the cases, and in whether those outcomes show bias, these cases are every

*Professor Anthony was Chairman of the Administrative Conference of the United States from 1974 to 1979.

bit as relevant as those in which he did write an opinion. Any bias ought to show up equally in both.

Beyond that, these cases demonstrate his manner of working in concert with others. Each decision is the product of collaborative consideration and discussion among the three judges of the panel. The outcomes and accompanying opinions show concretely the ways Judge Bork has worked with other judges, respecting and accommodating their views without relinquishing the essentials of his own. While the opinions a judge joins may reflect his personal style of reasoning less exactly than those he writes himself, he is nevertheless accountable for them. Such opinions are especially relevant in appraising qualifications for the Supreme Court, whose members each write fewer opinions because all nine of them sit on all cases.

In the 56 regulatory and benefits cases covered by this survey, Judge Bork sat and concurred with each of his D.C. Circuit colleagues, at least once and usually several times. The issues they passed upon stretched across a great range. Almost all were decided unanimously. There were only three dissents among the regulatory cases and one in the benefits cases.

Judge Bork has concurred with colleagues of all political persuasions in a very high percentage of his decisions -- not only in the 56 cases surveyed here, but in all of his cases (see White House briefing papers, part 6). Critics have asserted that the mere fact that Judge Bork concurred with a liberal colleague

ipso facto proves that the case was noncontroversial, and therefore irrelevant to the evaluation of Judge Bork. They thus attempt to divert attention from the unanimous decisions, which in fact are highly revealing.

The critics' position is fallacious, for two reasons. First, it is not the fact of concurrence or dissent that is critical. What is critical is the substance of what was concurred in: what does a decision show about the judge's position on that particular issue involving those specific parties? Second, the unanimous cases contradict the charges of bias. If Judge Bork harbored a bias regarding a certain class of parties or subject matter, the bias would exert itself not only in the split-decision cases but also in the process of deciding all cases involving the same kinds of parties or subject matter.

As this analysis shows, large proportions of Judge Bork's non-opinion decisions in the regulatory field favored the agency or nonbusiness party against business, and in the benefits area favored the individual against the agency. These decisions refute the claims of bias. Their unanimity cannot change that fact.

B. CASES INVOLVING REGULATION

The report prepared for Senator Biden states in a heading that "Judge Bork's Opinions Show a Decidedly Pro-Business Pattern" (p. 39). Astoundingly, the report cites only two cases

to support this highly unfair and misleading allegation (p. 39-40). Some "pattern"!

The 48 regulatory cases covered in the present survey show quite a different pattern. They are analyzed in three groups: First are those cases in which a regulatory issue was contested between a federal agency and business interests. Second are those where business organizations were the real parties in interest on both sides of the matter brought before Judge Bork's court. Third are cases (not all involving business) where nonbusiness groups sought to reverse regulatory agency action.

Needless to say, these 48 cases involved an enormous span of varied issues and procedural postures. In such circumstances, there obviously are limits on how informative an analysis can be when it is based on measuring outcomes against the identity of the parties. Nevertheless, such an approach has been made the framework of this analysis, for two reasons. First, the critics of Judge Bork have charged bias, and bias is revealed or refuted most tellingly by outcomes. Second, opponents of Judge Bork have argued heavily in "box score" terms, inviting rejoinder in kind.

1. <u>Business v. Regulatory Agency</u>

The Public Citizen paper states "that in cases in which businesses challenged agency actions, Judge Bork often overturned the agency and ruled in favor of the business interests" (p. 15). In the cases here surveyed, it wasn't so very "often" that this happened. Of 12 cases in this first group, Judge Bork decided 7

for the agencies and against the business interests, 4 for the business interests, and one with mixed results.

The paper prepared for Senator Biden asserts that Judge Bork's approach "favors big business against the government" (heading F, p. 39, emphasis added). But consider: Where Judge Bork ruled in favor of business (including the case with mixed results), the winners were Athlone Industries, Yakima Valley Cablevision, Wisconsin Electric Power, Quincy Cable TV, and (a partial winner) the National Soft Drink Association -- a couple pretty big, the others not so big. In 6 of the 7 cases ruling against business, by contrast, the losers were indubitably big: American Telephone and Telegraph, Kennecott, Tennessee Gas Pipeline division of Tenneco, American Trucking Associations, Kansas Gas and Electric, and General Electric Uranium Management Corporation. (The seventh case involved a licensed perishable commodities company.)

Judge Bork's panel dismissed AT&T's case on appeal because its petition to review was filed after the FCC's order had been announced but before the jurisdictional 60-day filing period, which began after publication in the Federal Register (Western Union Telegraph Co. v. F.C.C., 773 F.2d 375 (1985)). He voted to reduce the attorney's fees previously awarded Kennecott as a partially successful challenger of EPA regulations (Kennecott Corp. v. E.P.A., 804 F.2d 763 (1986)). His panel rejected on ripeness grounds Tennessee Gas's challenge to a Federal Energy Regulatory Commission rule change (Tenn. Gas Pipeline Co., A Div.

of Tenneco v. F.E.R.C., 736 F.2d 747 (1984). Judge Bork joined Judge Scalia in ruling against the American Trucking Associations' attack on ICC actions that enlarged competition among truckers (American Trucking Associations, Inc. v. I.C.C., 697 F.2d 1146 (1983)). His panel upheld the FERC's disallowance of Kansas Gas and Electric's use of "minimum billing demand clauses" in contracts with its customers (Kansas Gas & Elec. Co. v. F.E.R.C., 758 F.2d 713 (1985)). Judge Bork's panel rejected General Electric Uranium's complaint that the Department of Energy was charging excessive fees for disposal of spent nuclear fuel (General Elec. Uranium v. U.S. Dept. of Energy, 764 F.2d 896 (1985)). And he voted to uphold USDA orders debarring from employment stockholders of a licensee company that had violated the perishable commodities laws (Martino v. United States Dept. of Agriculture, 801 F.2d 1410 (1986)).

It assuredly cannot be said that these 7 pro-regulatory decisions disclose a pro-business bias. Nor can such a bias be discerned in the cases in which Judge Bork ruled in favor of business interests. It is amply clear that in none of his decisions was he engaging in some sort of pro-business activism, by reaching beyond the established law to arrive at a desired result. The concurrence of liberal judges on the panels that decided these cases attests to that. These judges would not have countenanced any sort of pro-business ruling that was not tied to normal legal moorings.

Four cases in this group were decided in favor of business

interests, and a fifth partially so. Judges Wilkey, McGowan and Bork held that the CPSC overreached its statutory powers when it attempted to impose civil penalties administratively (Athlone Industries v. Consumer Product Safety Commission, 707 F.2d 1485 (1983)). In Yakima Valley Cablevision, Inc. v. F.C.C., 794 F.2d 737 (1986), Judge Bork joined the opinion of Judge Edwards chastising and reversing the FCC for abruptly changing its practice of passing upon the legality of cable franchise fees. With Judges Spottswood Robinson and Starr, Judge Bork held for utilities in their attack upon unauthorized DOE nuclear waste fees (Wisconsin Elec. Power Co. v. Dept. of Energy, 778 F.2d 1 (1985)). Finally, in a major freedom of speech decision, Judge Bork joined with Judges Wright and Ruth Ginsburg in striking down, as violative of the First Amendment, FCC regulations requiring cable operators to carry nearby over-the-air television programming (Quincy Cable TV, Inc. v. F.C.C., 768 F.2d 1434 (1985), earlier proceeding at 730 F.2d 1548 (1984)).

One case produced mixed results for business. National Soft Drink Ass'n v. Block, 721 F.2d 1348 (1983). Pursuant to a then-recent amendment to the Child Nutrition Act, the Secretary of Agriculture promulgated regulations restricting the sale of soft drinks and other junk food in public schools where federally subsidized breakfasts and lunches are served. Sale of the junk foods was prohibited until after the last lunch meal of the day at the school. Senior Judge McNichols of the District of Idaho, joined by Judge Bork, upheld the regulations over several general

lines of attack. But they held that the statute, in accordance with the prior practice, authorized the prohibition of junk food sales only during periods of actual meal service, rather than all day until after lunch. Judge Wilkey dissented. (The Public Citizen paper, incidentally, grievously misstates this case. It declares that Judge Bork's panel held that the agency "did not have the authority to ban the sale of soft drinks in schools during mealtimes" (p. 34). In fact, the panel held precisely the opposite.)

2. Business Interest v. Business Interest

Although brought against an agency, an appeal to Judge Bork's court frequently represents the protest by one business interest against agency action favoring another business interest. Judge Bork participated in twelve such cases within this survey. All were decided unanimously. If one were searching most diligently for a pro-business bias, it would be very hard to find even a suspicion of it in these cases. They were business against business.

The paper prepared for Senator Biden charges that Judge Bork "favors big business", albeit that he favors big business "against the government." The cases certainly cannot support any suspicion that he favors big business over little business in his decisions. The parties in these cases were pretty evenly matched: Railroad against railroad (Burlington N.R. Co. v. U.S., 731 F.2d 33 (1984); Southern Pacific Transp. Co. v. I.C.C., 736 F.2d 708 (1984)); utility against railroad (S. Carolina Elec. &

Gas Co. v. I.C.C., 734 F.2d 1541 (1984)); pipeline against major distributor (Atlanta Gas Light Co. v. F.E.R.C., 756 F.2d 191 (1985); Wisconsin Gas Co. v. F.E.R.C., 758 F.2d 669 (1985)); shippers' group against bus freight carriers (Drug & Toilet Preparation Traffic Cont. v. U.S., 797 F.2d 1054 (1986)); major shipper against railroads (Aluminum Co. of America v. United States, 790 F.2d 938 (1986); Ford Motor Co. v. I.C.C., 714 F.2d 1157 (1983)); trucker against competing truckers (Global Van Lines, Inc. v. I.C.C., 804 F.2d 1293 (1986)); Bell operating companies against MCI and other long distance carriers (Bell Telephone Co. of Pennsylvania v. F.C.C., 761 F.2d 789 (1985).

In one case, the panel upheld the big guy, Wisconsin Bell, in its refusal to make pole attachments for the little guy, Paragon Cable, after Paragon's municipal franchise had been revoked (Paragon Cable Television, Inc. v. F.C.C., 822 F.2d 152, (1987).

In a "race to the courthouse" involving seven filings on the same day, the court chose two winners (Associated Gas Distributors and the Ohio Office of Consumers' Counsel) based on time of filing, but made no other disposition among the parties (Associated Gas Distributors v. F.E.R.C., 738 F.2d 1388 (1984)).

As noted above, Public Citizen asserts that "in cases in which businesses challenged agency decisions, Judge Bork often overturned the agency and ruled in favor of the business interests" (p. 15). We saw in the preceding section that, in 12 cases involving business challenges of agency regulatory action,

this happened just 5 times, including one in which the agency's decision was overturned only in part. Of the 12 cases just discussed in the present section, in which business interests were pitted against other business interests, Judge Bork reversed the agency in only 4. He upheld the agency in 7 cases (including one, Southern Pacific Transp. Co. v. I.C.C., 736 F.2d 708 (1984), in which there was remand on one minor aspect of a multipart appeal). In the twelfth case, the agency's action was not passed upon.

3. Cases Where Nonbusiness Organizations Sought Review

The cases in which Judge Bork participated but wrote no opinion include 24 regulatory cases in which nonbusiness organizations sought review of agency action. The petitioners included a broad assortment of activist citizen groups and some state and local governmental units.

In assessing his record in these cases, one may recall that Judge Bork is conservative, in the sense that he is disinclined to stretch law and precedent beyond their established foundation, as judges are often urged to do by activist groups seeking change through the judicial process. And though, as the cases show, Judge Bork harbors no pro-business prejudice, he certainly is in no way anti-business. Thus his philosophy stands in contrast to many activist groups that, for whatever reason, are consistently postured in support of or in opposition to business interests.

Particularly in light of these considerations, Judge

Bork's record of outcomes in these cases is a balanced one. Nine favored the citizen or public organizations: 8 reversed the agency and one affirmed the agency but ruled for the intervenor environmental organization. Fifteen others affirmed the agency, including one which produced mixed results for the environmental group.

Prevailing parties for whom Judge Bork ruled in this group of cases included a public housing tenants' group, environmental action organizations, a labor union, Navajo Indian groups, a radio listener group, consumers' organizations, and a state asserting its right to regulate beyond the federal minimum.

In Ashton v. Pierce, 716 F.2d 56 (1983), Judge Bork upheld the claim of public housing tenants for a broader reading of the Lead-Based Paint Poisoning Prevention Act and for stricter enforcement against paint poisoning hazards than was being pursued by HUD.

Judge Bork joined in a strong opinion by Judge Wald setting aside DOE determinations not to promulgate mandatory energy-efficient standards for major types of household appliances and sternly directing DOE to reappraise its appliances program (Natural Resources Defense Council v. Herrington, 768 F.2d 1355 (1985)).

On the petition of United Transportation Union officials, Judges Bork, Edwards and Swygert (Senior Judge of the 7th Circuit) reversed an ICC order that had denied statutory labor protections to railroad workers who were displaced by a

railroad's abandonment of a stretch of track but were not employed by that railroad. The panel held that the displaced union employees should be given the statutory protections even though they were employed by a different railroad. Black v. Interstate Commerce Commission, 814 F.2d 769 (1987).

Again voting to set aside an ICC action, Judge Bork ruled in favor of a group of petitioners representing various Navajo Indian interests in northwestern New Mexico. The court remanded an order which had approved a new rail line, near Navajo lands, without adequately considering allegations of misconduct regarding the preservation of Navajo sites, and without considering the Navajos' right to quiet possession of their domains. New Mexico Navajo Ranchers Assn v. I.C.C., 702 F.2d 227 (1983).

Judge Bork ruled in favor of a radio listeners' group that petitioned the FCC to deny renewal of a radio station's broadcast license, after the station had changed its programming format. The court set aside the Commission's denial of the group's petition without a hearing. The decision is significant because the petition-to-deny procedure is a citizen group's most potent tool to accomplish change in broadcast cases. The opinion joined by Judge Bork clarifies in a liberal direction the standard for granting hearings on petitions to deny. Citizens for Jazz on WRVR, Inc. v. F.C.C., 775 F.2d 392 (1985).

In Consumers Union of U.S. Inc. v. F.C.C., 691 F.2d 575 (1982), the court en banc, including Judge Bork, unanimously held

unconstitutional the legislative veto provisions by which Congress had purported to nullify the FTC's used car rule.

The DOT's Federal Highway Administration and the ICC's Office of Compliance and Consumer Assistance opposed the grant of a trucking certificate to an allegedlly unfit applicant, and on review Judge Bork's panel vacated the grant (Department of Transp., Fed. Hy. Admin. v. I.C.C., 733 F.2d 105 (1984)).

The FCC purported to preempt state regulation of subchannels of federally-licensed FM channels, even where the service was purely intrastate. Judge Buckley, joined by Judges Wright and Bork, held that the FCC lacked statutory authority to preempt such intrastate service, leaving the State of California free to regulate it. People of State of Cal. v. F.C.C., 798 F.2d 1515 (1986).

The case of Town of Summerville, W.Va. v. F.E.R.C., 780 F.2d 1034 (1986) is included here because the town was seeking a license in its proprietary capacity, and intervenor Friends of the Earth, opposing the town, prevailed before Judge Bork's panel. The court upheld the agency's dismissal of the town's application to develop a hydroelectric project on a river that was under consideration for inclusion in the national wild and scenic rivers system.

In the above 9 cases, just mentioned, Judge Bork upheld the positions of nonbusiness interests 6 times in dealing with economic regulation and 3 times in cases involving health, safety and environmental regulation. The corresponding numbers for the

cases in which Judge Bork upheld the agency are 7 concerned with economic and 8 with health, safety and environmental regulation -- 15 altogether.

In those 15 decisions, Judge Bork joined panel opinions by or with Judges Robinson, Wright, Wald, Mikva, Edwards, Ruth Ginsburg, Scalia, Starr, Buckley, Wilkey, Robb, Oberdorfer (District of the District of Columbia), Gasch (District of the District of Columbia), Jameson (District of Montana) and Gordon (Western District of Kentucky). In only two of these 15 cases were dissenting opinions written, both by Judge Wald.

Again, an examination of the decisions shows nothing that can be seen as indicative of a bias or activism favoring business. The decisions are sensible and solidly rooted in the law. In most of them, Judge Bork was joined by judges of established liberal views who, again, would surely countenance no activism on the right.

In the economic regulation area, the single nonunanimous decision was Cal. Ass'n of Physically Handicapped v. F.C.C., 778 F.2d 823 (1985). A handicapped persons group challenged the FCC's use of a "short-form" application in approving the transfer of stock interests in Metromedia, a licensed owner of broadcast stations. The group claimed injury from Metromedia's alledged longstanding neglect of its responsibilities to the hearing impaired and failure to exert reasonable efforts to hire the handicapped. Judge Ruth Ginsburg, joined by Judge Bork, held that the handicapped group lacked standing because the challenged

action (use of the short form and the transfer) did not cause its injury, as is required for a justiciable case or controversy under Article III of the Constitution. Judge Wald in dissent found standing based on injury from the transfer.

Judge Bork again (together with Judge Buckley) joined an opinion of Judge Ruth Ginsburg's in Committee to Save WEAM v. F.C.C., 808 F.2d 113 (1986). A group of big band music aficionados petitioned to deny the transfer of station WEAM to a new owner planning a country music format. In pursuance of its policy not to inquire into whether proposed radio entertainment format changes are in the public interest, the Commission granted the transfer without a hearing. Since the controlling FCC policy had been sustained by the Supreme Court and was properly applied in this case, the Commission's action was upheld.

In National Black Media Coalition v. F.C.C., 760 F.2d 1297 (1985), Judge Scalia, joined by Judges Bork and Starr, dismissed the appeal where appellants failed to file their notice of appeal within the statutory period. The panel held that the appeal deadline is jurisdictional, and equities possibly favoring appellants could not serve to create jurisdiction where it did not otherwise exist under the statute. (It may be noted that this is virtually identical to the basis on which Judge Bork dismissed an appeal brought by AT&T (Western Union Telegraph Co. v. F.C.C., 773 F.2d 375, (1985), described above.)

In an unrelated case involving the same parties, Judges Jameson, Wright and Bork upheld an FCC rule amendment exempting

small market television broadcasters from the requirement of conducting surveys to ascertain community need. Noting that only the survey requirement and not the underlying ascertainment requirement had been removed, the court held that the FCC had rationally based the change on the hypothesis that small-market broadcasters know their communities well enough to ascertain needs without a formal survey. National Black Media Coalition v. F.C.C., 706 F.2d 1224 (1983).

In City of Charlottesville, Va. v. F.E.R.C., 774 F.2d 1205 (1985), Judges Bork and Gasch joined an opinion by Judge Scalia upholding FERC approval of a new accounting method for allocating tax allowances among several utilities. The new method tended to result in higher rates for customers of profitable utilities, since tax losses of affiliate companies could no longer be passed through, but it more accurately reflected the cost of service to those customers.

In Cities of Anaheim and Riverside, Cal. v. F.E.R.C., 692 F.2d 773 (1982), the cities sought to compete with Southern California Edison in development of a hydroelectric site located near other existing facilities of Edison. The cities appealed Commission actions which did not preclude their competitive application but, they contended, reduced its effectiveness. Judge Jameson, joined by Judge Bork, held that the appeal was premature and therefore not ripe for review. Judge Mikva concurred, holding that some aspects (though not all) were ripe for review, but agreeing with the result by finding the

Commission's actions proper on the merits.

The final economic regulation case in which Judge Bork ruled against a nonbusiness challenger to agency action is Pennsylvania Public Utility Com'n v. U.S., 812 F.2d 8 (1987). Judge Oberdorfer, joined by Judges Bork and Buckley, rejected the Pennsylvania commission's contention that bus transportation of airline passengers and crew between Baltimore-Washington Airport and Columbia, Maryland was intrastate commerce.

In the realm of health, safety and environmental regulation, the single case that elicited dissent was San Luis Obispo Mothers for Peace v. N.R.C., 751 F.2d 1287 (1984), reheard en banc, 789 F.2d 26 (1986). Since Judge Bork wrote the majority opinion en banc, this case strictly need not be included in this survey of those cases in which he participated but did not write an opinion. Because the earlier proceeding (751 F.2d) was such a case, however, it is included. Both proceedings upheld the NRC's issuance of nuclear plant operating licenses over intervenors' objections, which were based on the concern that efforts to cope with a breakdown might be impeded by a simultaneous earthquake along nearby fault lines. In the originial panel decision, Judge Wilkey, joined by Judge Bork, held that the NRC had reasonably concluded that the possibility of an earthquake occurring at the same time as an independently-caused radiological emergency at the facility was so remote as to be insignificant. Judge Wald dissented. After rehearing en banc, parallel results ensued. Judge Bork wrote the majority opinion, which was joined by Judges

Edwards, Scalia and Starr and partially by Judge Mikva, who concurred separately. Judge Wald again wrote in dissent, and was joined by Judges Robinson, Wright and Ruth Ginsburg.

In another case where an operating license for a nuclear facility was opposed because of the asserted risks of seismic activity, Judges Bork and Scalia joined an opinion by Judge Starr, which painstakingly reviewed the record and found the agency action to be fully supported. Carstens v. Nuclear Regulatory Com'n, 742 F.2d 1546 (1984).

A per curiam opinion of Judges Edwards, Bork and Buckley upheld NRC procedures and the resulting NRC decision in Oystershell Alliance v. United States Nuc. Reg., 800 F.2d 1201 (1986). In the interest of reducing delays, the NRC issued a temporary operating license before all final proceedings including reconsideration were completed. The panel held that the temporary approval was proper, despite pendency of petitioners' motions for reconsideration, since the approval was without prejudice to further consideration of the merits. Judge Bork's panel also held that it was proper and indeed mandatory for the Commission to take account of all relevant evidence in the administrative record, whether or not contained in the adjudicatory record, provided the information was available to all parties.

In Cabinet Mountains Wilderness v. Peterson, 685 F.2d 678 (1982), conservation groups objected to a mining company's plan to conduct exploratory drilling on claims it held within a

wilderness area. Since each drill site was limited to an area of 20 feet by 20 feet, the numerous sites to be explored over the planned four-year period would occupy a total combined area of about one-half acre. After completing several environmental and biological assessments, and imposing restrictive conditions including those suggested by the Fish and Wildlife Service to protect grizzly bears, the Forest Service concluded that the plan would have no significant impact on grizzly bears, and approved it as modified. A panel of Judges Gordon, Bork and Robb held that in these circumstances, under established D.C. Circuit criteria, the Forest Service properly declined to prepare a full environmental impact statement.

The same panel upheld EPA's 1979 determination, overriding a State's preferences, that funding for advanced waste treatment projects should be deferred in favor of funding basic treatment facilities for municipalities that did not yet have them. People of the State of Cal. v. United States E.P.A., 689 F.2d 217 (1982).

Judge Wald wrote the opinion, joined by Judges Robinson and Bork, in National Wildlife Federation v. Gorsuch, 693 F.2d 156 (1982). The panel upheld EPA's decision that certain dam-induced water quality changes should be regulated under state-developed management plans, pursuant to the Clean Water Act, rather than under the National Pollutant Discharge Elimination System.

The penultimate case in this series has attained a modest

fame by virtue of Judge (now Justice) Scalia's opening waggery:

> This case, involving legal requirements for the content and labeling of meat products such as frankfurters, affords a rare opportunity to explore simultaneously both parts of Bismarck's aphorism that "No man should see how laws or sausages are made."

Community Nutrition Institute v. Block, 749 F.2d 50, 51 (1984). The Scalia opinion, joined by Judges Bork and Wilkey, upheld USDA regulations governing the labeling of meat products made partly with meat mechanically separated from bone. The rules were found to be authorized, reasonable, and supported by the record, which among other things included the findings of a panel of scientists that bone particles in the permitted amounts posed no health or safety risks except perhaps to persons sensitive to calcium and to infants, for whom protections were included in the regulations.

The final case, consolidating two proceedings, yielded mixed results. Judges Ruth Ginsburg, Bork and Buckley upheld an EPA safe drinking water rule against crossfire from an environmental organization, which wanted a stricter rule, and from a state health department, which urged a more tolerant rule or no rule at all. Natural Resources Defense Council v. Environmental Protection Agency, 812 F.2d 721 (1987).

The 48 cases reviewed in this Section B -- including those in which Judge Bork held for business interests, those in which he ruled for nonbusiness interests, and those in which he upheld the agencies -- when patiently inspected, belie any suggestion

that Judge Bork acts upon a predispostion in favor of business. These decisions and opinions can be searched in vain for any iota of evidence that Judge Bork decided them on the grounds of bias, ideology or politics. To the contrary, the pattern they trace is one of taking each case on its merits, and deciding it conscientiously and with scrupulous even-handedness.

C. CASES INVOLVING BENEFITS

The paper prepared for Senator Biden charges that Judge Bork's approach "favors the government against the individual" (heading F, p. 39).

It should be noted that the report cites not a single case to substantiate this harsh change. And it nowhere cites any of Judge Bork's decisions in the benefits entitlement field.

If this allegation had substance, the bias would manifest itself readily in the decision of cases involving the administration of federal benefits entitlement programs.

Judge Bork took part in 8 decisions in this category. Again, the cases belie the allegations of bias.

In 3 of the 8 decisions, individuals sought review of agency actions denying their claims. In all three, Judge Bork ruled in favor of the individuals' claims and against the agencies. Moreover, in two of these three decisions, Judge Bork's panel took strong and rather unusual measures to direct

positive agency action in the claimants' favor.

In three further cases, organizations representing benefits recipients challenged agency regulations or financing decisions. Judge Bork held for the benefits recipients' group in one case, ruled for the agency in a second, and dismissed the challenge in the third case on the basis that Congress had precluded court review by statute.

Thus, in the six cases just mentioned, Judge Bork held in favor of benefits recipients in 4 (including all three in which individuals sought to overturn agency denial of their benefits), and for the agency in 2 (including one dismissed for lack of jurisdiction).

Completing the category of Judge Bork's decisions involving benefits entitlement are two cases in which hospitals sought increased reimbursment under Medicare. They are included here principally in the interest of presenting all the cases in this group. The Medicare decisions do not involve the direct benefit claims of individuals, although persons relying upon Medicare may benefit indirectly from increased levels of reimbursement to hospitals. Judge Bork decided one of these cases for the hospital, and one for the agency.

The three cases involving individuals' claims for benefits -- in all of which Judge Bork held for the individual -- are these:

Ganem v. Heckler, 746 F.2d 844 (1984), opinion by Judge

Mikva, joined by Judges Bork and Starr. The Social Security benefits claimant was a citizen of Iran who had lived in the United States. Benefits are payable to such persons if the country of their citizenship has a general social insurance or pension system and that system does not discriminate against Americans. Although SSA resumed benefit payments to the claimant when she returned to the United States in 1984, SSA denied benefits for a prior period of residence in Iran, on the ground that it could not obtain from the revolutionary government of Iran the needed information about its social security system. The court issued the extraordinary writ of mandamus compelling the Secretary of HHS to adopt realistic means to determine Iranian law.

Vance v. Heckler, 757 F.2d 1324 (1985), opinion by Judge Wright, joined by Judges Bork and Scalia. The issue was whether the claimant's son was eligible for Social Security child's insurance benefits on the ground that he was the child of a deceased worker. Although the SSA administrative law judge, the Secretary and the district court had found the evidence insufficient to support a paternity finding, Judge Bork's panel held that a letter written by the putative father was an acknowledgement of paternity sufficient to meet the requirements of 42 U.S.C. sec. 416(h)(3)(C)(i)(I)! The court took the unusual step of remanding to the district court with instructions to direct the Secretary to award benefits.

Carter v. Dir., Office of Workers' Comp. Programs, 751

F.2d 1398 (1985), opinion by Judge Scalia, joined by Judges Bork and Starr. The court held that the agency could not offset a tort recovery against the benefits due the claimant under the Longshoremen's and Harbor Workers' Compensation Act.

The cases entailing challenges to general agency actions, rather than to the denial of individuals' claims, are these:

City of New Haven, Conn. v. United States, 809 F.2d 900 (1987), opinion by Judge Edwards, joined by Judges Bork and Swygert. Municipalities, community groups and expectant recipients of benefits challenged the President's deferral of funds earmarked for housing assistance programs administered by HUD. The statutory authorization for such deferrals contained a legislative veto clause. The court held that the legislative veto was unconstitutional, and since it was not severable the entire statute was invalid, leaving no authority upon which to base the deferrals.

Petry v. Block, 737 F.2d 1193 (1984), opinion by Judge Starr, joined by Judges Wald and Bork. Participants in the Child Care Food Program challenged a USDA regulation. The court ruled that the Secretary had followed proper procedures in issuing the regulation to implement spending reductions mandated by the Omnibus Budget Reconciliation Act.

Gott v. Walters, 756 F.2d 902 (1985), vacated and remanded with directions to dismiss, 791 F.2d 172 (1985), opinion by Judge Scalia joined by Judge Bork, dissent by Judge Wald. Veterans groups challenged VA documents establishing methodologies for

assessing claims of radiation injury in the determination of benefits. They argued that the VA had not duly observed the Administrative Procedure Act or its own regulations in promulgating these documents informally instead of through rulemaking procedures. The court held that the unusual preclusion provisions of the veterans' benefits statutes foreclosed judicial review of the matter. (After decision to rehear the case en banc, the parties jointly moved to remand the case to the district court, with directions to vacate all orders and dismiss, and the circuit court en banc unanimously so ordered.)

The Medicare cases are Walter O. Boswell Memorial Hosptial v. Heckler, 749 F.2d 788 (1984) (opinion by McGowan, joined by Mikva and Bork), remanding HHS regulations reducing the share of hospitals' malpractice insurance to be reimbursed by Medicare, and Villa View Community Hosptial v. Heckler, 728 F.2d 539 (1984) (per curiam, Wright, Mikva and Bork), holding that hospitals without bedside monitoring for cardiac patients do not qualify for the higher level of "special care unit" reimbursement.

These cases were decided on the merits, not on politics or ideology. In them, Judge Bork joined in decisions with colleagues across the spectrum of supposed political and policy identifications. In only one was there a dissent. These decisions disclose no trace of bias. Indeed, they evidence Judge Bork's receptivity to the claims of individuals and of organizations seeking benefits in their behalf.

The author thanks Charles Ablard, Joan Anthony, Peter Anthony, Marc Hoberman, Lee Liberman, Martha Moo, Patrick W. Murphy, Fred Nelson, Arthur Schulcz, Jennifer Smith, Denise Wallace, Scott Whitney and Katherine Yarbrough for their help.

Arlington, Virginia

September 10, 1987

Pat's - original

JUDGE BORK, SEPARATION OF POWERS AND SPECIAL PROSECUTOR BILLS

BY GARY LAWSON
RESEARCH FELLOW
YALE LAW SCHOOL

During his service as a judge and executive branch official, Judge Bork has dealt at great length with issues that, from a broad standpoint, involve the constitutional allocation of authority among the three branches of government. For example, his well-known writings and speeches on the proper role of the courts in our constitutional democracy directly implicate the separation of powers. However, for good reasons or bad, this fundamental issue of the judicial role is generally treated as a subject distinct from "separation of powers." The same is true of numerous other subjects that also address, at some level, the proper allocation of governmental powers, such as administrative law, statutory interpretation, and standing. The term "separation of powers" is instead often reserved for a class of constitutional issues dealing with the governmental _process_ or pertaining to the _enforcement_ of the laws; issues generally considered to involve "separation of powers" in this sense are the proper modes for appointment and removal of federal officials, the constitutionality of legislative or line-item vetoes, and the propriety of special prosecutors not subject to

plenary executive branch control. This essay explores Judge Bork's publicly-expressed views on this narrower class of separation-of-powers questions. What emerges is a sketchy, but nonetheless discernible, approach to separation of powers that is very similar to the view reflected in Supreme Court decisions of the past decade.

Like most federal judges, Judge Bork has had no occasion to write an opinion directly addressing separation-of-powers issues. The closest he has come is a concurring opinion in Nathan v. Smith,[1] in which he concluded that private citizens are not authorized by the Ethics in Government Act[2] to bring court challenges to decisions by the Attorney General not to conduct preliminary inquiries into whether to seek appointment of a special prosecutor.[3] In construing the statute not to create a private right of action, Judge Bork relied in large measure on the well-established constitutional principle that enforcement of the federal criminal laws is committed to the executive branch, pointing to the possible constitutional problems that would thus be raised by a contrary interpretation. Judge Bork's construction of the statute was in substance adopted by the full court when it determined that such decisions by the Attorney

---

1. 737 F.2d 1069, 1077 (D.C. Cir. 1984).

2. 28 U S C. §§591-598.

3. See id. at §592(a)(1).

General are not subject to judicial review.[4] Judge Bork also joined several per curiam opinions invalidating legislative veto provisions before the Supreme Court held them unconstitutional in INS v. Chadha.[5] Taken alone or together, these decisions say little about Judge Bork's views on separation of powers. However, while serving as Solicitor General and Acting Attorney General, Judge Bork gave testimony before Congress on the constitutionality of then-proposed legislation to create a special prosecutor, in which he set forth an identifiable view of separation of powers. That view is consistent with that expressed by a majority of the present Supreme Court.

The possible approaches to separation-of-powers analysis form a spectrum, with two end-points. At one extreme is a "formalist" view, which gives literal and quite rigid effect to the Constitution's separation of powers provisions. The author subscribes to this view, but it appears to find favor on the present Supreme Court only with Justice Scalia.[6] At the other

---

4. 737 F.2d 1167 (D.C. Cir. 1984) (en banc).

5. 462 U.S. 919 (1983). See AFGE v. Pierce, 697 F.2d 303 (D.C. Cir. 1983); Consumers Union v. FTC, 691 F.2d 575 (D.C. Cir. 1982), aff'd mem., 463 U.S. 1216 (1983).

6. See Young v. United States ex rel. Vuitton Et Fils S.A., 107 S.Ct. 2124, 2141 (1987) (Scalia, J., concurring in judgment that a contempt prosecution conducted by an interested private attorney appointed by the court was invalid, but maintaining--in a lone opinion--that separation of powers requires that all contempt prosecutions for noncompliance with court judgments be conducted by executive branch officials).

extreme is an "accommodationist" approach, which views the Constitution much more as requiring a balancing of interests, and which thus displays a willingness to accommodate the perceived needs of modern government. Justice White appears to be an exponent of this approach, judging from his dissents in all of this decade's major Supreme Court decisions finding practices unconstitutional on separation-of-powers grounds.[7]

Most of the present (and, indeed, past) Justices fall between these two extremes, employing an analysis more flexible than formalism but more demanding that accommodationism.[8] Bork squarely aligns himself with this "centrist" analysis. In his 1973 testimony before the House Judiciary Committee, Bork was asked by Rep. Hungate, "Now, page 6 of your statement relates to the separation of powers. You are not a watertight compartment man, are you?", to which Bork replied, "No sir, I am not.

---

7. See Bowsher v. Synar, 106 S. Ct. 3181, 3205 (White, J., dissenting from invalidation of automatic spending reduction provisions of Gramm-Rudman); Chadha, 462 U.S. at 967 (White, J., dissenting from invalidation of one-house legislative veto); Northern Pipeline Construction Co. v. Marathon Pine Line Co., 458 U.S. 50, 92 (1982) (White, J., dissenting from holding that non-Article III bankruptcy judges cannot decide state law questions).

8. Compare Synar, Chadha, and Buckley v. Valeo, 424 U.S. 1 (1976), which employ formalistic reasoning, with Vuitton and CFTC v. Schor, 106 S. Ct. 3245 (1986) (the Commodity Futures Trading Commission, a non-Article III body, may adjudicate state law counterclaims in reparations proceedings), which uphold practices that are dubious on formalist reasoning.

the separation of powers. You are not a watertight compartment man, are you?", to which Bork replied, "No sir, I am not. Whatever else I am I am not a rigid constructionist."[9] The views on specific issues expressed by Bork at those hearings show the accuracy of this self-assessment. At the time of Bork's testimony, it had been announced that Sen. William Saxbe was to replace him as Attorney General. Article I, section 6, clause 2 of the Constitution provides that "No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time." The salary for the office of Attorney General had been increased during Mr. Saxbe's tenure in the Senate. Congress and the Executive Branch responded by reducing the Attorney General's salary to the level it had been when Mr. Saxbe was elected to the Senate. Bork viewed this as a fully adequate response to the constitutional problem, because "the rationale of this constitutional provision was to prevent Senators or Congressmen or Representatives from voting for bills

---

9. Special Prosecutor and Watergate Grand Jury Legislation: Hearings before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 93rd Cong., 1st Sess. 284 (1973) ("House Hearings").

and raising salaries in the expectation of getting the increased salary,"[10] and by reducing the Attorney General's salary "the spirit of the constitutional provision is fully complied with."[11]

A formalist, like this author, would argue that the clause says nothing about whether the appointee actually receives an increase in salary; it says only that he cannot be appointed to a position for which the salary was increased. Bork, however, rejects the formalist view in favor of a more moderate position that seeks to give effect to the purposes behind the provision without giving it a "rigid"[12] construction or application. (And, it must be conceded that Bork has precedent on his side.) Bork's flexible approach is also demonstrated by his suggestion that President Roosevelt's court-packing plan, if implemented, would have been "unconstitutional because...it was designed to destroy the independent judicial review function of the Supreme Court."[13] A formalist would again argue, as did Rep. Hungate, that the Constitution nowhere specifies the size of the Supreme Court and thus places no legal (as opposed to moral) limits on the elected branches' ability to alter its composition.

---

10. Id. at 275.

11. Id. at 279.

12. Id. at 284.

13. Id.

At the same time, however, Bork took a hard line in his testimony on the need for executive branch control of law enforcement:

> Congress' duty under the Constitution is not to enforce the laws but to make them. The Federal courts' duty under the Constitution is not to enforce the laws but to decide cases and controversies brought under the laws. The Executive alone has the duty and the power to enforce the laws by prosecutions brought before the courts. To suppose that Congress can take that duty from the Executive and lodge it either in itself or in the courts is to suppose that Congress may be [sic] mere legislation alter the fundamental distribution of powers dictated by the Constitution. Under such a theory, the Congress, should it deem it wise, could take the decision of criminal cases from the courts and assume that function itself or lodge it in the Criminal Division of the Department of Justice. That is simply not our system of government.[14]

He also took a dim view of devices designed to circumvent the President's constitutional power to appoint, with Senate advice and consent, principal federal officials by limiting the pool of appointees that he could choose from,[15] which provided

---

14. Special Prosecutor: Hearings before the Senate Comm. on the Judiciary, 93d Cong., 1st Sess. 451 (1973) ("Senate Hearings").

15. See House Hearings, at 269, and of the 1867 Tenure of Office Act.

that officers removed by the President were to remain in office until their successors were confirmed by the Senate.[16]

Applying these principles, Bork expressed grave doubts as to the constitutionality of the special prosecutor bills then before the Congress. Those bills sought to place as much distance as possible between the President and the conduct of investigations. One approach was to lodge the appointment of a special prosecutor in the Attorney General, subject to removal the Attorney General only for cause. Advocates of this plan relied on a proviso in the Appointments Clause which generally requires officers of the United States to be appointed by the President subject to Senate confirmation, but allows Congress by law to "vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."[17] Bork agreed that this clause permitted Congress to make the special prosecutor appointable by the Attorney General and to place restrictions on the prosecutor's removability that might not be valid if he was a presidential appointee performing prosecutorial functions.[18] He made clear, however, that he did not believe that Congress could make appointees of the Attorney General subject to Senate confirmation. Rather, the Appointments

---

16. See id. at 257-58.

17. U.S. Const. Art. II, §2, cl. 2.

18. See House Hearings, at 260, 279, 290.

Clause contemplates two modes of appointment: by the President with Senate confirmation, and by the President, department heads, or courts without confirmation.[19] Bork's view is amply supported by judicial precedent, and again represents middle ground. A formalist would maintain that the President personally retains ultimate responsibility for all criminal prosecutions, and the remedy for presidential misconduct rests in the impeachment power. Bork, in fact, noted the possibility that impeachment may be the only means of getting at a President, without endorsing or in terms rejecting it[20] though, as noted, his views implicitly reject the premises underlying the formalist position. This is not untypical of Bork's testimony; he frequently displays a keen sensitivity to the existence of separation-of-powers questions without having definitively formed a view on their proper resolution.

The other approach taken by the bills considered by Bork was the strategy eventually adopted by the Ethics in Government Act: appointment of the special prosecutor is lodged in a special division of the courts.[21] Bork expressed doubts as to the

---

19. See Senate Hearings, at 455-56; House Hearings, at 260.

20. See Senate Hearings, at 474.

21. See 28 U.S.C. §§592(c), 593.

constitutionality of this plan.[22] Although the Appointments Clause says that Congress can vest the appointment of inferior officers "in the Courts of Law," Bork did not believe that this provision, added "with little or no debate toward the end of the Constitutional Convention,"[23] can be read casually to undo "the principle of separation of powers [the Framers] had so painstakingly worked out in the course of their deliberations."[24] Rather,

> It seems as clear as such matters ever can be that the Framers intended to give Congress the power to vest in the courts the power to appoint "inferior officers" such as clerks, bailiffs, and similar functionaries necessary to the functioning of courts, just as they intended "Heads of Departments" to be able to appoint most of their subordinates without troubling the President in every case. The power is clearly one to enhance convenience of administration, not to enable Congress to destroy the separation of powers by transferring the powers of the Executive to the Judiciary or, for the matter of that, transferring the powers of the Judiciary to the Executive.[25]

---

22. See Senate Hearings, at 262 ("I don't see any way that can be done.").

23. Id. at 452.

24. Id.

25. Id.

It is true, Bork noted, that courts temporarily appoint United States Attorneys when there is a vacancy.[26] Nor did he think that Ex parte Siebold[27] was good authority for judicial appointment of a special prosecutor. Siebold involved judicial appointment of an election monitor. Bork thought the case both wrongly decided and distinguishable, as "the appointment of a supervisor to look at an election is certainly unlike taking a major area of criminal jurisdiction out of the Department of Justice and the executive branch and locating it somewhere else."[28] Bork also thought the appointment of a special prosecutor different from appointment by a court of a private attorney to prosecute contempts, which Bork thought proper and necessary when a court "feels that it has been flouted."[29]

---

26. See United States v. Solomon, 216 F. Supp. 835 (S.D. N.Y. 1963) (upholding the practice against constitutional attack), but in those cases the President retains the power immediately to remove the appointees, who are wholly subject to the control and direction of the executive branch. See Senate Hearings, at 490; House Hearings, at 259.

27. 100 U.S. 371 (1879).

28. House Hearings, at 264.

29. Id. at 271. (This may or may not be inconsistent with Justice Scalia's position in Vuitton; unlike Bork, Justice Scalia distinguished between contempt prosecutions to secure compliance with court judgments and to maintain order in the courtroom. The Vuitton opinion addresses only the former.)

It is not possible from this testimony to determine whether Judge (or Justice) Bork would uphold the constitutionality of the special prosecutor statute now in effect. Although the present scheme involves a court-appointed prosecutor, which Bork repeatedly indicated he thought to be unconstitutional, it is important to note that the bills on which he commented in 1973 provided for both appointment and removal by a court.[30] This point may be critical, because Bork also testified that it was constitutional for courts to appoint temporary United States Attorneys, as long as those officers remained subject to the control and direction of the executive branch. Special prosecutors under an existing provision of law are subject to removal, for cause, by the Attorney General,[31] a provision that Bork specifically approved. Whether that constitutes sufficient executive branch control to validate the statutory scheme is an open question, and the inability to pigeon-hole Bork's general position on separation of powers make prediction impossible. It seems very likely, however, that Judge Bork would uphold a prosecution under the statute if the prosecutor received a parallel appointment from the Attorney General, as has been done with some of the prosecutors investigating the Iran-Contra affair.

---

30. See Senate Hearings, at 462-63.

31. See 28 U.S.C. §596(a)(1).

It is also worth noting that in Buckley v. Valeo,[32] Solicitor General Bork filed a brief on behalf of the Attorney General arguing that officials of the Federal Election Commission could not engage in law enforcement activities because they were appointed by Congress rather than in conformance with the Appointments Clause. The Supreme Court ultimately agreed with this position.

32. 424 U.S. 1 (1976).

"TAKE THE TROUBLE TO UNDERSTAND"

BY CARLA ANDERSON HILLS
PARTNER, WEIL, GOTSHAL & MANGES

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 "ac̜tivist 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

By Michael W. McConnell
Assistant Professor of Law
University of Chicago Law School

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 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,

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 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

---

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

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

---

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.

46. Id.

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

---

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
(footnote continued)

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 researchers 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

---

"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, 612-13 (1971).

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

51. Some commentators have asserted 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.

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 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.

---

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

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