THE WHITE HOUSE

WASHINGTON

COMMENTS ON MRS. HILLS' REPORT

- I want to thank Mrs. Hills and the very distinguished group of legal scholars and practioners who have contributed to this impressive and thorough survey of Judge Bork's jurisprudence.

- I look forward to reading it and to receiving the remainder of the report, which I understand is nearing completion.

- I expect that the Senate and the public will look to this effort as the most evenhanded, scholarly and dispassionate treatment of the issues that are relevant to Judge Bork's confirmation.

- As such, it is a very much needed counterweight to the sort of overly emotional, rhetorical, unbalanced discussion of this nomination that has been heard so far--the sort of discussion that creates more heat than light.

- The Supreme Court and the Constitution are just too important to be treated in this partisan, shallow way. The Senate's responsibility to advise and consent is just that--a serious obligation given to us by the Constitution and owed by us to the people.

- We owe it to them, and to ourselves, to take the high road on Judge Bork's nomination--to look thoroughly, seriously and fairly at his record, as you have done.

- No cheap appeals to narrow, partisan special interests. No shallow manipulations of incomplete statistics. Above all, none of the political maneuvering that would deprive the Senate of its voice in advising the President.

- If we avoid those pitfalls--if the Senate takes the same fairminded look at Judge Bork's record that you have taken--we will celebrate the bicentennial of the Constitution by elevating to the Supreme Court a man I confidently predict will be one of the greatest justices who has ever sat on that great court.

- Thank you again for the great help you are giving the Senate in discharging its constitutional duty to advise and consent.

ANALYSIS OF JUDGE ROBERT BORK'S LABOR OPINIONS

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I. Purpose and Sources

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

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

However, I do have a criticism of the AFL-CIO's listing. The AFL-CIO criteria for including a case were rather strict; as a result, five labor law opinions written by Judge Bork were not

included. In my sequential discussion below, I note when a case was not on the AFL-CIO list. (Conversely, because I had the AFL-CIO list, no case on that list is omitted from my consideration.)

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

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

AFL-CIO memo, authored by L. Gould, W. Kamiat, August 17, 1987.

As a result of these criteria, the AFL-CIO list includes two cases in which Judge Bork did not write. AFGE v. FLRA, 778 F.2d 850 (D.C. Cir. 1985) (Bork joining Wald, R. Ginsburg dissenting); and Simplex Time Recorder v. Secretary of Labor, 766 F.2d 575 (D.C. Cir. 1985) (Bork joining Davis Fed. Cir.), Wald dissenting in part). In my view, these two cases provide no insight into

Judge Bork's independent thinking. Yet they are listed as two of five cases identified by the AFL-CIO as "Cases in which Bork voted for employer and against union/employees."

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

II. Survey Results

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

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

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

MAJORITY OPINION WITH NO DISSENT: Cases 1, 2, 5.
MAJORITY OPINION FROM WHICH THERE
WAS A DISSENT: Cases 3, 4, 6, 10.
DISSENTING OPINIONS: Cases 7.
CONCURRING OPINIONS: Cases 8, 9.
CASES DEFERRING TO
THE ADMINISTRATIVE AGENCY: Cases 1, 6, 7, 8.
CASES OVERRULING THE
ADMINISTRATIVE AGENCY: Cases 2, 3, 4, 9, 10.
CASES DEFERRING IN PART TO,
OVERRULING IN PART, THE,
ADMINISTRATIVE AGENCY: Case 5.

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

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

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

occasion, an opinion shows a real brilliance in statutory interpretation and reasoning far above the average of labor law jurisprudence.

III. The Labor Law Opinions of Judge Bork

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

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

Under the Urban Mass Transportation Act of 1964, federal money may be allocated to municipal transit systems which have taken over private transit companies. However, the Secretary of Labor must certify that "the interests of employees affected by such assistance" have been protected. 49 U.S.C. sec. 1609 (c). This degree of protection includes "the continuation of collective bargaining rights."

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

bargaining agent for these workers. The union's complaint was that the Secretary of Labor should have insisted that the union be recognized as the collective bargaining agent before approving the federal funds.

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

COMMENT:

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

The best argument the other way was that the union had new evidence of majority status, by reason of signature cards. Under the National Labor Relations Act, an employer is obliged to give evidence of such majority status serious attention, and to bargain if she or he believes the union truly to represent the majority of the employees. However, even the clearest evidence of majority status cannot compel a duty to bargain by an entity that is not an employer under the Act. Here, the city employer was not under the Act, and the receipt of federal funds did not make it so. It would be quite unusual to construe the receipt of UMTA funds as an implicit exception to the definition of employer under the National Labor Relations Act.

The decision, in my view, is utterly noncontroversial.

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

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

The Federal Service Labor-Management Relations Act, 5 U.S.C. sec. 7103 (a)(12) (1982), establishes a duty to bargain by federal

employers, but excludes certain specified management rights, among them the right to assign work.

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

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

The union proposed a second rule. "Absent just cause," the rule read, certain union officials were to have preference for office audits. The IRS refused to bargain on this proposal as well, for the same reason; and the Federal Labor Relations Authority held for the IRS. Here, Judge Bork reversed the FLRA. The provision for "just cause" allowed the IRS sufficient

flexibility to ensure that work would be done on the timely basis desired; hence, the management prerogative to assign work was not unduly infringed.

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

COMMENT:

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

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

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

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

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

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

Two employees were discharged for violating the company's absolute no-solicitation rule. One employee had engaged in extensive on-the-job solicitation on behalf of the union. The other employee had engaged in only one instance of on-the-job solicitation, lasting less than five minutes, and the soliciting employee himself was off hours. The company had tolerated six instances of on-the-job solicitation among employees for gifts to

celebrate fellow-employees' birthdays, retirements, etc. The ALJ, and the NLRB itself, found that the tolerance of these non-union solicitations made the employer's application of the no-solicitation rule to the two employees in question discriminatory and thus in violation of the Act.

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

Judge MacKinnon agreed with Judge Bork as to the employee who had engaged in greater solicitation. But as to the employee who had engaged only in one on-the-job solicitation, Judge MacKinnon would defer more to the NLRB and its Administrative Law Judge. The legal standard is actual disruption, not potential for disruption, in Judge MacKinnon's view. He accuses the majority of

creating the potential for disruption standard by relying on dicta from Central Freight Lines, Inc. v. NLRB, 653 F.2d 1023 (5th Cir., 1981). In terms of actual disruption, this employee's actions were equivalent to the birthday, etc., kinds of solicitations. Hence, the Board should be affirmed as to this employee.

COMMENT:

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

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

Evidently, in Judge MacKinnon's view, an employer who allows birthday cake contribution solicitations on work-time is building

a record against himself or herself in the event a union organizer wants to take the same amount of time. This rule would require some careful monitoring of actual time expended. And it involves other difficult questions: are such solicitations to be added together, or on an employee-by-employee basis, in deciding how much time a union organizer must have?

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

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

Once the legal rule is settled, the issue of substantial evidence poses no serious problems. Judge Bork is entirely correct that, if potential disruption is at issue, the Board's finding lacked any evidence. Of course if the Board's standard of actual disruption is correct, a further inquiry is warranted: Judge MacKinnon undertook such an inquiry and faulted the board

with respect to one of the employees, but Judge Bork did not have to take this step.

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

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

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

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

In the private sector, the duty of fair representation was read into the National Labor Relations Act by the Supreme Court as a necessary inference from exclusivity. But the union was

responsible under this duty only in so far as it was the exclusive representative; i.e., on matters under the collective bargaining agreement. On other matters (e.g., participation in internal union affairs) the union could distinguish between members and non-members.

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

In this case, the union refused to provide a non-member employee with counsel in pursuing his appeal through the procedures of the Civil Service Reform Act. It was the union's policy to provide such counsel for its members, however. The Federal Labor Relations Authority held that the union had violated its duty of fair representation. The union appealed, arguing that it had no such duty as to the statutory right of appeal under the Civil Service Reform Act, since that process was outside of the collective bargaining context. It is not disputed that, in the private sector, a union's failure to provide counsel in such a setting would not violate duty of fair representation. Thus, the issue was whether the Federal Service Labor-Management Relations Act imposed a greater duty upon a union than was the case under the National Labor Relations Act.

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

Judge Swygert dissented. He believed the case was controlled by National Treasury Employees Union v. Federal Labor Relations Authority, 721 F.2d 1402 (D.C. Cir. 1983), which held a union to a duty of fair representation in providing an attorney through a collective bargaining grievance procedure. Although the grievance in the earlier case was being pursued under the collective

bargaining procedures, Judge Swygert felt the opinion was not premised on this distinction. (In the majority opinion, Judge Bork quoted extensively from this case to demonstrate that it did not make frequent reference to the collective bargaining context.)

COMMENT:

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

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

The structure of Judge Bork's opinion is particularly compelling here. On a difficult issue of statutory compelling

here. On a difficult issue statutory interpretation, he goes first to the wording of the Act, then to its structure, then to its legislative history, and then to a practical consideration of the enforceability of alternative constructions.

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

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

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

Thereafter, the union signed the zipper clause. The contract contained no mention of a Christmas bonus. Later that year, the company unilaterally eliminated the Christmas bonus. The union

alleged this was a breach of the employer's duty to bargain before changing terms or conditions of employment; the company pled the zipper clause. The ALJ found for the union, claiming that any waiver had to be clear and unmistakable The NLRB reversed, finding for the company because of the breadth of the integration part of the zipper clause.

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

COMMENT:

This is a straightforward case. The analysis is correct and well structured, relying first on the words of the agreement, then on the bargaining history. Two small points remain, one slightly troubling, one comforting. First, Judge Bork states he does not need to opine on the correct degree of deference to the Board since his interpretation of the contract is identical. This is a minor departure from the more correct practice of deferring to a fact finding by the NLRB. Second, Judge Bork does not reach in this case for the latent legal question: was the company under an obligation to provide the union with a list of extant agreements

that it considered to be covered by the integration clause? This question was not properly presented in the appeal, but many courts would have reached out to decide it, since it is a matter of legal interest and would clearly control the outcome. Judge Bork resisted the temptation to reach out for an issue not presented, and that is commendable.

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

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

The issue on which Judge Bork wrote, therefore, is precisely the issue in controversy. The case involved the reassignment of a federal employee, without loss of grade or step. The employee alleged that the work was, nevertheless, substantially less in content and responsibility, thus constituting a de facto reduction in rank (although salary remained the same). Judge Bork, joined by Judge Starr, read the Civil Service regulations to require that rank be determined only by reference to numerical grade and actual organizational standing. Judge Mikva read the same regulations to allow reference to responsibility and job description. The regulation at issue reads:

> In law and the Commission's regulations, the term rank means something more than a numerical grade,

or class, or level under a classification system or its equivalent in the Federal Wage System. Basically, it means an employee's relative standing in the agency's organizational structure, as determined by his official position assignment. Federal Personnel Manual Chapter 752.1, cited in 775 F.2d at 1200.

COMMENT:

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

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

Then, if there were substantial evidence for the Commission's judgement, a reviewing court could simply affirm.

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

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

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

The legal issue dealt with what constitutes concerted activity for purposes of section 7 of the National Labor Relations

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

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

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

COMMENT:

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

1975. The entire issue in the case turns on whether that is what the Board did.

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

"For all the foregoing reasons, we are persuaded that the per se standard of concerted activity is at odds with the Act. The Board and courts always considered, first, whether the activity is concerted, and only then, whether it is protected. This approach is mandated by the statute itself, which requires that an activity be both 'concerted' and 'protected.' A Board finding that a particular form of individual activity warrants group support is not a sufficient basis for labeling that activity 'concerted' within the meaning of section 7.

"Based on the foregoing analysis, we hold that the concept of concerted activity first enunciated in Allelulia does not comport with the principles inherent in Section 7 of the Act. We rely, instead, upon the 'objective' standard of concerted activity--the standard on which the Board and courts relied before Allelulia. Allelulia and its progeny."

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

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

A second point of difference exists on whether the rule now adopted by the NLRB actually was the rule before Allelulia or not. In NLRB v. City Disposal Systems, 104 S. Ct. 1505 (1984), the Court upheld a presumption of concerted activity when a single employee asserts rights granted under a collective bargaining relationship. Both majority and dissent grapple with this case. The majority argues that this case prevents a return to the pure test of evidence of acting on authority for others. Judge Bork argues that the pre-Allelulia standard never excluded such a presumption, since Allelulia did not deal with collective bargaining rights. Undeniably, City Disposal Systems has had some effect on the law. Hence, the Board (and Judge Bork) may have been too glib in saying all the Board was doing was returning to the pre-Allelulia standard. But Judge Bork carries the day in holding at that this is surely no grounds for remand since the present case does not implicate collective bargaining rights.

The last point is whether the action at issue here could ever be held to be concerted. Judge Bork holds no; thus, any Chenery

error by the NLRB would be harmless, error. But I believe Judge Bork was in error.

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

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

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

The opinion for the court was written by Judge Wright, joined by Judge Mikva. Judge Bork concurred separately. The court's decision upheld the NLRB determination that a representation

election in favor of the union had been valid and the Board's choice of remedies for management's failure to bargain.

Judge Bork's separate concurrence states no disagreement with the majority's holding. He raises only two points: (1) the majority announced, as though it were doctrine, the debatable proposition that delay in an election always favors management; and (2) the majority did not need to criticize the 4th Circuit's opinion in PPG Industries, Inc. v. NLRB, 671 F.2d 817 (4th Cir. 1982).

COMMENT:

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

On the second point, Judge Bork is again correct. There was ample evidence to sustain the Board's finding that certain employee conduct was not attributable to the union. The majority did go out of its way to state its disagreement with a fourth circuit opinion which held that conduct sufficient to constitute an employee an agent for management would be sufficient to constitute an employee an agent for the union. The majority states this is not so, since management has less need of agents in

a plant than does a union attempting organizing. Judge Bork does not opine on this proposition; he only notes it is not necessary to reach it to decide the case. In this he is quite right.

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

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

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

The basis for Judge Bork's separate concurrence was simply to urge restraint in Judge MacKinnon's criticism of the NRLB. The Board had, quite evidently, chosen to ignore controlling circuit court precedent in reaching the decision that it did. The company had sought a contempt citation against the Board, or some other sanction. The court refused such relief, but the majority opinion excoriated the Board's attitude toward circuit court precedent Judge Bork states that he has not studied with Board's conduct sufficiently to agree or disagree with Judge MacKinnon, But he

does agree that the board was being disingenuous with the facts in this case.

COMMENT:

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

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

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

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

COMMENT:

The majority opinion is an unexceptional application of administrative law principles in the labor context. While several

independent bases for reopening were available, and potentially justifiable, the reviewing court was not able to perform its function without knowing on which ground the agency had acted. Should the agency choose the position that it can reopen without giving any reason, that would present a contestable issue of administrative law; but Judge Bork considered it wiser not to rule on that issue unless it were clear that they agency had actually pitched its authority under it.

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

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

Mary Ann Glendon

September 2, 1987

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

In the media discussions that followed the announcement of the nomination of Judge Robert H. Bork to the Supreme Court of the United States, there have been frequent suggestions that the Bork appointment would be harmful to the interests of women. Indeed, a document published by the National Women's Law Center has gone so far as to claim that Judge Bork's presence on the Supreme Court would threaten all the legal gains that women in the United States have made in the 20th century. It is difficult to discover the basis for this disquiet about the Bork nomination. Judge Bork has written only one opinion dealing with a sex-based equal protection claim and, in that case, he did not reach the merits.[1] Nor has he devoted any of his scholarly writings to women's rights as such. Much has been made of a dissent in which Judge Bork criticized the majority for taking the positions that voluntariness can never be a defense in a sexual harassment case and that an employer is automatically liable for sexual harassment by a supervisor even if the employer

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

knew nothing of the conduct and had a clear policy against it.[2] But Judge Bork's position on these questions, about which reasonable men and women differ, seems to afford a very slender basis for predicting how he would be likely to regard the vast range of legal issues affecting important interests of women.

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

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

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2. Vinson v. Taylor, 753 F.2d 141, rehearing denied, 760 F.2d 1330 (Bork dissenting)(D.C. Cir. 1985); aff'd sub nom. Meritor Savings Bank v. Vinson 106 S.Ct. 2399 (1986). On review, although affirming, the Supreme Court substantially agreed with Judge Bork's reasoning on the issue of the employer's liability.

reservations about the Bork nomination.

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

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

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

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

Amendment to the Constitution.

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

Formal equality is now seen by many feminists as having benefited mainly business and professional women, and having

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

6. Kay, note 5 above at 2.

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

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

Abortion. Judge Bork, like the great majority of legal experts who have written about Roe v. Wade, from Ruth Ginsburg to

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7. Becker, note 5 above.

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

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

One cannot, however, infer from the widespread opposition of legal experts to Roe, that the Roe critics would now favor overturning that decision. Judge Bork, for example, is committed to the view that even a wrongly decided case should not be overruled if it has become so firmly embedded in the fabric of the legal system that a great number of governmental arrangements

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9. Archibald Cox, The Role of the Supreme Court in American Government (New York: Oxford University Press, 1976), 53-55, 114; Alexander M. Bickel, The Morality of Consent (New Haven: Yale University Press, 1975), 28; John Hart Ely, "The Wages of Crying Wolf: A Comment on Roe v. Wade," 82 Yale Law Journal 920 (1973); Harry H. Wellington, "Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication," 83 Yale Law Journal 223, 297 ff. (1973); Richard Epstein, "Substantive Due Process by Any Other Name: The Abortion Cases," 1973 Supreme Court Review 159; Paul A. Freund, "Storms over the Supreme Court," 69 American Bar Association Journal 1474, 1480 (1983); Ruth Bader Ginsburg, "Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade," 63 North Carolina Law Review 375 (1985).

and private expectations have grown up around it.[10] It is thus by no means certain that Judge Bork would be in favor of overruling Roe 14 years after it was decided. He has in fact been an outspoken opponent of what he regards as impermissible attempts to overturn the abortion cases, testifying against a proposed Human Life Bill and against legislation that would deprive the courts of jurisdiction over such issues.

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

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

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

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

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

world."[13]

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

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13. Catholic University Speech, March 31, 1982, p. 24 (unpublished). See, for an analysis of the modes of discourse on the current Supreme Court, Frank I. Michelman, Foreword: Traces of Self-Government, 100 Harvard L. Rev. 4, 28-36 (1986). Michelman finds Justice O'Connor more than her fellow justices, to be committed to resolving disputes by dialogue, by "open and intelligible reason-giving, as opposed to self-justifying impulse and ipse dixit." (Id. at 34). This is the mode to which Judge Bork, too, seems inclined.

professorial elite.[14]

It is not self-evident, however, that women's interests coincide with those of this group. The legislative process -- as imperfectly representative, and as flawed as it is at the present time -- is working well for women. Women will undoubtedly fare even better as legislatures become more and more representative. To preserve and consolidate their gains, they will need judges who, like Judge Bork, believe that the basic decisions in a democratic society ought to be made by the people through their elected representatives.

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

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14. Bork, note 4 supra, at 394.