Corporations

What if Judge Bork had become Justice Bork?

*By David Balto**

Maybe it's that I am a Boston Red Sox fan: I always ask "what if?" What if Babe Ruth had not been traded in 1918, what if in 1975 Bucky Dent had awoken with a toothache, if Bill Buckner could have fielded that simple grounder in 1986, what if. . .

With the recent Supreme Court confirmation battles we were once again reminded of the contentious nomination of Judge Robert Bork in 1987. Soon after Justice Roberts' nomination was announced, some commentators and politicians opined how much worse off the legal system would have been if Bork had been confirmed. They posited that civil liberties, the right to choose and other fundamental liberties would have been severely restricted by Bork's presence on the Court.

But many people forget that Judge Bork's nomination raised a uniquely adversarial debate in the antitrust arena, where Judge Bork was known as one of the most visible critics of antitrust jurisprudence. What would have happened to antitrust jurisprudence if Judge Bork had become Justice Bork?

Beginning with his dissent from the 1968 White House Antitrust Task Force Report on Antitrust in which he strongly criticized proposed legislation aimed at "deconcentrating" markets, then-Professor Bork wrote frequently on how antitrust jurisprudence was out of date for the demands of the later-20th-Century economy. Judge Bork's 1978 book, *The Antitrust Paradox*, articulated his comprehensive views about the inadequacies of antitrust law and the fashion in which it had harmed the ultimate goal of protecting consumer welfare. By the time of his nomination nine years later *The Antitrust Paradox*[1] had had an extraordinary influence in the refinement of antitrust law. It had been cited by six of the nine Justices then sitting on the Court and had been cited by over by 70 lower court opinions.

We are all familiar with the contentious debates in the Bork hearings on constitutional rights, civil liberties and certain unenumerated rights. Antitrust, however, was also an important area of the debate on his nomination, although it was left until the last two days of the hearings. The adversaries in the Bork antitrust debate were luminaries of the antitrust world.

Supporting Judge Bork were Philip Areeda, the leading antitrust scholar, Thomas Kauper, another leading antitrust scholar, Former Assistant Attorney General for the Antitrust Division Donald Baker, then a preeminent antitrust practitioner, and James Halverson, speaking on behalf of the ABA Antitrust Section. On the other side of the ring were an equally prominent group of scholars and officials led by two state attorneys general, Robert Abrams of New York and Charles Brown of West Virginia. The antitrust scholars' role was played by Robert Pitofsky, then-Dean of the Georgetown Law School and soon to be Chairman of the Federal Trade Commission, and representing the interests of private plaintiffs was Max Blecher.

The proponents of Judge Bork's nomination emphasized three factors: First, Judge Bork's beliefs, although inconsistent with some old Supreme Court precedents, were within the mainstream of antitrust law. Second, Judge Bork's scholarship had provided important guidance in helping to modernize the approach to antitrust law. Third, Bork's scholarship emphasized the critical paradox in the values that lay beneath the surface of the antitrust laws: between what Justice Powell (whom Bork would have replaced) called "competition based on efficiency" and what Justice Peckham a century ago called the protection of "small dealers and worthy men." In this debate the former values were preeminent.

Bork had been a judge on the D.C. Circuit for about three years. During that time, he had authored three notable antitrust opinions: *Neumann v. Reinforced Earth,* 786 F.2d 424 (DC Cir. 1986), a monopolization case based on allegations of sham litigation; *FTC v. PPG Industries*, 628 F. Supp. 881 (DDC) in which the court supported an FTC request for a full-stop injunction on a proposed acquisition (the panel ordered a complete injunction); and *Rothery v. Atlas Van Lines,* 792 F 2d. 210 (DC Cir. 1986), in which he upheld joint venture marketing restraints under the ancillary restraints doctrine.

The proponents even suggested that Judge Bork had an activist antitrust agenda. First, based on his writings and the decision in *Rothery,* Bork would provide important guidance on joint-venture antitrust law. Second, his scholarship focused on how sham litigation could be used to impose barriers to competition and violate the antitrust laws. Finally, the proponents suggested that he would attack governmental restraints such as those imposed under the state action doctrine.

Not surprisingly, the opponents of the Bork nomination had a diametrically opposite perspective. They dissected *The Antitrust Paradox* line-by-line. *The Antitrust Paradox* called for significant reform of the antitrust laws, and the critics suggested that as a Supreme Court justice he would use the Court to make radical reforms regardless of Congress' intent.

At a philosophical level the debate was about the purposes of the antitrust laws: were the concerns strictly economic or did they include other political and social concerns? One of the main targets of criticism was Bork's view that economic efficiency was the sole concern of the antitrust laws.

Bork said in *The Antitrust Paradox*, "the only goal that should guide the interpretation of the antitrust laws is the welfare of consumers. Departure from that standard destroys the consistency and predictability of the law; run counter to legislative intent, as that intent is conventionally derived; and damage the integrity of the judicial process by involving the courts in grossly political choices for which neither the statutes nor any other acceptable source provide guidance." For an insightful criticism of Bork's

perspective see Robert Lande, "Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged," 34 HASTINGS L.J. 65 (1982).

The critics emphasized that according to Judge Bork, antitrust enforcement should be limited to "the suppression of competition by horizontal agreement, . . . horizontal mergers creating very large market shares, . . . and deliberate predation." They suggested that Bork's focus on "consumer welfare" actually was a very narrow concept of "business efficiency." In Judge Bork's world, to paraphrase the critics, there would be no enforcement against such beneficial practices as small horizontal mergers, all vertical and conglomerate mergers, vertical price maintenance and market division, tying arrangements, exclusive dealing and requirements contracts and price discrimination. Dean Pitofsky suggested in a Bork antitrust world even the merger of Exxon and Texaco would be permitted.

According to the critics, Bork would clearly support reversing numerous major Supreme Court antitrust opinions, and Bork had expressed a profound skepticism about Congress' ability to legislate in the area of antitrust. Specifically, the critics suggested that under Bork's legal regime there would be no resale price maintenance enforcement and mergers would be permitted to the level of reducing the number of firms to three or four in any market.

The *Rothery* decision received specific criticism (although, as an interesting sidenote, Bork's opinion was joined by then-Judge Ruth Bader Ginsberg). *Rothery* involved a straightforward marketing restraint imposed by a joint venture. Bork reversed the district court, which had granted summary judgement on *Copperweld* [2] grounds, perhaps to reach the more interesting joint venture questions. He argued that any restraints imposed by a joint venture with such a small market share could not have had an anticompetitive effect.

What was troubling to the critics was Judge Bork's observation that after the Supreme Court's decisions in *GTE Sylvania* and *BMI,* the Supreme Court's 1967 decision in *United States v. Sealy* and 1972 decision in *United States v. Topco* had been effectively overruled. Such "guidance" seemed unnecessary to the resolution of the case and seemed to reflect relatively narrow recognition of antitrust precedent and a willingness to rewrite the law.

The Committee rejected Bork's nomination and cited his antitrust views as a reason why he would be inappropriate for the bench. It noted that "despite his reputation as a practitioner of judicial restraint . . . he was an activist of the right" in the antitrust field, "ready and willing to substitute his views for legislative history and precedent in order to achieve his ideological goals; and even when examined by comparison to other conservative critics of antitrust enforcement his views are extreme." Some critics had said that Bork's appointment to the Court would result in "antitrust changes of truly tidal proportions." The committee report noted that Bork criticized most of the landmark Supreme Court antitrust decisions, including *Brown Shoe v. United States* (1962) (horizontal and vertical mergers); *FTC v. Proctor and Gamble* (1967) (conglomerate mergers); *Dr. Miles Medical Co. v. John D. Park & Sons Co.* (1911) (per-se illegality of resale price maintenance); and *Standard Oil Co. of California v. United States* (1949) (exclusive-dealing arrangements). In fact he had called the entire body of Supreme Court precedent in the antitrust field "mindless law."

The Committee noted that Bork recognized in *The Antitrust Paradox* the incredible power that the Supreme Court has in molding the antitrust laws: "the antitrust laws are so open textured leaving so much to be filled by the judiciary, that the court plays in antitrust almost as unconstrained a role as it does constitutional law." The Committee found it difficult to reconcile his professed philosophy of judicial deference to the will of Congress with this "undisguised distrust and disregard for Congressional enactments" in the area of antitrust.

Bork's nomination went down to defeat by 58-42. He resigned from the D.C. Circuit soon thereafter.

So what would the difference in antitrust jurisprudence have been if Bork had been elevated to the Supreme Court? Ultimately President Reagan was able to appoint Anthony Kennedy to Justice Powell's seat. Kennedy certainly has been less prolific than Bork probably would have been, authoring only four antitrust opinions, *Kansas v. Utilicorp*, *FTC v. Ticor*, *Brooke Group v. Brown & Williamson*, and *United States Postal Services v. Flamingo Industries*. Moreover, antitrust is not an area in which there are particularly important swing votes. In fact, of the 24 antitrust cases decided in the 18 years since Bork's failed nomination, only four involved five-four decisions: *Summit v. Pinhas*, *Kansas v. Utilicorp*, *Hartford Fire v. California*, and *California Dental Association v. FTC*. Kennedy was on the losing side in all of those cases except *Kansas v. Utilicorp*. Having a different judge in Justice Kennedy's chair would not have made a significant difference in these cases.

Counting votes, however, severely understates the potential influence of an antitrust luminary such as Judge Bork. Bork, with his expertise, boundless energy and clear vision would have had substantially greater influence than his single vote. In the past two decades antitrust has been a back-bench subject with typically only one case a year decided. One would have expected a far greater attention to antitrust with Bork on the bench.

So what are some of the potential differences we might have seen had he been a member of the Court?

Here are six "what if" suggestions:

1.) *City of Columbia v. Omni* [3] —This case upheld an alleged fraud in securing a franchise. The Court rejected an antitrust claim under the state action doctrine, holding that a conspiracy or fraud exception did not exist. With Bork's strong views about the anticompetitive uses of governmental action one might have expected him to have taken an aggressive posture on the conduct at issue in this case and the Supreme Court may indeed have found a violation.

2.) *Kodak v. Image Technical Services*[4] —This case reversed summary judgment for the defendant in a controversial tying arrangement. One might imagine that Bork, with his strong criticism of antitrust law involving tying, would have framed the debate in a very different fashion than the case was ultimately decided. Bork

would have given very little deference to the older tying cases that Justice Brennan extensively relied upon.

3.) *Professional Real Estate Investors v. Columbia Pictures Industries.*[5]—This case articulated a rather strict rule for antitrust cases attacking sham litigation. One might imagine that Bork, with his strident criticism of the use of sham litigation as a form of predation, would have argued for a broader rule of law that would have enabled private plaintiffs and the government to attack sham litigation more broadly. Moreover, his views may have led to a decision in finding an antitrust violation.

4.) *California Dental v. FTC* [6]—This case reversed an FTC decision finding certain advertising restraints by the California Dental Association illegal under the antitrust laws. It resulted in a 5-4 decision which has proven to be uniquely difficult to interpret for the courts and regulators. Bork, with his clear vision of the potential problems of horizontal restraints, might have brought together a consensus with a clearer rule of law on why these restraints were illegal.

5.) *Federal Trade Commission v. Superior Court Trial Lawyers*[7]—In this decision the Supreme Court reversed a decision of the D.C. Circuit decision upholding a "boycott" by publicly funded defense attorneys, in part, on First Amendment grounds. Judge Bork, with his strong opinions on First Amendment rights, may well have convinced his fellow Justices that the boycott seeking higher reimbursement for representatives of indigent defendants should not be condemned as *per se* illegal.

6.) Chroma Lighting v. GTE Prods.[8]—Of course Bork would have been able to exercise his influence on decisions of whether to grant *certiorari* in certain cases. The Supreme Court accepted very few antitrust decisions for review in the 1990s. One might imagine that the number would have been significantly greater with such a notable antitrust expert on the bench. One area in which Bork's scholarship suggested there was significant mischief was in the area of Robinson-Patman enforcement. *Chroma Lighting* offered the opportunity for the Supreme Court to reverse the *Morton Salt* [9] presumption of anticompetitive harm from the existence of price discrimination. One might imagine that Bork would have worked hard to have certiorari granted in such a case to narrow the potentially harmful effects of Robinson-Patman litigation.

Eighteen years after the debate one wonders whether Bork's nomination to the bench would today receive such strident opposition. Thanks to the effective leadership of Republicans like the late Janet Steiger, Jim Rill and Tim Muris, and Democrats like Bob Pitofsky and Joel Klien, antitrust has clearly become a bipartisan endeavor where consensus rules over controversy. One can search in vain to find either Democrat or Republican antitrust enforcers citing *Brown Shoe, Procter & Gamble, Standard Oil, Topco,* or *Sealy.* On the other hand, one can find studious citation to Bork's opinion in *Neumann* and Bork's writings in the DOJ briefs in *Microsoft*. Even Judge Bork's call for limited enforcement in the areas of resale price maintenance, vertical mergers, conglomerate mergers and price discrimination has come about regardless of which political party is in charge.

Ultimately, though he did not ascend to the Court, Judge Bork appears to have prevailed in the debate posed in *The Antitrust Paradox*. But Supreme Court antitrust jurisprudence is probably far less vibrant because of his absence.

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Footnotes

[1] Robert H. Bork, The Antitrust Paradox: A Policy at War With Itself (Basic Books, Inc. 1978).

[2] Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984).

[3] City of Columbia and Columbia Outdoor Advertising v. Omni Outdoor Advertising, 499 U.S. 365 (1991).

[4] Eastman Kodak Co. v. Image Technical Services, 504 U.S. 451 (1992).

[5] Prof'l Real Estate Investors v. Columbia Pictures Indus., Inc., 508 U.S. 49 (1993).

[6] Cal. Dental Ass'n v. Federal Trade Comm'n., 526 U.S. 756 (1999).

[7] FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990).

[8] Chroma Lighting v. GTE Prods. Corp., 127 F.3d 1136 (9th Cir. 1997).

[9] Fed Trade Comm'n v. Morton Salt Co., 334 U.S. 37 (1948).