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EMBARGOED UNTIL 10:00 AM EDT
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RESPONSE PREPARED TO WHITE HOUSE ANALYSIS OF JUDGE BORK'S RECORD

The Chairman of the Senate Judiciary Committee requested a review of the White House briefing paper, released August 3, 1987, on the nomination of Judge Robert Bork to be an Associate Justice of the Supreme Court. The background research was conducted by Committee consultants Jeffrey Peck, a member of the District of Columbia Bar, and Christopher Schroeder, Professor of Law at Duke University. Their research was reviewed and approved by Floyd Abrams, member of the New York Bar; Clark Clifford, member of the District of Columbia Bar; Walter Dellinger, Professor of Law, Duke University Law School; and Laurence H. Tribe, Tyler Professor of Constitutional Law at Harvard Law School.

Attached you will find a copy of the researchers' statement and the text of their review of the White House briefing paper.

STATEMENT OF COMMITTEE CONSULTANTS

SEPTEMBER 2, 1987

The White House statement, "Materials on Robert H. Bork," released on August 3, 1987, significantly distorts the issues posed for the Senate and the nation by President Reagan's nomination of Judge Bork to fill the Supreme Court vacancy created by the resignation this July of Associate Justice Lewis Powell. Although there is room for debate and disagreement over the ultimate issue -- whether the Senate should grant or withhold its consent to the pending nomination -- the record of Judge Bork's public pronouncements and actions over the past quarter-century paint a picture of Judge Bork as an extremely conservative activist rather than a genuine apostle of judicial moderation and restraint.

The attempt by the White House to depict Judge Bork as a mainstream moderate simply does not comport with his record. Bruce Fein, a former Reagan Administration official and a conservative legal scholar, made much the same point earlier this week in a radio interview. He remarked:

Judge Bork, even if he's portrayed as a moderate and is confirmed is not going to alter his vote that way....I think when you try to be a little too cute as the President is being I believe, that no one is deceived....They chose Bob Bork because they wanted him to make changes in the law.

Fein went on to say that the President should be

going straight forward and telling the Senate, telling all the public, and the media, that of course, these are the major areas where he believes the Court has erred in the past and where he believes Justice Powell perhaps cast an errant vote and he would hope that Judge Bork would correct these.

The enclosed paper undertakes to present a response to the White House summary of Judge Bork's record. It incorporates briefing materials received and reviewed by Senator Biden and was prepared in response to inquiries from Senate staff and the media about the White House position paper. It is intended to serve these purposes only, and is not intended to be a complete evaluation of the nominee's record.

Statement Of Committee Consultations
September 2, 1987
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Upon completion of the research, the Chairman asked four distinguished members of the legal community to review the draft of the Response: Floyd Abrams, member of the New York Bar; Clark Clifford, member of the District of Columbia Bar; Walter Dellinger, Professor of Law, Duke University Law School; and Laurence H. Tribe, Tyler Professor of Constitutional Law, Harvard University Law School. These individuals have advised the Chairman that they support wholeheartedly the substance of the views expressed in the Response.

**RESPONSE PREPARED TO WHITE HOUSE ANALYSIS
OF JUDGE BORK'S RECORD**

September 2, 1987

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APPENDIX A.

APPENDIX B.

I.

SUMMARY

On August 3, 1987, the White House distributed a document entitled "Materials on Judge Robert H. Bork." In itself, this was unusual so early in a confirmation process. Because of that early distribution, and because the document portrays Judge Bork as in the "mainstream tradition" of such justices as Lewis Powell and John Harlan, the White House position paper has generated considerable comment.

Members of the media, Senate staff and other interested persons have inquired about the substance of the White House position paper. In response to these inquiries, Senator Joseph R. Biden, Jr., Chairman of the Senate Judiciary Committee, directed several consultants to prepare an analysis of its portrayal of Judge Bork's record, and then asked several prominent academics and lawyers to evaluate their work.

This Response is the result of that effort. It is not a definitive or exhaustive analysis of Judge Bork. It is based upon an examination of the public record, including Judge Bork's writings as an academic, as Solicitor General and as a federal Circuit Court Judge, as those pertain to the principal assertions in the White House position paper concerning Judge Bork's public record. The overall conclusion of this review is that the position paper contains a number of inaccuracies, and that the picture it paints of Judge Bork is a distortion of his record. By highlighting the major inaccuracies and by collecting other pertinent information, omitted by the White House, relevant to an overall assessment of Judge Bork, this Response undertakes to depict Judge Bork's record more fully and accurately.

The White House position paper sets forth a number of propositions about Judge Bork that are not supported by the record. These propositions, and the response to them, are summarized below.

The White House position paper asserts that the Senate should focus on the nominee's judicial, rather than academic, record and suggests that since his criticism of "the reasoning of Supreme Court opinions" is merely something "that law professors do," it has little relevance to the Senate's inquiry. (Chapter 3, at 2.) In fact, Judge Bork's own statements demonstrate that he believes that a nominee's entire record is relevant to the Senate's inquiry. He has said that:

- "teaching is very much like being a judge and you approach the Constitution in the same way." (Interview with WOED, Pittsburgh, Nov. 19, 1986.)

- "my views have remained about what they were [since becoming a judge]....So when you become a judge, I don't think your viewpoint is likely to change greatly." (District Lawyer Interview, May/June 1985, at 31.)

- "when you're considering a man or woman for a judicial appointment, you would like to know what that man or woman thinks, you look for a track record, and that means that you read any articles they've written, any opinions they've written. That part of the selection process is inevitable, and there's no reason to be upset about it." (District Lawyer Interview at 33.)

The White House position paper asserts that Judge Bork is one of the "most eloquent and principled proponents of judicial restraint" and that he rejects a philosophy in which "the desire for results appears to be stronger than the respect for legitimacy." (Chapter 2, at 1.) In fact, the nominee's record shows that he has often advocated and engaged in "judicial activism."

- members of the D.C. Circuit charged Judge Bork with attempting to "wipe away selected Supreme Court decisions in the name of judicial restraint" and with conducting "a general spring cleaning of constitutional law." (Dronenburg v. Zech, 746 F.2d 1579, 1580 (D.C. Cir. 1984).)

- five members of the D.C. Circuit described Judge Bork's criteria for reviewing cases en banc as "self-serving and result-oriented" and as doing "substantial violence to the collegiality that is indispensable to judicial decision-making." (United States v. Meyer, No. 85-6169, slip op. at 2 (D.C. Cir. July 31, 1987).)

• other members of the D.C. Circuit stated that Judge Bork's use of sovereign immunity to deny access to the courts was "extraordinary and wholly unprecedented" and, if adopted as the governing rule, would destroy the "balance implicit in the separation of powers." (Bartlett v. Owen, 816 F.2d 695, 703, 707 (D.C. Cir. 1987).)

The White House position paper attempts to support its claim about Judge Bork's restraint in a number of ways. For example, the position paper asserts that Judge Bork "has never wavered in his consistent and principled protection of...civil liberties...that can actually be derived from the Constitution and federal law," and that he has "opposed what he views as impermissible attempts to overturn" the right to privacy decisions. (Chapter 2, at 1-2.) In fact, Judge Bork has repeatedly and consistently rejected the right to be free from governmental interference into one's private life and has never said that the Supreme Court should not overturn its prior decisions establishing and extending the right to privacy.

• the nominee has repeatedly rejected the decision upholding the right of married couples to use contraceptives. ("Neutral Principles" at 9.)

• Judge Bork described as "unconstitutional" the decision upholding the right of a woman to decide with her doctor the question of abortion. (Hearings Before the Subcommittee on Separation of Powers of the Senate Judiciary Committee, 97th Cong., 1st Sess., June 10, 1981, at 310.)

• Judge Bork has sharply criticized the decision striking down a law that called for the involuntary sterilization of certain criminals. ("Neutral Principles" at 11-12.)

• Judge Bork has rejected constitutional protection for what he views as "so tenuous a relationship as visitation [of children] by a non-custodial parent." (Franz v. United States, 707 F.2d 582 (1983).)

• Judge Bork has criticized the Supreme Court's rulings protecting the decisions of parents about their children's education. ("Neutral Principles" at 11.)

The White House position paper states that the nominee is "[a]mong the nation's foremost authorities on antitrust...law." (Chapter 1, at 3.) In fact, what the White House omits is that Judge Bork's antitrust views are a vivid demonstration of his judicial activism.

• in the antitrust area, Judge Bork proposes that the courts ignore almost one hundred years of congressional enactments and judicial precedents.

- Judge Bork's exclusive focus on "economic efficiency" is inconsistent with the legislative history of the antitrust statutes.

- Judge Bork has attacked virtually all of the basic antitrust statutes.

- Judge Bork has rejected many of the Supreme Court's leading antitrust decisions.

- Judge Bork has put his activist ideas into practice on the Court of Appeals.

The White House position paper also asserts that Judge Bork's First Amendment cases "suggest a strong hostility to any form of government censorship" (Chapter 9, at 1), and that his "record indicates he would be a powerful ally of First Amendment values on the Supreme Court." (Chapter 3, at 6.) In fact, Judge Bork's record on First Amendment issues demonstrates that he would narrow many well-established First Amendment protections.

- Judge Bork's criticism of landmark Supreme Court decisions suggests that he would tolerate far broader prior restraints on the press than have historically been deemed constitutional, as well as permitted far more governmental punishment of speech than has traditionally been protected.

- Judge Bork has taken a narrow view of the right of the press to gather information by limiting requests under the Freedom of Information Act.

- Judge Bork's writings show that he would protect only speech that is tied to the political process, and that he would not protect artistic and literary expression such as Shakespeare's plays, Rubens' paintings and Barishnikov's ballet.

- Judge Bork has rejected protection for the advocacy of civil disobedience, so that if his view had been the governing rule, the right to advocate sit-ins at lunch counters segregated by law would have been left to the discretion of state legislatures.

- in the area of church and state, Judge Bork has rejected several Supreme Court decisions, and has called for a "relaxation of current rigidly secularist doctrine" and for the "reintroduction of some religion into public schools." ("Untitled Speech, Brookings Institution, Sept. 12, 1985, at 3.)

The White House position paper asserts that Judge Bork would follow in the "mainstream tradition" exemplified by such jurists as Justices Powell and Harlan. (Chapter 2, at 1.) In fact, the position paper has ignored many fundamental differences between Judge Bork and the jurists in whose tradition he would purportedly follow.

- Judge Bork's repeated rejection of constitutional protection for certain fundamental liberties contrasts markedly with the views of Justice Powell, who found such liberties to be "deeply rooted in this Nation's history and tradition," (Moore v. East Cleveland, 431 U.S. 494 (1977)), and Justice Harlan, who found them to be "implicit in the concept of ordered liberty." (Griswold v. Connecticut, 381 U.S. 479, 500 (1965).)

- Judge Bork's willingness to overturn numerous landmark Supreme Court decisions conflicts with Justice Powell's view that the doctrine of stare decisis "demands respect in a society governed by the rule of law." (City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 419-420 (1983).)

- Judge Bork's view that Roe v. Wade is an "unconstitutional decision" and "a serious and wholly unjustifiable judicial usurpation of state legislative authority" (Hearings Before the Subcommittee on Separation of Powers of the Senate Judiciary Committee, 97th Cong., 1st Sess., June 10, 1981, at 310), conflicts with Justice Powell's view that there are "especially compelling reasons for adhering to stare decisis in applying the principles of Roe v. Wade." (City of Akron, 462 U.S. at 420 n.1.)

- Judge Bork's restrictive view of press rights conflicts with the balanced approach used by Justice Powell.

- the statistics proffered in the position paper do not demonstrate that Judge Bork and Justice Powell are ideologically similar.

The White House position paper asserts that Justice Powell agreed with Judge Bork in a leading case protecting employees from sexual harassment in the workplace (Vinson v. Taylor (753 F.2d 141, rehearing denied, 760 F.2d 1330 (D.C. Cir. 1985), aff'd sub nom. Meritor Savings Bank v. Vinson, 106 S. Ct. 2399 (1986))), and that the Supreme Court "adopted positions similar to those of Judge Bork" in the case. In fact, this assertion is incorrect, since a unanimous Supreme Court flatly rejected Judge Bork's views on the issue of liability.

- Judge Bork argued that "[b]y depriving the charged person of any defense, [the majority] mean[s] that sexual dalliance, however voluntarily engaged in, becomes harassment whenever

an employee sees fit, after the fact, to so characterize it." (760 F.2d at 1330.)

- in an opinion joined by Justice Powell, Justice Rehnquist held that "[t]he correct inquiry is whether [the plaintiff] by her conduct indicated that the alleged sexual advances were unwelcome, not whether her participation...was voluntary." (106 S. Ct. at 2406.)

The White House position paper asserts that Judge Bork "has never wavered in his consistent and principled protection of civil rights...that can actually be derived from the Constitution and federal law," and suggests that Judge Bork is a strong supporter of civil rights. (Chapter 2, at 1.) In fact, Judge Bork's extensive record shows that he has opposed virtually every major civil rights advance on which he has taken a position, including such issues as the public accommodations bill, open housing, restrictive covenants, literacy tests, poll taxes and affirmative action.

- in 1963, Judge Bork opposed the Public Accommodations bill on the ground that it would mean "a loss in a vital area of personal liberty." ("Civil Rights -- A Challenge," New Republic, 1963, at 22.) He has since recanted this view.

- in 1968, the nominee attacked a Supreme Court decision striking down a referendum that revoked a state open-housing statute. ("The Supreme Court Needs A New Philosophy," Fortune, Dec. 1968, at 166.)

- in 1968, 1971 and 1973, Judge Bork sharply criticized the decisions establishing the principle of one-person, one-vote. ("The Supreme Court Needs A New Philosophy," at 166; "Neutral Principles and Some First Amendment Problems," 47 Indiana Law Journal 1, 18-19 (1971); Confirmation Hearings to be Solicitor General (1973) at 13.)

- in 1971, he challenged the decision striking down racially restrictive covenants in housing. ("Neutral Principles" at 15-16.)

- in 1972 and 1981, he criticized decisions banning literacy tests in voting. ("Constitutionality of the President's Busing Proposals," American Enterprise Institute (1972) at 1, 9-10; Hearings on the Human Life Bill Before the Subcommittee on Separation of Powers of the Senate Judiciary Committee, 97th Cong., 1st Sess. (1982).)

- in 1973 and 1985, he attacked the decision outlawing poll taxes as a prerequisite to voting. (Solicitor General Hearings (1973) at 17; "Forward" in G. McDowell, The Constitution and Contemporary Constitutional Theory (1985) at vii.)

● in 1978, he rejected the decision upholding affirmative action. ("The Unprincipled Bakke Decision," Wall Street Journal, July 21, 1978.)

● in 1987, he stated that "I do think the Equal Protection Clause probably should be kept to things like race and ethnicity," indicating that he would not extend protection, for example, to women. ("Worldnet Interview," United States Information Agency, June 10, 1987, at 12.)

● Judge Bork has opposed the Equal Rights Amendment because it would, in his view, constitutionalize issues of gender equality. (Judicial Notice Interview, June 1986, at 7-8.)

● commenting generally on the Bill of Rights, Judge Bork says that it was "a hastily drafted document on which little thought was expended." ("Neutral Principles" at 22.)

The White House position paper asserts that a "statistical analysis of Judge Bork's voting record," including the fact that none of his majority opinions has been reversed, demonstrates his suitability for the Supreme Court. (Chapter 6, at 1.) In fact, the position paper's compilation of statistics seriously distorts Judge Bork's record.

● the statistical analysis is uninformative since the nominee, as a circuit court judge, has been constitutionally and institutionally bound to follow Supreme Court precedent.

● the analysis of Judge Bork's supposed "agreement" with majority opinions often distorts his more substantive rejection of the majority's position.

● since Judge Bork concedes that 90% of his docket has been non-ideological (Untitled Speech, Federal Legal Council, Oct. 16, 1983, at 2), his circuit court record says little about his suitability for the Supreme Court, whose docket is far more controversial.

● the emphasis on Judge Bork's lack of reversals distorts the more important fact that none of his majority opinions has yet to be reviewed by the Supreme Court.

The White House position paper describes the case reviewing then-Acting Attorney General Bork's firing of Special Prosecutor Archibald Cox by reference only to the "rescission of the regulations granting Cox independent prosecution authority." (Chapter 8, at 3.) In fact, this description is, for several reasons, inaccurate and incomplete.

- the plaintiffs challenged both the firing of Mr. Cox and the rescission of the regulations.
- the court ruled that Mr. Cox was illegally discharged, not just that the rescission of the regulation was improper.
- the position paper fails to note that even if the rescission of the regulation had preceded the actual firing of Mr. Cox, Judge Bork still would have acted unlawfully, since the court found that the rescission itself was "arbitrary and unreasonable."

The White House position paper asserts that there is "no basis...in Judge Bork's record" for the view that he would "seek to 'roll back' many existing precedents" and that Judge Bork "believes in abiding by precedent." (Chapter 3, at 2.) In fact, Judge Bork's judicial and academic record raise serious questions about his willingness to respect and adhere to landmark decisions of the Supreme Court, since he has said that:

- the appointment power is the "only cure" for "judicial excesses." (Hearings Before the Senate Judiciary Committee (1982) at 7; "'Inside' Felix Frankfurter," The Public Interest, Fall Book Supplement (1981) at 109-110.)
- an originalist judge would have "no problem whatever in overruling a non-originalist precedent." (Remarks on the Panel "Precedent, the Amendment Process, and Evolution of Constitutional Doctrine," First Annual Lawyers Convention of the Federalist Society, Jan. 31, 1987, at 126.)
- precedent in constitutional law "is less important" than it is with respect to statutes or the common law. (Federalist Society Convention at 126.)
- "broad areas of constitutional law" should be "reformulated." ("Neutral Principles" at 11.)
- a "large proportion" of the "most significant constitutional decisions" of the "past three decades" could not have been reached through a proper interpretation of the Constitution. (Untitled Speech, Catholic University, March 31, 1982, at 5.)

- the Constitution does not "allow" "dozens of cases" that have been decided "in recent years." (Hearings Before The Subcommittee on Separation of Powers (1981) at 315.)
- Roe v. Wade is "by no means the only example of unconstitutional behavior by the Supreme Court." (1981 Hearings at 310.)
- the Supreme Court has since "the mid-1950s" made decisions for which it has offered little or no "constitutional argument." ("Judicial Review and Democracy," Encyclopedia of the American Constitution, Vol. 2 (1986) at 1062.)

The White House position paper asserts that "there can be no serious debate that the Los Angeles Times is correct" when it observed on July 2, 1987, that "Bork has proved to be a judge who follows the law and legal precedent--not his personal preferences--in arriving at his opinions." (Chapter 2, at 8.) In fact, the position paper distorts the position of the Los Angeles Times, which on the very same day spoke against the Bork nomination in an editorial entitled "Hard-Right Rudder." The editorial said that:

- "it appears that Bork's addition to the court would cement a five-vote majority for undoing much of the social progress of the last three decades."
- "The country would have been better served by a nominee more like Justice Powell, who had few ideological commitments but who weighed each case on the facts before him and tried to decide what was right."

II.

ESTABLISHING THE CONTEXT: THE BORK NOMINATION IS A DECISION ABOUT THE FUTURE

A vacancy on the Supreme Court is always a national concern. But this particular vacancy -- occurring at this particular time -- carries historical weight. In this year of its bicentennial, the Constitution is more than an object of celebration; it is the focus of a critical national debate about what it is, what it means and what it requires.

The appropriateness of a Supreme Court nomination must be considered in context, taking into account the Court on which the nominee would sit, the impact of the nominee's judicial philosophy on vital decisions likely to face the Court during the nominee's tenure, as well as the nominee's personal qualifications. The White House position paper attempts to narrow the focus of the Senate's inquiry and to obscure the significance of this nomination, by charging that it is inappropriate for any member of the Senate to oppose the nomination "on the ground that it would affect the 'balance' on the Supreme Court" because a "balance theory" is "result orient[ed]." (Chapter 7, at 2.) "There would be no need to worry" about balance, the paper continues, "if Judges...were to confine themselves to interpreting the law as given to them by statute or Constitution, rather than injecting their own personal predilections...." (*Id.*) Even if the question of balance were an appropriate topic of inquiry, the paper concludes, "Judge Bork's appointment would not change the balance of the Court." (*Id.*)

A. The Direction Of The Supreme Court's Constitutional Interpretation Is Of Legitimate Concern To The Senate

To be sure, neither the Constitution nor judicial practice enshrines any particular philosophical balance on the Supreme Court. And the President must have some latitude to select Supreme Court nominees who generally share his philosophical perspective.

That latitude is exceeded when a President attempts to remake the Supreme Court in his own image by selecting nominees whose extensive expressions of views on major, specific issues clearly parallel his own; when the President and the Senate are divided deeply on the great issues of the day; and when the Court itself is closely divided philosophically, and a determined President could bend it to political ends that he can not achieve through the legislative process. When it is clear that the President is seeking more than broad philosophical compatibility, it is the Senate's right, and indeed its responsibility, to look closely at the philosophy of even a well-qualified nominee. That much is

apparent from both the text and history of the Constitution and from Senate precedent.

B. The Supreme Court's Constitutional Direction Is At Stake

When a nominee such as Judge Bork could dramatically change the direction of the Supreme Court, each Senator has both a right and a constitutional duty to consider whether the judicial philosophy of that nominee is desirable for this time and for this Court. And, contrary to the assertions of the White House position paper, the direction of the Supreme Court is very much at stake.

1. The Supreme Court's Last Term Demonstrates That Justice Powell Often Cast The Swing Vote

Statistics from the Supreme Court's last term (derived from "Supreme Court Review," The National Law Journal, Aug. 17, 1987, at S-1 to S-36) demonstrate that Justice Powell often cast the swing vote on the Court: he voted with the majority in 36 of the 43 decisions decided by a 5-4 vote. Powell was clearly a moderate conservative on the Court. And over half of the cases in which Justice Powell agreed with Chief Justice Rehnquist and disagreed with Justice Brennan (35 out of 59) involved criminal justice issues. Apart from criminal justice cases, where Justice Powell was most predictably aligned with the Court's conservatives, he was quite moderate indeed: where Justice Brennan and Chief Justice Rehnquist disagreed, Powell sided with Rehnquist in 24 cases and with Brennan in 20 cases.

The National Law Journal has summarized the Court's last term as follows:

[Justice Powell's vote] was the crucial swing vote. Chief Justice Rehnquist and Justices Scalia, Byron R. White and Sandra Day O'Connor won it to build majorities in criminal justice, business and property cases; Justices Brennan, Blackmun, John Paul Stevens and Thurgood Marshall relied on it in abortion, affirmative action, civil rights and religion cases. (Id. at S-3.)

As discussed in Section III, Judge Bork's extensive record suggests his voting would not be equivalent to the votes cast by Justice Powell's in these latter cases.

2. The Response To Justice Powell's Retirement And Judge Bork's Nomination Also Suggests That The Direction Of The Court Is At Stake

As the response by the news media and to many affected groups indicates, the public recognizes that the direction of the Court is now at issue. Following Justice Powell's resignation, headlines declared: "Powell Leaves High Court... President Gains Chance to Shape the Future of the Court" (The New York Times, June

27); "Justice Powell Quits, Opens Way For Conservative Court" (The Los Angeles Times, June 28); "Reagan Gets His Chance To Tilt the High Court" (The New York Times, June 28).

Representatives of conservative groups confirm what is at issue with this nomination. Bruce Fein, formerly the General Counsel of the Federal Communications Commission and now at the Heritage Foundation, remarked that President Reagan "is relying on Bork's appointment to refashion constitutional jurisprudence and political discourse regarding social, civil-rights and criminal-justice matters to satisfy his constitutional backers." ("If Heart Is Gone, Can Bork Save The Soul?" Los Angeles Times, Aug. 16, 1987.)

Reverend Jerry Falwell has said that "[w]e are standing at the edge of history. Our efforts have always stalled at the door of the U.S. Supreme Court," and Bork's nomination "may be our last chance to influence this most important body." ("Groups Unlimber Media Campaign Over Bork," Washington Post, Aug., 4, 1987.) And on July 27, Christian Voice expressed a similar view:

"[E]nsure a conservative America -- even after President Reagan leaves the White House in 1988....Now we have a prime opportunity to give the Supreme Court its first conservative majority since the 1930s....[D]id you realize that Justice Powell...was the deciding vote in winning the last 8 pro-abortion cases brought to the Supreme Court by the American Civil Liberties Union? Confirming Judge Bork would change all this. (Emphasis in original.)

Few observers, therefore, have any doubt as to what the nomination of Robert Bork is about.

3. As It Stretches To Find Moderate Allies, The White House Paper Misrepresents An Important Editorial Conclusion

The White House position paper concludes its review of the nominee's judicial record with a distortion of an assessment of Judge Bork by the Los Angeles Times. The White House paper states that "there can be no serious debate that the Los Angeles Times is correct" when it observed on July 2, 1987, that "'Bork has proved to be a judge who follows the law and legal precedent -- not his personal preferences -- in arriving at his opinions.'" (Chapter 2, at 8.) This selective quotation suggests that the Los Angeles Times, through its editorial board, has endorsed the nominee. In fact, the statement is simply part of a reporter's story.

More importantly, on the very same day, the editorial board of the Los Angeles Times did offer its considered opinion on the Bork nomination. In an editorial entitled "Hard-Right Rudder," it

described Judge Bork as a "rock-solid right-winger," and not as the "moderate" described in the White House position paper:

From his record, it appears that Bork's addition to the court would cement a five-vote majority for undoing much of the social progress of the last three decades. But we hope that if he is seated, the strands of flexibility that have occasionally appeared will come to the fore.

From the outset of his Administration, Reagan has made clear his desire to fill the Judiciary with people who would decide cases as he would. Though the President's term will end in 18 months, the nomination of Bork gives Reagan the opportunity to write his views into the law for years to come. The country would have been better served by a nominee more like Justice Powell, who had few ideological commitments but who weighed each case on the facts before him and tried to decide what was right.

In his five years on the Court of Appeals, Bork has not ruled on an abortion case. But he has made clear in other opinions that he does not believe the Constitution contains a "right to privacy," which was the basis of the Supreme Court's landmark decision in Roe v. Wade, legalizing abortion. The last time the Supreme Court considered abortion, in 1986, it ruled 5 to 4 against restrictions imposed by a state. Powell's was the fifth vote. Bork seems sure to vote the other way, moving the country back to the scandalous state of affairs that existed before 1973...

Bork's legal philosophy goes by the name judicial restraint, which is a code term used by whichever side dislikes what the courts are doing....The problem is that whenever ideologically committed people of either stripe get on the bench, they always find that the law supports their policy preferences. If the Senate approves the President's nomination, Bork will likely do the same. (Emphases added.)

III.

CONTRARY TO THE POSITION PAPER'S PORTRAYAL, THE NOMINEE IS A JUDICIAL ACTIVIST

The White House position paper emphasizes a number of generalizations about Judge Bork's adherence to "judicial restraint" and his "faithful application" of the precedent of the Supreme Court and of his own court. According to the White House position paper, for example, Judge Bork "is among the most eloquent and principled proponents of judicial restraint." (Chapter 2, at 1.) In support of its claim, the White House position paper asserts that, "as a judge, [Bork] has faithfully applied the legal precedents of both the Supreme Court and his own Circuit Court." (Chapter 3, at 2.) To demonstrate that "faithful application," the position paper relies on a "statistical analysis of Judge Bork's voting record." This analysis, it claims, shows that the nominee "is an open-minded judge who is well within the mainstream of contemporary jurisprudence." (Chapter 6, at 1.)

These statements are too general and abstract to provide any meaningful sense of Judge Bork's philosophy. As generalizations, moreover, they avoid the more important questions of whether Judge Bork, while sitting on the D.C. Circuit, has practiced restraint, and whether his writings evince a willingness to do so. Or do Judge Bork's opinions and other writings indicate that he has engaged in precisely the same kind of "activism" for which he has chided other jurists, including members of the Warren and Burger Courts?

Attention to specific decisions and writings shows that the picture painted by the White House position paper is inaccurate and incomplete. Among the omissions are clear examples of Judge Bork's advocacy and implementation of conservative activism, which demonstrate that he is not the apostle of judicial restraint and moderation described in the White House position paper.

A. The Position Paper's Compilation Of Statistics Seriously Distorts Judge Bork's Record

1. The Statistical Analysis Is Uninformative Since The Nominee, As A Circuit Court Judge, Has Been Constitutionally And Institutionally Bound To Follow Supreme Court Precedent

As an intermediate court judge, the nominee has been constitutionally and institutionally bound to respect and apply Supreme Court precedent. Indeed, Judge Bork has explicitly recognized that duty in some of his decisions. (Franz v. United States, 712 F.2d 1428 (D.C. Cir. 1983); Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984).) Relying on Judge Bork's lack of reversals to show his "faithful application" of Supreme Court precedents thus says nothing about his potential for activism if confirmed as an Associate Justice on the Supreme Court, where he

would be free of such restraints. The "statistical analysis," therefore, is uninformative.

2. The Position Paper's Statistics Ignore The Rejection By A Unanimous Supreme Court Of Judge Bork's Dissent In A Recent Leading Case On Sexual Harassment In The Workplace

The focus in the White House position paper on the lack of reversals of Judge Bork's majority opinions ignores the rejection of one of Judge Bork's dissents by a unanimous Supreme Court. In a factually inaccurate and misleading description, the White House position paper claims that the Supreme Court "adopted positions similar to those of Judge Bork both on the evidentiary issues and on the issue of liability" in the case of Vinson v. Taylor, (753 F.2d 141, rehearing denied, 760 F.2d 1330 (D.C. Cir. 1985), aff'd sub nom. Meritor Savings Bank v. Vinson, 106 S. Ct. 2399 (1986)), the leading case on sexual harassment in the workplace. In fact, Justice Rehnquist's opinion for the full Court took a far more sensitive approach to liability for such harassment than did Judge Bork's dissent.

Vinson, a bank teller, claimed that her supervisor insisted that she have sex with him, and that she did so because she feared she would be fired if she did not. Vinson claimed that over the next several years, her supervisor made repeated sexual demands, fondled her in front of other employees, exposed himself to her, and forcibly raped her on several occasions. The trial court dismissed the claim, saying that their relationship was "voluntary." The D.C. Circuit reversed, holding that if the supervisor made "Vinson's toleration of sexual harassment a condition of her employment," her voluntariness "had no materiality whatsoever."

The D.C. Circuit was asked to rehear the case, and the full court declined. Judge Bork dissented from the denial of the rehearing. Attacking the original decision, Judge Bork argued that "voluntariness" should be a complete defense in a sexual harassment case. He said that "[t]hese rulings seem plainly wrong. By depriving the charged person of any defenses, they mean that sexual dalliance, however voluntarily engaged in, becomes harassment whenever an employee sees fit, after the fact, to so characterize it." (760 F.2d at 1330.)

Judge Bork's holding on the voluntariness issue was flatly rejected by a unanimous Supreme Court, with Justice Powell joining the opinion. (The Court did agree with Judge Bork on the evidentiary issue.) Justice Rehnquist wrote the Court's opinion, and held that the correct test for sexual harassment was whether the employer created "an intimidating, hostile, or offensive working environment." He concluded that "[t]he correct inquiry is whether [plaintiff] by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual

participation in sexual intercourse was voluntary." (106 S. Ct. at 2406.)

The White House position paper's statements about the Vinson case thus fail to comport with the clear factual record. And by distorting the facts, the position paper inflates Judge Bork's record with respect to review by the Supreme Court.

3. The Position Paper's Analysis Of Judge Bork's Supposed "Agreement" With Majority Opinions Often Distorts His More Substantive Rejection Of The Majority's Position

Throughout the White House position paper, Judge Bork is identified as having agreed with the majority opinion in a number of cases that purport to show his moderation and restraint. Typical of such attribution is the statement, made in connection with Planned Parenthood Federation v. Heckler (712 F.2d 650 (D.C. Cir. 1983)):

Judge Bork showed his respect for statutory requirements by agreeing with a decision that the Health and Human Services Department violated the law in its attempts to require federally-funded family planning grantees to notify parents when contraceptives were provided to certain minors. Thus, the Department's so-called 'squeal' rule was overturned by the court. (Chapter 2, at 2.)

This description distorts the true nature of Judge Bork's opinion, which is anything but deferential and non-activist.

In Planned Parenthood, the plaintiffs challenged a federal regulation that required all family-planning centers to give notice to parents that their teenagers sought contraceptives. Because Congress explicitly stated that it did not intend to "mandate" family involvement in the delivery of services, but rather wanted the centers to "encourage" teenagers to bring their families into the process, the court held that the parental notification requirement was inconsistent with Congress's intent.

Although Judge Bork agreed that Congress intended that notification be voluntary on the teenager's part (*id.* at 665, 667), he concluded that Congress did not clearly prohibit the regulations. He conceded that HHS had misinterpreted the relevant law, but argued nonetheless that the authority necessary for the regulation might be found elsewhere. Noting that the regulations pertained to a "vexed and hotly controverted area of morality and prudence," (*id.* at 665), Judge Bork urged that the case be remanded to search for this unknown authority. The majority argued that a remand would be gratuitous, since it was clear that the Executive had violated the law.

**4. None Of Judge Bork's Majority Opinions Has Ever
Been Reviewed By The Supreme Court**

One "statistic" cited by the White House position paper is that Judge Bork, author of more than 100 majority opinions, has never been reversed. It is more accurate to say, however, that no majority opinion of Judge Bork's has ever been reviewed. Until recently, in all of Judge Bork's majority opinions review had not been sought by either party (100 cases) or review had been denied. (9 cases). While the Supreme Court has recently granted certiorari in one case in which he wrote a majority opinion (Finzer v. Barry, (798 F.2d 1450 (D.C. Cir. 1986), cert. granted, 107 S. Ct. 1282 (1987)), the Court has still never addressed the merits of any of Judge Bork's majority opinions.

**5. Since Judge Bork Concedes That 90% Of His Docket
Has Been Non-Ideological, His Circuit Court Record
Says Nothing About His Suitability For The Supreme
Court, Whose Docket Is Far More Controversial**

The White House position paper goes to great pains to argue that because Judge Bork has never been reversed, he is entitled to sit on the nation's highest court. Its statistical assessment relies on more than 400 cases from the D.C. Circuit. Most of those cases, however, have little relevance to the Bork nomination. As noted by Judge Bork, the D.C. Circuit "is an ideologically divided court" but this "[m]akes no difference on 9/10's of [our] cases. (Notes for Untitled Speech, Federal Legal Council, Oct. 16, 1983, at 2.) (Emphasis added.)

Judge Bork himself has acknowledged that the caseload of the Supreme Court is quite different from that of the D.C. Circuit:

[The Supreme Court] certainly has a distinct set of responsibilities. Everybody has an appeal as of right to this court and any circuit court. So we are much more in the business of settling disputes just because they are disputes. The Supreme Court, which has a discretionary jurisdiction, can't conceivably settle all of the disputes that come up through the federal courts or up through the state courts, and so it must pick and choose, and it picks and chooses bearing in mind its obligation to settle important, unresolved questions of law and to lay down guidelines. (District Lawyer Interview(1985) at 31-32.)

According to Judge Bork, therefore, 90% of his cases on the D.C. Circuit are non-ideological and, consequently, non-controversial. Judge Bork's affirmance ratio, as described by the White House position paper, thus says little, if anything, about his suitability for the Supreme Court, which agrees to hear only a small percentage of the cases for which review is sought and whose docket has far more ideological and controversial cases.

**6. The Statistics Do Not Demonstrate That Judge Bork
And Justice Powell Are Ideologically Similar**

The position paper claims that Justice Powell has agreed with Judge Bork in 9 of 10 "relevant" cases that went to the Supreme Court. (Chapter 6, at 1.) It thus continues its transparent effort to depict Judge Bork as the ideological equivalent to the retired Lewis Powell. Such depiction has no basis in fact.

The "9 out of 10" figure, marshalled to show the similarity in the views of the two men, seriously misrepresents some of those cases. In Vinson v. Taylor, for example, the position paper reports that Judge Bork and Justice Powell were in agreement. In fact, as discussed above (Section III(A)(2)), the two were on opposite sides, with Judge Bork dissenting from a D.C. Circuit opinion that was unanimously affirmed by the Supreme Court. Furthermore, a careful analysis of the remaining cases cited by the position paper shows that Judge Bork and Justice Powell both wrote opinions in only two. (A summary of the 9 cases identified in the briefing book is included in Appendix A to this Rebuttal.) In order to identify the substantive distinctions between Justice Powell and Judge Bork, therefore, casual and selective analysis of statistics simply can not suffice. Rather, it is necessary to delve into the judicial philosophy, judicial method and substantive positions of the individuals, as is done in other sections of this Rebuttal.

**B. An Accurate Portrait Of Judge Bork's Record Leaves
No Doubt That He Has Been A Conservative Activist And
Not A Practitioner of Judicial Restraint**

Despite the constitutional and institutional restraints under which Judge Bork operated, his judicial record -- far from supporting the position paper's assertions of restraint -- is replete with examples of an activist approach. Indeed, Judge Bork's colleagues on the D.C. Circuit have made this quite clear.

**1. Judge Bork's Novel Approach To Lower Court
Constitutional Adjudication In Dronenburg Led
Four Members Of The D.C. Circuit To Remind Him
That "Judicial Restraint Begins At Home"**

In Dronenburg v. Zech (741 F.2d 1388 (D.C. Cir. 1984)), Judge Bork's majority opinion affirmed the dismissal of the Navy's discharge of a nine-year veteran for engaging in consensual homosexual activity. After a lengthy recitation of the Supreme Court's line of privacy decisions for creating what he deemed as "new rights," (Id. at 1395), Judge Bork claimed that he could find no "explanatory principle" in them, and then argued that lower federal courts were required to give very narrow readings to them because the courts "have no guidance from the Constitution or...from articulated Supreme Court principle." (Id. at 1396.)

Judge Bork's theory of lower court constitutional jurisprudence in Dronenburg -- a theory that has never been expressed or endorsed by the Supreme Court -- as well as his criticism of the privacy decisions, led four members of the D.C. Circuit to caution Judge Bork, in their dissent from the denial of the petition for rehearing en banc, about the proper role of the court:

[Judge Bork's] extravagant exegesis on the constitutional right of privacy was wholly unnecessary to decide the case before the court....We find particularly inappropriate the panel's attempt to wipe away selected Supreme Court decisions in the name of judicial restraint. Regardless whether it is the proper role of lower courts to 'create new constitutional rights,' surely it is not their function to conduct a general spring cleaning of constitutional law. Judicial restraint begins at home. (746 F.2d 1579, 1580.) (Emphasis added.)

2. Five Members Of The D.C. Circuit Have Charged Judge Bork With Evaluating En Banc Cases According To "Self-Serving And Result-Oriented" Criterion

Dronenburg is not the only case in which several members of the District of Columbia Circuit have charged Judge Bork with an pursuing his own agenda. In a series of recent orders issued by the full Court, a majority decided to reverse its decisions to grant en banc hearings in four cases. (Cases before the appeals court are normally heard by panels of three judges, but a party may seek review of a panel decision by asking for an en banc hearing before all members of the court.) Although Reagan nominee Lawrence Silberman disassociated himself, Judge Bork, in dissent, joined in the group attacking the majority's decisions. That dissent led Judge Edwards, writing on behalf of Chief Judge Wald and Judges Robinson, Mikva and Ginsburg, to charge the group led by Judge Bork with conducting their review of en banc cases according to "self-serving and result-oriented criterion." (United States v. Meyer, No. 85-6169, Slip op. at 2 (D.C. Cir. July 31, 1987).) (Emphasis added.)

Judge Edwards also noted that the conduct of the faction headed by Judge Bork had done

substantial violence to the collegiality that is indispensable to judicial decision-making. Collegiality cannot exist if every dissenting judge feels obliged to lobby his or her colleagues to rehear the case en banc in order to vindicate that judge's position. Politicking will replace the thoughtful dialogue that should characterize a court where every judge respects the integrity of his or her colleagues. (Id. at 4.) (Emphasis added.)

C. Judge Bork's Unbroken Repudiation Of The Doctrines Preventing Unwarranted Governmental Intrusion Into The Intimacies Of Personal Life Ignores The Tradition And Text Of The Constitution

Since 1971, the nominee has mounted a persistent attack on the long line of Supreme Court decisions protecting the intimacies of personal life from unwarranted governmental intrusion. The intensity and consistency of this attack raises substantial concern about the agenda the nominee might bring to the Court with respect to this line of decisions. It also is indicative of Judge Bork's willingness to discard the text, history and tradition of the Constitution in order to achieve the results he desires.

1. Judge Bork Has Dismissed Many Of The Supreme Court's Landmark Privacy Decisions

Judge Bork's rejection of constitutional protection against unwarranted intrusion into the intimacies of one's personal life is not limited to any one case or any one area of private relations. Rather, Judge Bork has dismissed many of the Court's decisions covering a wide range of personal conduct.

a. Judge Bork Has Opposed The Decision Upholding The Right Of Married Couples To Use Contraceptives

In Griswold v. Connecticut (381 U.S. 479 (1965)), the Supreme Court struck down a state law making it a crime for married couples to use contraceptives and for physicians to advise such couples about contraceptives. As a Law Professor at Yale, the nominee stated that Griswold "is an unprincipled decision, both in the way in which it derives a new constitutional right and in the way it defines that right, or rather fails to define it....The truth is that the Court could not reach its result in Griswold through principle." ("Neutral Principles" at 9.) He went so far as to say that there is nothing in the Constitution to distinguish between the desire of a husband and wife to be free to have sexual relations without fear of unwanted children and the desire of an electric utility to be free of a smoke pollution ordinance." ("Neutral Principles" at 9.)

In 1985, while sitting on the D.C. Circuit, Judge Bork stated: "I don't think there is a supportable method of constitutional reasoning underlying the Griswold decision." (Judge Bork Is a Friend of the Constitution," Conservative Digest Interview, Oct. 1985.)

In 1986, Judge Bork argued that replacing Justice Douglas's approach in Griswold with "a concept of original intent" was "essential to prevent courts from invading the proper domain of democratic government." (San Diego Law Review at 829.)

b. Judge Bork Has Described As "Unconstitutional" The Decision Upholding The Right Of A Woman To Decide With Her Doctor The Question Of Abortion

What is significant about the White House materials on Judge Bork's position on abortion is not simply what is said, but what is not said. The materials acknowledge that "Judge Bork, when...in academic life," criticized the Court's "right to privacy decision" and opposed legislative efforts to overturn Roe v. Wade (410 U.S. 113 (1973)). (Chapter 2, at 1-2.) That he views such legislative attempts as improper says nothing about whether the nominee would bring an agenda to the Court as an Associate Justice.

What is relevant to that determination is Judge Bork's testimony at the same hearings cited by the White House position paper. Said Bork: "I am convinced, as I think most legal scholars are, that Roe v. Wade is itself, an unconstitutional decision, a serious and wholly unjustifiable judicial usurpation of state legislative authority." (Hearings Before the Subcommittee on Separation of Powers of the Senate Judiciary Committee, 97th Cong., 1st Sess., June 10, 1981, at 310.) (Emphasis added.) The nominee also said that the Constitution does not "allow" the Roe decision. (Id.)

c. Judge Bork Has Indicated That The Constitution Does Not Protect Against Mandatory Sterilization

The nominee has sharply criticized the Supreme Court's decision in Skinner v. Oklahoma (316 U.S. 535 (1942)), in which the Court struck down a law that mandated surgical and involuntary sterilization for any person convicted on three or more crimes "amounting to felonies involving moral turpitude." The Court said:

We are dealing here with legislation which involves one of the basic rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the state conducts is to his irreparable injury.

Sterilization for those who have thrice committed grand larceny with immunity for those who are embezzlers is a clear, pointed, unmistakable discrimination....If such a classification were permitted, the technical common law concept of a 'trespass'...could readily become a rule of human genetics. (Id. at 541-42.)

According to then-Professor Bork, Skinner was "as improper and intellectually empty as Griswold...." ("Neutral Principles at 12.) In his view:

All law discriminates and thereby creates inequalities. The Supreme Court has no principled way of saying which non-racial inequalities are impermissible. What it has done, therefore, is to appeal to simplistic notions of 'fairness' or to what it regards as 'fundamental interest' in order to demand equality in some cases but not in others, thus choosing values and producing a line of cases...[such as] Skinner. ("Neutral Principles" at 11-12.)

Judge Bork also has addressed the sterilization issue while on the D.C. Circuit. In Oil, Chemical and Atomic Workers International Union v. American Cynamid Co. (741 F.2d 444 (D.C. Cir. 1984)), the owner of a manufacturing plant was sued because the release of lead into the plant air led to an increase in the level of lead in the blood of pregnant workers. The company adopted a policy that gave women of childbearing age a choice of being sterilized or losing their jobs. The Secretary of Labor concluded that Congress had not contemplated this policy when it passed the Occupational Safety and Health Act, which requires every employer to furnish "to each of his employees employment and a place of employment which are free from recognized hazards."

Judge Bork disagreed with this assessment. He found that the statute did not apply to the employer's "fetus protection policy," because the various examples of "hazards" cited in the legislative history all referred to poisons, combustibles, explosives, noises and the like, all of which occur in the workplace. Because the employer's policy, by contrast, was effectuated by sterilization performed in a hospital outside the workplace, Bork's opinion held that it was not covered by the Act. (Id. at 449.)

d. Judge Bork Has Argued That Visitation Rights Of Non-Custodial Parents Are Not Constitutionally Protected

In Franz v. United States (707 F.2d 582 (D.C. Cir. 1983), and 712 F.2d 1428 (D.C. Cir. 1983)), the Justice Department relocated a federal witness, his wife and her children by a former marriage, and then concealed the whereabouts of the children from their natural father, who had retained visitation rights. The natural father sued over this severance of his visitation rights, and the majority held that the total and complete termination of the relationship between a non-custodial parent and his minor children, without their participation or consent, violated their right to privacy.

After the court filed its opinion, Judge Bork issued a separate statement concurring in part and dissenting in part. He charged that the reasoning underlying the right to privacy doctrine was "ill-defined;" accused the majority of transforming mere emotional distress into a protectable constitutional

interest; and disparaged the bond between a minor child and his or her parent by suggesting that its severance was constitutionally indistinguishable from severance of the bond between an adult draftee and his or her parent.

Judge Bork argued in Franz that "a substantive right [in] so tenuous a relationship as visitation by a non-custodial parent" may be created, if at all, only by the Supreme Court. He then explained why the Court should reject such a right. Families and the institution of marriage are protected, he said, because our "tradition is to encourage, support and respect them....That cannot be said of broken homes and dissolved marriages....[T]o throw substantive...constitutional protections around dissolved families will likely have a tendency further to undermine the institution of the intact marriage...." (712 F.2d at 1438.)

In an addendum to the opinion for the court, the majority noted that even Judge Bork admitted that his "dissatisfaction with the majority's interpretation of the [right to privacy] doctrine derives more from distaste for substantive due process theory than from disagreement regarding whether the principles established by the Supreme Court are fairly applicable to the instant case." (Id.)

e. Judge Bork Has Attacked Supreme Court Decisions Protecting The Rights Of Parents To Control The Upbringing Of Their Children

Judge Bork's wholesale rejection of the privacy doctrine includes an attack on the well-established decisions of the Supreme Court protecting the rights of parents to make fundamental decisions about raising their children.

In Meyer v. Nebraska (262 U.S. 390 (1922)), the Supreme Court struck down a state law that made it a crime to teach any foreign language in a public or parochial school. The Court reasoned that the "liberty" protected by the Due Process Clause included a right to decide how to raise and educate one's children.

Then-Professor Bork found Meyer to be "wrongly decided," arguing that the Due Process Clause should not be construed to protect any specific substantive liberties, since the Constitution fails to specify "which liberties or gratifications may be infringed by majorities and which may not." ("Neutral Principles" at 11.)

In Pierce v. Society of Sisters (268 U.S. 510 (1925)), the Court struck down a state law that required that all children between the ages of 8 and 16 be sent to a public school. The Court held that the law "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control....The child is not the mere creature of the state; those who nurture him and direct his destiny have

the right, coupled with the high duty, to recognize and prepare him for additional obligations." (Id. at 535-36.)

Judge Bork has argued that Pierce, like Meyer, was "wrongly decided." At most, he conceded that "perhaps Pierce's result could be reached on acceptable grounds, but there is no justification for the Court's methods." ("Neutral Principles" at 11.)

2. Judge Bork's Wholesale Dismissal Of The Right To Privacy Conflicts With The Supreme Court's Longstanding Tradition Of Protection For Certain Fundamental Liberties

The Supreme Court has recognized on several occasions that certain fundamental liberties merit protection because they are the very foundation from which the Constitution was built. These liberties exist, furthermore, even though they are not specified in the text of the Constitution.

In Palko v. Connecticut (302 U.S. 319 (1937)), for example, the Court noted that there are certain fundamental liberties which, while not manifest in the text of the Constitution, are nonetheless "implicit in the concept of ordered liberty," (Id. at 325), such that "neither liberty nor justice would exist if [they] were sacrificed." (Id. at 326.) Echoing this same theme, Justice Powell described fundamental liberties in Moore v. East Cleveland (431 U.S. 494 (1977)) as those liberties that are "deeply rooted in this Nation's history and tradition." Powell reiterated his belief in "deeply rooted traditions" in Zablocki v. Redhail (434 U.S. 373, 399 (1978)(Powell, J., concurring)).

Chief Justice Burger also recognized that unenumerated rights merit protection. Writing for the Court in Richmond Newspapers v. Virginia, 448 U.S. 555 (1980), in which the Court held that the right of the public and press to attend criminal trials is guaranteed under the First and Fourteenth Amendments, he stated:

[A]rguments such as the state makes have not precluded recognition of important rights not enumerated. Notwithstanding the appropriate caution against reading into the Constitution rights not explicitly defined, the Court has **acknowledged that certain unarticulated rights are implicit in enumerated guarantees.** For example, the rights of association and privacy...appear nowhere in the Constitution or Bill of Rights. Yet these important but unarticulated rights have nonetheless been found to share constitutional protection with explicit guarantees. The concerns expressed by Madison and others have thus been resolved; **fundamental rights, even though not expressly guaranteed, have been recognized by the Court as indispensable to the enjoyment of rights explicitly defined.** (Id. at 580-581.) (Emphasis added.)

Judge Bork's dismissal of the history and tradition encompassed within these formulations as "not particularly helpful," (Dronenburg v. Zech, 741 F.2d at 396), and his claim that American institutions are weakened by "abstract philosophizing about the rights of man or the just society," ("Styles in Constitutional Theory," 26 South Texas Law Journal 383, 395 (1985)), simply ignore this history and tradition. Judge Bork also ignores the famous dissent of Justice Brandeis -- now recognized as expressing the Court's majority view -- in Olmstead v. United States (277 U.S. 438, 478 (1928)):

The protection guaranteed by the [Fourth and Fifth] Amendments is much broader in scope. The makers of the Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be bound in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone -- the most comprehensive of rights and the right most valued by civilized man. (Emphasis added.)

3. Judge Bork's Views Are Fundamentally At Odds With Those Of Justice Harlan, In Whose Tradition The Nominee Would Purportedly Follow

Justice Harlan -- in whose tradition the White House position paper asserts that Judge Bork would follow (Chapter 2 at 1)-- also recognized the tradition underlying the Constitutional right to privacy. Harlan dissented in Poe v. Ullman, (367 U.S. 497 (1961)), in which the majority dismissed challenges, on procedural grounds, to Connecticut statutes that prohibited the use of contraceptive devices and the giving of medical advice on their use. Poe, in other words, involved essentially the same issue presented to and decided by the Court four years later in Griswold. Justice Harlan argued not only that the challenges were justiciable, but that the statutes infringed the due process clause of the Fourteenth Amendment. (*Id.* at 555. (Harlan, J., dissenting)). His discussion of due process provides a cogent rejection of Judge Bork's views on fundamental liberties:

Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society....The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically

departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgement and restraint. (Id. at 542.) (Emphasis added.)

Additional evidence that Judge Bork clearly would not follow in the Harlan tradition is provided in the latter's opinion in Griswold. Justice Harlan concurred in the judgment, writing separately to reiterate his view in Poe that the statutes infringed the Due Process Clause. He also invoked Palko v. Connecticut in stating that the statutes "violate[d] basic values 'implicit in the concept of ordered liberty.'" (Griswold, 381 U.S. at 500 (Harlan, J., concurring).)

4. Judge Bork's Call For Ignoring The Ninth Amendment As A Source For Privacy Or Any Other Rights Cannot Be Squared With His Purported Adherence To The Text Of The Constitution

The Ninth Amendment states that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." Judge Bork, as noted previously, repeatedly invokes the text of the Constitution as a principal source of "core values." Why, then, in light of such textual reliance, does Judge Bork ignore the Ninth Amendment to the Constitution?

Judge Bork refuses to accept the Amendment's clear command that the enumeration of certain rights not be taken as a denial of other unspecified rights. Instead, he asserts that there are alternative explanations of the Amendment.

[I]f it ultimately turns out that no plausible interpretation can be given, the only recourse for a judge is to refrain from inventing meanings and ignore the provision, as was the practice until recently. ("Interpretation of the Constitution," 1984 Justice Lester W. Roth Lecture, University of Southern California, Oct. 25, 1984, at 16.) (Emphasis added.)

This suggested disregard for the Amendment is consistent with Judge Bork's general recommendation that

[w]hen the meaning of a provision, or the extension of a provision beyond its known meaning is unknown, the judge has in effect nothing more than a water blot on the document before him. He cannot read it; any meaning he assigns to it is no more than judicial invention of a constitutional

¹ As discussed below, Judge Bork also sharply attacked Justice Harlan's opinion in Cohen v. California (403 U.S. 15 (1971)).

prohibition; and his proper course is to ignore it. (Id. at 11-12.) (Emphasis added)

These statements cannot be squared with either Judge Bork's own framework or the clear statements of the Supreme Court. Indeed, they are in direct conflict with the position of the revered Chief Justice, John Marshall, who stated in Marbury v. Madison (1 Cranch 137, 174):

It cannot be presumed that any clause in the Constitution is intended to be without effect.

Judge Bork's statements also conflict with Chief Justice Burger's position in Richmond Newspapers:

The Constitution's draftsmen...were concerned that some important rights might be thought disparaged because not specifically guaranteed.

Madison's efforts, culminating in the Ninth Amendment, served to allay the fears of those who were concerned that expressing certain guarantees could be read as excluding others.

Thus, while it is no doubt true that the proper scope of the Ninth Amendment has been a topic of debate by courts and commentators, the Supreme Court has made clear that the Amendment has some meaning. According to Judge Bork, however, the text of the Amendment should simply be ignored.

5. The Bill Of Rights Was Not, As Judge Bork Claims, "A Hastily Drafted Document On Which Little Thought Was Expended"

The Bill of Rights can only be understood by reference to that heritage of "self-evident" truths and "free government." It was not, as Judge Bork would have it, "a hastily drafted document on which little thought was expended," ("Neutral Principles" at 22) (emphasis added), with "rights...handed down to us...out of particular circumstances and particular sentiments and religious beliefs." (Conservative Digest Interview, (1985) at 93.) (Emphasis in original.) Indeed, Judge Bork's view is more than a misunderstanding; it is the "narrowed" definition of individual rights that the framers feared two hundred years ago.

The history and tradition recognized by the Supreme Court and ignored by Judge Bork lie at the very core of our political institutions. The state conventions that ratified the Constitution set forth the strongest intent to secure individual rights. Furthermore, the Constitution was nearly defeated in several states because of the lack of a Bill of Rights. For example, at John Hancock's suggestion, democratic firebrand Samuel Adams voted for the Constitution only "in full confidence that the amendments proposed will soon become a part of the system." (2

Elliot 179.) This promise of a Bill of Rights was critical to the Constitution's narrow approval in three key states.

Another critical role in securing the Bill of Rights was played by Thomas Jefferson, who, three months after the Constitutional Convention, found among the things "I do not like[, f]irst, the omission of a bill of rights....what the people are entitled to against every government on earth, and what no just government should refuse, or rest on inference." (Letter to Madison, Dec. 20, 1787, 12 Boyd 43-440.) Madison presented the concerns of Jefferson when he introduced the Bill of Rights into Congress three months later:

I believe that the great mass of the people who opposed [the Constitution], disliked it because it did not contain effectual provisions against encroachments on particular rights, and those safeguards which they have long been accustomed to have interposed between them and the magistrate....If they are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive. (Debate of 8 June 1789, 1 Annals of Congress 440-460.)

Judge Bork's dismissal of the Bill of Rights is particularly striking in light of his self-described position as an "interpretivist" or "originalist." One who, like Judge Bork, takes others to task for ignoring "original intent" has a particular duty to adhere to that intent with respect to the entire Constitution, not just selected parts of it.

D. Judge Bork Has A Severely Limited View Of The Right To Advocate Political and Social Change

In his 1971 Indiana Law Journal article, Judge Bork articulated his view that only explicitly political speech is afforded First Amendment protection. But he removed from that category of constitutionally protected speech "any speech advocating the violation of law." ("Neutral Principles" at 31.) He reasoned that "political truth is what the majority decides it wants today." And the "process of 'discovery and spread of political truth,'" Judge Bork continued, "is damaged or destroyed if the outcome is defeated by a minority that makes law enforcement...impossible or less effective." (*Id.*) According to Judge Bork, therefore, advocacy of peaceful law violation should not be protected even if it presents no clear and present danger.

The thrust of Judge Bork's theory is plainly directed at civil disobedience. Had his theory been the governing rule in the 1960s, the right of Martin Luther King, Jr. to advocate sit-ins at lunch counters segregated by law would have been left to the discretion of each legislature or town council. The same would have been true of advocacy of boycotts, marches, sermons and

peaceful demonstrations -- the tools that made possible the peaceful and lawful transformation in the South. And if Judge Bork's theory were the governing rule today, the Washington D.C. city council could prohibit individuals from advocating, however abstractly and without incitement, that protestors march in front of the Nicaraguan or South African embassies.

Judge Bork's 1971 views were repeated with renewed vigor in a 1979 speech at the University of Michigan. He sharply attacked in that speech the famous dissents of Justices Holmes and Brandeis in Abrams v. United States (250 U.S. 616 (1919)) and Gitlow v. New York (268 U.S. 652 (1925)), in which they argued there that speech aimed at government itself may be punished only when it presents a "clear and present danger." The Supreme Court has long come to accept these dissents as articulating the correct view of the First Amendment. Judge Bork remarked in 1979 that "the superiority of the [dissents]...is almost entirely rhetorical. Holmes' position lapses into severe internal contradictions, while Brandeis' dissents are less arguments than assertions." ("The Individual, the State, and the First Amendment," University of Michigan, 1979, at 19.) And he said in the "Neutral Principles" article that the "clear and present danger" requirement "is improper...because it erects a barrier to legislative rule where none should exist."

This attack on Holmes and Brandeis is nothing short of radical. These two Justices are recalled in American folklore as perhaps this nation's two most revered judges because of the very opinions with which Judge Bork disagrees -- opinions which afford citizens the opportunity to oppose governmental action and, to a point, to urge people to disobey unjust laws.

Judge Bork also attacked two critically important First Amendment cases in the last 20 years: Brandenburg v. Ohio (395 U.S. 444 (1969)) and Hess v. Indiana (414 U.S. 105 (1973)). In Brandenburg, the Court overturned the conviction of a Klu Klux Klan leader who advocated violence, holding that such speech can be restricted only when it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." In Hess, the Court overturned a conviction of a demonstrator being removed from a campus street who told the police that "we'll take the fucking street later," holding that it was "mere advocacy of illegal action at some indefinite future time."

Judge Bork said that both these landmark cases "are fundamentally wrong interpretations of the First Amendment." (Michigan Speech at 21.) In addition, he repeated his indictment of civil disobedience: "Speech advocating the forcible destruction of democratic government or the frustration of such government through law violation has no value in a system whose basic premise is democratic rule." (Id.)

Another example of the nominee's rejection of case law protecting speech against state punishment is his criticism of the 1971 ruling of the Supreme Court in Cohen v. California (403 U.S. 15 (1971)). There, the Court, through the distinguished jurist John Marshall Harlan, held unconstitutional on First Amendment grounds a California statute that banned disturbing the peace by "offensive conduct." The statute had been applied against a person who had worn a jacket in a courthouse with the words "Fuck the Draft" on it. Reasoning that "one man's vulgarity is another's lyric," the Court stated that "it is largely because government officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual."

In Bork's view, the language used by Justice Harlan -- to whom the White House position paper compares Judge Bork -- was far too protective of expression. Bork said Cohen

might better have been decided the other way on the ground of public offensiveness alone. That offensiveness had nothing to do with the ideas expressed, if any ideas can be said to have been expressed at all....If the First Amendment relates to the health of our political processes, then, far from protecting such speech, it offers additional reason for its suppression. (Michigan Speech at 18.) (Emphasis added.)

Judge Bork's rejection of Justice Harlan's now famous opinion in Cohen is just one example of his view that it is the right of the community to impose its moral standards on the minority. ("Morality and Authority," Carleton College, 1978 at 5.) The critical question with respect to the application of this view to the First Amendment is who is to define "speech" and "advocacy." Once the judiciary refuses to make that determination -- as Judge Bork would have it do, based on his Michigan speech -- the community is left virtually unrestrained.

E. Judge Bork Would Bar From The Federal Courts Many Claimants Whose Right To Bring Suit Has Been Previously Recognized

Judge Bork has consistently taken a very narrow and crabbed view of the doctrine of access to the courts -- the doctrine that determines those claims that will be redressed by the courts. Judge Bork's opinions argue repeatedly for a sharply limited role for the federal courts. Those opinions take a number of novel and unprecedented positions.

1. Judge Bork Has Called For The Wholesale Rejection Of Congressional Standing

Judge Bork's views in two Congressional standing cases provide a valuable insight into his views of the role of the courts in our society. In these cases, the nominee argued that members of Congress should not be given standing to bring actions alleging that the Executive or other members of Congress have infringed upon Congressional lawmaking powers. In one case, House Republicans argued that the Democrats had not allowed them enough Committee seats (Vander Jagt v. O'Neill, 699 F.2d 1166 (D.C. Cir. (1983))). In another case, Democrats argued that President Reagan could not validly pocket veto a bill during the midterm recess. (Barnes v. Kline, 759 F.2d 21 (D.C. Cir. (1985)).)

Judge Bork wrote separately in both cases, dissenting in Barnes and concurring in Vander Jagt. In Barnes, he called for "renounc[ing] outright the whole notion of Congressional standing." (759 F.2d at 41.) (Emphasis added.) He argued that "[e]very time a court expands the definition of standing, the definition of interests it is willing to protect through adjudication, the area of judicial dominance grows and the area of democratic rule contracts." (*Id.* at 44.) Judge Bork then provided the rationale for his novel views on standing:

Though we are obligated to comply with Supreme Court precedent, the ultimate source of constitutional legitimacy is compliance with the intentions fo those who framed and ratified the Constitution. (*Id.* at 56.)

This concept is important because it supplies the premise for overturning Supreme Court decisions that, in Judge Bork's view, are "illegitimate."

2. Judge Bork Has Taken Novel And Unprecedented Approaches With Other Doctrines To Reduce Access

Judge Bork has also used the doctrine of sovereign immunity (pursuant to which a state government can only be sued if it consents) to limit access to the courts. He took a particularly harsh position in Bartlett v. Owen (816 F.2d 695 (1987)), in which the plaintiff challenged certain provisions of the Medicare Act on constitutional grounds. The government argued that the claim should be dismissed because the Act denied judicial review of the plaintiff's claim. The majority rejected this contention, concluding that Congress did not intend to preclude the courts from considering constitutional challenges to the Act.

Judge Bork dissented, and in the words of the majority, he "relie[d] on an extraordinary and wholly unprecedented application of the notion of sovereign immunity to uphold the Act's preclusion of judicial review." (*Id.* at 703.) The majority said that Judge Bork took "great pains to disparage" a leading Supreme Court

decision, which suggested that Congress could not preclude review, as Judge Bork would have it, of constitutional claims. And, continued the majority, Judge Bork "ignore[d] clear precedent" from his own circuit that followed that Supreme Court decision and made "no mention of the Supreme Court's very recent affirmation of [the decision] -- using exactly the same language." (816 F.2d at 702-03.)

The majority concluded that Judge Bork's view that Congress may not only legislate, but also may "judge the constitutionality of its own actions," would destroy the "balance implicit in the doctrine of separation of powers." (*Id.* at 707.) Thus, according to the majority, Judge Bork's

sovereign immunity theory in effect concludes that the doctrine...trumps every other aspect of the Constitution. According to the dissent, neither the delicate balance of power struck by the framers among the three branches of government nor the constitutional guarantee of due process limits the Government's assertion of immunity. Such an extreme position cannot be maintained. (*Id.* at 711.)

Judge Bork also took an unprecedented approach in Haitian Refugee Center v. Gracey, 809 F.2d 794 (D.C. Cir. (1987)). There, a non-profit Center and two of its members challenged the legality of the seizure of certain Haitian vessels and the forcible return of their undocumented passengers to Haiti. The question before the court involved the plaintiffs' standing to sue. A plaintiff must have standing -- that is, must have suffered some actual or threatened injury that was fairly caused by the defendant -- before the court may hear the case. Here, the plaintiffs claimed injury to their ability to act together with a third party -- the passengers -- not before the court. Judge Bork held that the plaintiffs did not have standing because of the nature of the relationship between the named plaintiffs and the third parties whose rights they were seeking. Under Judge Bork's test, the plaintiff's claim to proceed only if the action by the defendant -- in this case, the government -- "purposefully interfered" with the relationship between the plaintiff and the third party. (*Id.* at 801.)

While concurring in the result, Judge Buckley chose not to adopt Judge Bork's "purposeful interference" test. In Judge Buckley's view, "an alternate analysis of the causation requirement [was] more readily inferred from Supreme Court precedent." (*Id.* at 816.)

In dissent, Judge Edwards described Judge Bork's approach as activist in nature, and found it to be "quite [an] extraordinary notion of 'causation,' both in the novelty of the majority's test and in its disregard of Supreme Court precedent." (*Id.* at 827.) (Emphasis added.) Said Judge Edwards:

The majority seeks to abandon the Supreme Court's consistently articulated test of causation in favor of an entirely new test applicable only in cases such as this one....[A]s even the majority recognizes, none of [the Supreme Court] cases enunciates a 'purposeful interference' test of causation. Indeed, the point is too obvious to be belabored....In the absence of any precedent to support its new test of causation, the majority looks to considerations of separation of powers....[I]t is plain that even the majority recognizes that 'the Supreme Court has never said explicitly that the separation of powers concept leads it to deny causation where it otherwise might be found if it were a purely factual question.' This admission alone shows that this novel view of standing cannot be adopted as the law, especially given the Supreme Court's clear and consistent articulation of a different test of causation. (Id. at 827.) (Emphasis added.)

3. Judge Bork Has Consistently Ruled Against Individuals And Public Interest Organizations In Split Cases Involving Access

Judge Bork has participated in 14 split cases involving individuals or public interest organizations seeking access to the courts or to administrative agencies. In each of these cases, Judge Bork voted against granting access.

F. In The Antitrust Area, Judge Bork Has Called For Unprecedented Judicial Activism, Proposing That The Courts Ignore Almost One Hundred Years Of Judicial Precedents And Congressional Enactments

As previously noted, the White House position paper identifies Judge Bork as a leading proponent of judicial deference to the legislature. Like his selection of "constitutional values," however, that deference depends on the particular matter in question. In the antitrust area, for example, Judge Bork has advocated an unprecedented role for the courts and has expressed a sharp disdain for the legislature's clear policy preferences.

Importantly, Judge Bork's antitrust views are particularly relevant to his constitutional jurisprudence, since he has said that "antitrust law,...[because of] its use of highly general provisions and its open texture, resembles much of the Constitution." ("The Crisis in Constitutional Theory: Back to the Future," The Philadelphia Society, April 3, 1987, at 11-12.) Similarly, he Judge Bork has commented that his antitrust jurisprudence is "an instructive microcosm" of his views on "social policy and the lawmaking process." (The Antitrust Paradox.)

1. Judge Bork's Exclusive Focus on "Economic Efficiency" Is Inconsistent With The Legislative History Of The Antitrust Statutes

The nominee's antitrust views are set out in a lengthy book published in 1978, entitled The Antitrust Paradox. The paradox about which he writes derives from his view that the basic purpose of the Sherman Act (i.e., to preserve competition) has been perverted by legislation and judge-made law that is protectionist and anti-competitive. Judge Bork has not shied away from expressing his contempt for the ability of Congress to deal with complex economic issues. "Congress as a whole is institutionally incapable," Judge Bork has declared, "of the sustained rigor and consistent thought that the fashioning of a rational antitrust policy requires." (Id. at 412.)

For Judge Bork, the only legitimate goal of antitrust is increased economic efficiency, defined in his view as the enhancement of consumer welfare. (Id. at 51.) By this he means the avoidance of restriction of output. From this point of departure, Judge Bork justifies a wide variety of economic practices that have been widely regarded and defined for decades as anticompetitive and illegal.

It is important to recognize the special sense in which Bork uses the phrase "consumer welfare." It is a technical concept that relates to efficiency in an economy-wide sense. For example, if a practice resulted in efficiencies that led solely to greater profits for manufacturers, Judge Bork would call that "consumer welfare" even though consumers as a group paid higher prices.

Judge Bork's theory stems, in part, from his reading of the legislative history of the Sherman Act. That reading, however, conflicts sharply with the views of others. For example, Robert Pitofsky, Dean of the Georgetown Law School, states:

The legislative histories of the major federal antitrust enactments show abundant concern for other matters besides operating efficiencies of businesses...[for example,] concern for concentration because it would create opportunities, in times of domestic stress or upheaval, for the overthrow of democratic institutions and their replacement with totalitarianism. Concentration was also thought likely to invite greater and greater levels of governmental intrusion into the affairs of free enterprise, because government would simply be unable to leave big, concentrated firms politically unaccountable...Later enactments, most notably the Robinson-Patman Act, for example, clearly took into account congressional concern regarding concentration at the expense of small businesses. (Pitofsky and Wallman, "Judge Bork's Views on Antitrust Law and Policy," Aug. 25, 1987.)

2. Judge Bork Has Attacked Virtually All Of The Basic Antitrust Statutes Enacted By Congress

Judge Bork's elevation of "efficiency" as the only goal of antitrust leads him to attack virtually all of the basic antitrust statutes passed by Congress since the Sherman Act. He has concluded, for example, that Congress erred when it enacted Section 3 of the Clayton Act, dealing with vertical integration, because "exclusive dealing and requirements contracts have no purpose or effect other than the creation of efficiency." ("The Antitrust Paradox," at 309.) Similarly, he has condemned price discrimination amendments to the Clayton Act as "pernicious economic regulation" (*id.* at 382) resting upon an erroneous congressional view that "free markets were rife with unfair and anticompetitive practices which threatened competition, small businesses and consumers." (*Id.*) Judge Bork has also attacked the 1950 Celler-Kefauver antimerger amendment to Section 7 of the Clayton Act (the primary statute under which mergers and acquisitions have been challenged) because "vertical mergers are means of creating efficiency, not of injuring competition," (*id.* at 226), and because "conglomerate mergers should not be prohibited." (*Id.* at 262.)

3. Judge Bork Has Rejected Many Of The Supreme Court's Leading Antitrust Decisions

Judge Bork has not limited his criticism to Congress; he is equally contemptuous of the antitrust decisions of the Supreme Court:

In modern times the Supreme Court, without compulsion by statute and certainly without adequate explanation, has inhibited or destroyed a broad spectrum of useful business structures and practices. (*Id.* at 4)

The Supreme Court decisions that Judge Bork has condemned span the antitrust horizon:

-- Brown Shoe v. United States, 370 U.S. 294 (1962), which condemned anticompetitive horizontal and vertical mergers, is labeled "disastrous" (*id.* at 201), because it converted Section 7 of the Clayton Act to a "virtually anticompetitive regulation." (*Id.* at 198).

-- Federal Trade Commission v. Procter & Gamble Co., 386 U.S. 568 (1967), which articulated the Supreme Court's theory prohibiting some conglomerate mergers, is sharply criticized as "mak[ing] sense only when antitrust is viewed as pro-small business -- and even then it does not make much sense." (*Id.* at 255).

-- Standard Oil Co. v. United States (Standard Stations), 337 U.S. 293 (1949), a landmark case defining the limits of exclusive dealing arrangements, is condemned as resting "not upon economic analysis, not upon any factual demonstration, but entirely and astoundingly, upon the asserted inability of courts to deal with economic issues." (Id. at 301.)

-- Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911), another landmark antitrust case holding vertical price fixing to be a per se violation of the Sherman Act, is rejected, notwithstanding the fact that a half-century of Supreme Court opinions have adhered to the rule enunciated in the case and that no Supreme Court opinion has suggested that the holding is questionable.

4. Judge Bork's Recommended Activist Role For The Courts Conflicts With His Statements Regarding "Judicial Restraint"

Thus, the failure to apply "correct" economic analysis, Judge Bork claims, has produced a line of Supreme Court decisions that, in the name of protecting the consumer and small business, are intolerably restrictive of business freedom. The combined failure of Congress and the courts to consider or understand economics then becomes Judge Bork's excuse to reject as "mindless law" those statutes and cases that have expanded application of the antitrust laws beyond what he perceives as their original objective. Judge Bork's proposed remedy is a simple one -- and one that would engage the courts in an unprecedented role in terms of statutory interpretation:

No Court is constitutionally responsible for the legislature's intelligence, only for its own. So it is with the specific antitrust laws. Courts that know better ought not to accept delegations to make rules unrelated to reality and which, therefore, they know to be utterly arbitrary.

* * * * *

It would have been best...if the courts first confronted with the Clayton Act and later the Robinson-Patman Act had said something along these lines: We can discern no way in which tying arrangements, exclusive dealing contracts, vertical mergers, price differences, and the like injure competition or lead to monopoly....For these reasons, and since the statutes in question leave the ultimate economic judgment to us, we hold that, with the sole exception of horizontal mergers, the practices mentioned in the statutes never injure competition and hence are not illegal under the laws as written. (Id. at 410) (Emphasis added.)

Judge Bork expressed a similar view at a conference in 1983, after he came onto the bench:

[P]recedent is less important in Sherman Act jurisprudence than elsewhere; and this just as well. There is no particular reason why courts have to keep doing harm, rather than good, once they understood economic reality.

The Clayton Act and the Robinson-Patman Act are somewhat different animals....[T]hey tell the judge to prohibit... practices only when they may tend to injure competition. If the judge sees that they do not tend to injure competition, I think it is entirely proper for him to say so and to change prior doctrine, unless he is constrained by a precedent from a higher court. (Remarks, Antitrust Conference on "Changing Antitrust Standards, Judicial Precedent, Management" Responsibility and the New Economics, 1983, at 6.)

In attempting to support such an active role for the courts, Judge Bork has analogized the legitimacy of a Supreme Court refusal to enforce antitrust statutes with the propriety of a court refusing to accede to the views of "a particularly benighted legislature" that enacts laws to curb automotive accidents by regulation of poltergeists. (Antitrust Paradox at 410.)

This recommended role for the courts in the antitrust field hardly comports with the judicial role that Judge Bork himself has advocated. He says, in effect, that a judge should refuse to enforce statutes or judicial precedents that do not adhere to that individual judge's understanding of the reasons behind an entire body of law. Such a view surely conflicts with the traditional notion of judicial restraint. Indeed, it places a judge in the radical posture of determining what the law ought to be -- the precise role that Judge Bork advocated, in The Antitrust Paradox, should be left to the legislature:

[T]he modern tendency of the federal judiciary to arrogate to itself political judgments that properly belong to democratic processes...occurs...most obviously and dramatically in the modern expansion of constitutional law...but the same tendency is observable in statutory and common law fields as well. It occurs, for example, through the skewed interpretation of statutes in order to reach results more to the liking of the judge. (Id. at 419-20.) (Emphasis added.)

5. Judge Bork Has Put His Activist Ideas Into Practice On The Court Of Appeals

Judge Bork has not hesitated to put his activist ideas into practice. In Rothery Storage & Van Co. v. Atlas Van Lines, Inc., (792 F.2d 210 (D.C. Cir. 1986)), a large interstate van line required its local carrier agents to conduct competitive interstate business through a separate company, rather than continuing to use the national company's equipment and training to conduct their own independent business at the same time that they represented the national firm. The trial judge and all judges on

the Court of Appeals agreed that the arrangement among the moving companies was reasonable.

Judge Bork used the occasion, however, to promote his extreme views on the role of market power in antitrust enforcement. Single-handedly repudiating numerous Supreme Court cases to the contrary, Judge Bork held that market power was the only criteria to use in determining whether a horizontal restraint was reasonable. While concurring in the result, Chief Judge Wald wrote separately to express her concerns about the breadth of Judge Bork's opinion, taking issue with his conclusion concerning market power as the only appropriate measure of anticompetitive conduct. In Judge Wald's words:

If, as the panel assumes, the only legitimate purpose of the antitrust laws is this concern with the potential for decrease in output and rise in prices, reliance on market power alone might be appropriate. But, I do not believe that the debate over the purposes of antitrust laws has been settled yet. Until the Supreme Court provides more definitive instruction in this regard, I think it premature to construct an antitrust test that ignores all other potential concerns of the antitrust laws except for restriction of output and price raising. (Emphasis added.)

Until the Supreme Court indicates that the only goal of antitrust law is to promote efficiency, as the panel uses the term, I think it more prudent to proceed with a pragmatic, albeit nonarithmatic and even untidy rule of reason analysis, than to adopt a market power test as the exclusive filtering out device for all potential violators who do not command a significant market share. (*Id.* at 231-32.) (Emphasis in original.)

6. If Adopted, Judge Bork's Views Would Dramatically Impact Antitrust Policy

An important question that arises from Judge Bork's antitrust views is their impact if adopted. With respect to merger policy, Judge Bork has written that challenges should be limited to "horizontal mergers creating very large market shares (those that leave fewer than three significant rivals in any market)." (*Antitrust Paradox* at 406.) This means that Judge Bork would support an economy in which mergers led to the survival of only three firms in every industry. Presumably, therefore, any proposed merger in the oil (for example, Exxon-Texaco), steel (U.S. Steel-Bethlehem), supermarkets (Safeway-Kroger), or beer (Miller-Anheuser Busch) industries (to give some examples) would be acceptable.

With respect to vertical restraints, Bork has said that any such restraint should be lawful. If adopted, such a view would mean that a score of Supreme Court cases regulating every kind of vertical restriction would not survive. For example, the present

Supreme Court view that resale price fixing is illegal would be overruled. One consequence is that discount retailers would be put out of business or survive only if manufacturers approved of their discounting practices.

7. Summary

The White House position paper has told us "there would be no need to worry about 'balance' on the Court" if only judges "would confine themselves to interpreting the law as given to them by statute or Constitution...." The antitrust statutes have been given to the courts to interpret and apply. According to Judge Bork, however, Congress was woefully misinformed when it adopted most of those statutes, and thus he recommends that judges reject them out of hand. Although the nominee has been portrayed as a practitioner of "judicial restraint", he seems willing to rewrite the law whenever he determines that he has a clearer understanding of what a statute ought to accomplish than the legislators who were responsible for its enactment. One must wonder what other statutes Judge Bork believes to be unworthy of enforcement because their authors wanted to achieve goals that he regards as undesirable. The position paper's assertion, therefore, simply ignores Judge Bork's antitrust views, which call for unprecedented judicial activism.

F. Judge Bork Has Generally Taken An Approach That Favors Big Business Against The Government But Which Favors The Government Against The Individual

The discussion in the White House position paper of Judge Bork's views on economic policy, governmental regulation and labor fails to make clear that the nominee's approach to business and regulatory matters generally follows a consistent pattern: He defers to the government when an individual or public interest group has brought suit, and he defers to big business when it is suing the government.

1. Judge Bork's Opinions Show A Decidedly Pro-Business Pattern

Judge Bork has written several opinions that favor business plaintiffs against the government in a variety of regulatory contexts.

In McIlwain v. Hayes (690 F.2d 1041 (D.C. Cir. 1982)), for example, the question was whether the Food and Drug Administration could continue to allow the sale of color additives 22 years after Congress required manufacturers to show that an additive was "safe" before they can use it. Congress had provided for a 2 1/2 year "transitional period" provision under which additives already on the market could continue to be used "on an interim basis for a reasonable period." During that period, the manufacturers would complete the testing necessary to prove that the additives were safe. Relying on that provision, the FDA had extended the

transitional period for 20 years to allow many widely-used additives to remain on the market. Judge Bork held that the agency had the discretion to allow such extensions.

In dissent, Judge Mikva sharply challenged Judge Bork's ruling:

Some 22 years [after Congress' amendments], the majority is willing to let the FDA and industry go some more tortured miles to keep color additives that have not been proven safe on the market. The majority has ignored the fact that Congress has spoken on the subject and allows industry to capture in court a victory that it was denied in the legislative arena. The [congressional amendments] have been made inoperative by judicial fiat. (*Id.* at 1050.) (Emphasis added.)

In Jersey Central Power & Light v. Federal Energy Regulatory Commission, an electric utility claimed that FERC's denial of a rate increase of \$400 million amounted to a "taking" of its property without just compensation. The rate increase was necessary, the utility claimed, because of construction costs for an unfinished nuclear plant.

Judge Bork's first opinion in this case denied the utility's claim. (730 F.2d 816 (D.C. Cir.1984).) On rehearing, however, he adopted the opposite position, holding that as long as the higher rates sought by the utility did not exceed those charged by neighboring utilities, it would be a violation of due process for the agency to reject them. (768 F.2d 1500, 1505 and n.7 (1985), vacated, 810 F.2d 1168, 1175-76, 1180-81 and n.3 (1987)(en banc).)

The dissent stated that Judge Bork's final position was "the quiet announcement of a major new federal entitlement" for regulated corporations "to earn net revenues if they can earn them at rates lower than those charged by one or more corporations in the same line of business located nearby." (768 F.2d at 1512.) According to the dissent, Judge Bork breached his own admonition against the creation of new constitutional rights:

What is most startling is that the court's opinion produces this new substantive right virtually out of thin air; the majority just makes it up. It is apparently of no concern to the majority that the Supreme Court has never suggested such a limit on the Commission's authority; indeed, the majority sees no need to refer to any decision by any court, or even a concurring or dissenting opinion, granting to investors in regulated industries anything like the conditional right to dividends recognized by the court today. (*Id.*)

2. Judge Bork's Opinions On Labor Issues Have Markedly Favored Employers

The White House position paper claims that "Judge Bork has joined or authored numerous decisions that resulted in important victories for labor unions," "vividly" demonstrating his "open-mindedness and impartial approach to principled decisionmaking...." In the overwhelming majority of the nonunanimous labor cases he has heard, however, Judge Bork has ruled against the union.

Even putting aside his quantitative record, some of Judge Bork's labor opinions show very unfavorable attitudes toward unions. In Restaurant Corp. of America v. NLRB (801 F.2d 1390 (D.C. Cir. 1986)), for example, the National Labor Relations Board had held that the employer discriminated against union activists in the enforcement of a broad no-solicitation rule, pointing to evidence that the employer had previously allowed employees to solicit during work hours for non-union causes. Judge Bork refused to enforce the Board's order directing the reinstatement of the fired union activists.

Judge Bork held that while the employer had allowed solicitation for non-union causes, it had done so to bring about an "increase in employee morale and cohesion." He then stated that the employer could refuse to allow employees to solicit for union causes because that solicitation was qualitatively different as a matter of law. In short, the employer was allowed to assume that union solicitation was per se disruptive and inconsistent with employee morale.

3. Judge Bork Has Narrowly Interpreted Statutes Promoting Workplace Safety

In Prill v. National Labor Relations Board (755 F.2d 941 (D.C. Cir. 1985)), Judge Bork showed an insensitivity to workplace safety. A driver for a non-union company had refused to drive a company tractor-trailer because it had faulty brakes and other unsafe features that had previously caused it to jackknife in a highway accident. When the employee called the State Police to inspect the trailer rather than following company orders to take the trailer back out on the road, the company fired him because "we can't have you calling the cops all the time." The NLRB found that the worker was not protected under the relevant statute unless he had expressly joined with others in rejecting unsafe work.

The majority rejected the NLRB's position. They concluded that the Board had ignored or misread a number of its prior decisions that had allowed protection for workers, even though their protests about unsafe work had not been closely joined with those of other workers.

Judge Bork voted to affirm the NLRB's decision in an opinion that could have far-reaching consequences if adopted as the governing rule. Judge Bork found that because the statute included the word "concerted," it forbids the NLRB to extend protection to workers who act by themselves, even if they act on a matter of common concern about which it may be presumed the other employees would agree. Judge Bork did not explain how this right could be exercised by workers such as truck drivers who work alone, in contrast to those who work in a factory or other single location, where they normally face common workplace problems.

Another workplace safety case in which Judge Bork found the applicable statute to be too narrow to protect employees is Oil, Chemical and Atomic Workers International Union v. American Cyanamid Co. (741 F.2d 1984)), discussed previously in Section (B)(3). In this case, the Secretary of Labor had concluded that the employer's policy of giving women the option of fertilization if they did not want to leave the workplace was not what Congress had intended in enacting the Occupational Safety and Health Act. Judge Bork rejected that finding and approved of the employer's policy.

IV.

CRUCIAL OMISSIONS AS TO JUDGE BORK'S PUBLICLY EXPRESSED VIEWS CONTRIBUTE TO GRAVE DISTORTIONS IN THE WHITE HOUSE POSITION PAPER

The White House position paper omits many key statements made and positions adopted by Judge Bork that constitute a substantial portion of his public record. In many important areas, the examples proffered by the position paper are highly selective. These omissions render the position paper largely incomplete in such areas as civil rights, First Amendment protections and executive power. Here, we undertake to present a more complete picture of Judge Bork's record on these topics.

A. Throughout His Career, Judge Bork Has Opposed Virtually Every Major Civil Rights Advance On Which He Has Taken A Position

Using selective examples, the White House materials seek to convey the impression that Judge Bork is a strong advocate of civil rights and that, as a Supreme Court Justice, he would extend protection for minority groups. The position paper states that "Judge Bork has consistently advanced positions that grant minorities and females the full protection of civil rights laws." (Chapter 11, p. 1) This claim is not supported by the record, which, when examined fully, shows that the nominee has been a strong critic, rather than a supporter, of civil rights advances.

1. 1963: Judge Bork Opposed The Public Accommodations Bill

In an article published in August 1963 -- the same time that Martin Luther King gave his historic "I have a dream" speech -- the nominee, then a 36 year-old Yale law professor, argued against the Public Accommodations bill on the ground that it would mean "a loss in a vital area of personal liberty." He went on to say that "[t]he principle of such legislation is that if I find your behavior ugly by my standards, moral or aesthetic, and if you prove stubborn about adopting my view of the situation, I am justified in having the state coerce you into more righteous paths. That is itself a principle of unsurpassed ugliness." ("Civil Rights -- A Challenge," New Republic, 1963, at 22.)

Having concluded in the context of other issues that the majority is free to impose its views on individuals through government coercion on even the most intimate personal choices, (see the discussion in section III (C) above), in 1973 Judge Bork recanted his original position on the majority imposition of public morality on the issue of the Public Accommodations bill.

2. 1968: Judge Bork Opposed The Decision Advancing Open Housing

In 1968, Judge Bork argued that the Court's decision in Reitman v. Mulkey (387 U.S. 369 (1967)), was wrongly decided. In Reitman, the Supreme Court invalidated a California referendum that added to the state constitution a prohibition against any legislation that abridged "the right of any person...to declare to sell, lease or rent [real] property to such person or persons as he, in his absolute discretion, chooses." The effect of the referendum was to invalidate the state's open-housing statutes. The Supreme Court held that the referendum "was intended to authorize, and did authorize, racial discrimination in the housing market. The right to discriminate is now one of the basic policies of the State." (Id. at 381.)

In Judge Bork's view:

[T]he extent to which [the Supreme] Court, in applying the Fourteenth Amendment, has departed from both the allowable meaning of the words and the requirements of consistent principle is suggested by Reitman v. Mulkey. There the Court struck down a provision...[that] guaranteed owners of private property the right to sell or lease, or refuse to do either, for any reason they chose. It could be considered an instance of official hostility only if the federal Constitution forbade states to leave private persons free in the field of race relations. That startling conclusion can be neither fairly drawn from the Fourteenth Amendment nor stated in a principle of being uniformly applied. ("The Supreme Court Needs A New Philosophy," Fortune, Dec. 1968, at 166.)

3. 1968, 1971 and 1973: Judge Bork Opposed The Decisions Establishing The Principle Of One-Person, One-Vote

In Baker v. Carr (369 U.S. 186 (1962)) and Reynolds v. Sims (377 U.S. 533 (1964)), the Supreme Court established the familiar one-person, one-vote rule, which requires that the districts from which state or local officials are elected contain an equal population. Judge Bork has repeatedly disagreed with this premise.

In 1968, Judge Bork said that "on no reputable theory of constitutional adjudication was there an excuse for the doctrine it imposed....Chief Justice Warren's opinions in this series of cases are remarkable for their inability to muster a supporting argument." ("The Supreme Court Needs A New Philosophy," Fortune, Dec. 1968, at 166.)

In 1971 and 1973, Judge Bork reiterated his opposition, and called for approving any rational reapportionment scheme that would not permit "the systematic frustration of the will of a

majority of the electorate." ("Neutral Principles" at 18-19.). He also said, "I think 'one-man, one-vote' was too much of a straightjacket. I do not think there is a theoretical basis for it." (1973 Confirmation Hearings at 13.)

4. 1971: Judge Bork Opposed The Decision Striking Down Racially Restrictive Covenants

In 1971, the nominee, still a Professor at Yale, attacked the landmark case of Shelley v. Kraemer (334 U.S. 1 (1948)), in which the Court held that the Fourteenth Amendment forbids state court enforcement of a private, racially restrictive covenant. Said then-Professor Bork:

I doubt...that it is possible to find neutral principles capable of supporting...Shelley....The decision was, of course, not neutral in that the Court was most clearly not prepared to apply the principle to cases it could not honestly distinguish....Shelley...converts an amendment whose text and history clearly show it to be aimed only at governmental discrimination into a sweeping prohibition of private discrimination. There is no warrant anywhere for that conversion. ("Neutral Principles" at 15-16.)

5. 1972 and 1981: Judge Bork Opposed Decisions Banning Literacy Tests

In 1972, Judge Bork wrote that the Supreme Court, in Katzenbach v. Morgan (348 U.S. 641 (1966)), was wrong in upholding provisions of the 1965 Voting Rights Act that banned the use of literacy tests under certain circumstances. ("Constitutionality of the President's Busing Proposals," American Enterprise Institute, 1972, at 1, 9-10.) In 1981, he described Katzenbach and Oregon v. Mitchell (400 U.S. 112 (1970)), upholding a national ban on literacy tests, as "very bad, indeed pernicious, constitutional law." (Hearings on the Human Life Bill Before the Subcommittee on Separation of Powers of the Senate Judiciary Committee, 97th Cong., 1st Sess. (1982).)

6. 1973 And 1985: Judge Bork Opposed The Decision Outlawing Poll Taxes

In 1973, Judge Bork argued that Harper v. Virginia Board of Elections (383 U.S. 663 (1966)), in which the Supreme Court outlawed the use of a state poll tax as a prerequisite to voting, "as an equal protection case, it seemed to me wrongly decided." He said that "[a]s I recall, it was a very small poll tax, it was not discriminatory and I doubt that it had much impact on the welfare of the Nation one way or the other." (Solicitor General Confirmation Hearings, 1973, at 17.)

In 1985, after having sat on the D.C. Circuit for three years, Judge Bork renewed his attack on Harper:

[T]he Court frequently reached highly controversial results which it made no attempt to justify in terms of the historic constitution or in terms of any other preferred basis for constitutional decision making. I offer a single example. In Harper..., the Court struck down a poll tax used in state elections. It was clear that poll taxes had always been constitutional, if not exacted in racially discriminatory ways, and it had taken a constitutional amendment to prohibit state imposition of poll taxes in federal elections. That amendment was carefully limited so as not to cover state elections. Nevertheless, the Supreme Court held that Virginia's law violated the equal protection clause.... ("Foreword" in G. McDowell, The Constitution and Contemporary Constitutional Theory, 1985, at vii.)

7. 1978: Judge Bork Opposed The Decision Upholding Affirmative Action

In 1978, then-Professor Bork argued against the landmark opinion in Regents of University of California v. Bakke (438 U.S. 265 (1978)), in which the Supreme Court said that a state medical school could give affirmative weight in admissions decisions to the minority status of a candidate. He wrote that Justice Powell's opinion was "[j]ustified neither by the theory that the amendment is pro-black nor that it is colorblind," and concluded that "it must be seen as an uneasy compromise resting upon no constitutional footing of its own." ("The Unpersuasive Bakke Decision," Wall Street Journal, July 21, 1978.)

It also seems clear that Judge Bork would give little or no weight to past patterns of racial discrimination and exclusion as a basis for affirmative action. He also rejected Justice Brennan's argument that affirmative action was justified because "but for pervasive racial discrimination, [Bakke] would have failed to qualify for admission even in the absence of Davis's special admission program." Judge Bork responded:

Even granting the speculative premise, we cannot know which individuals under a hypothetical national history would have beaten out Bakke. Justice Brennan appears to mean, therefore, that the particular individuals admitted in preference to Bakke on grounds of race are proxies for unknown others. Bakke is sacrificed to person A because [the school] guesses that person B, who is unknown but of the same minority race as A, would have tested better than Bakke if B had not suffered pervasive societal discrimination. A is advanced to compensate for B's assumed deprivation, and Bakke pays the price. The argument offends both ideas of common justice and the 14th Amendment's guarantee of equal

protection to persons, not classes. ("The Unpersuasive Bakke Decision.")

8. 1987: According To A Panel Majority, Judge Bork's Views On Sovereign Immunity Could Defeat A Challenge To A Legislative Scheme Drawn Along Racial Lines

As discussed in Section III(E), Judge Bork's dissent in Bartlett v. Owen (816 F.2d 695 (1987)), in which he favored the preclusion of judicial review of certain constitutional claims, provoked a sharp response from the majority. They explained, in part, that under Judge Bork's view, the doctrine of sovereign immunity could defeat a constitutional challenge to a legislative scheme drawn along racial lines. As the majority described Judge Bork's view:

Congress would have the power to enact, for example, a welfare law authorizing benefits to be available to white claimants only and to immunize that enactment from judicial scrutiny by including a provision precluding judicial review of benefits claims....Any theory that would allow such a statute to stand untouched by the judicial branch flagrantly ignores the concept of separation of powers and the guarantee of due process. We see no evidence that any court, including the Supreme Court, would subscribe to the dissent's theory in such a case. (Id. at 711.) (Emphasis added.)

9. Despite the White House's Emphasis on Judge Bork's Occasional Advocacy Of Pro-Civil Rights Positions As Solicitor General, A Comparison Of The Nominee With Other Solicitors General Demonstrates That Judge Bork Was Not A Consistent And Energetic Defender Of Civil Rights As Solicitor General

While the White House position paper identifies a few cases in which the nominee argued pro-civil rights positions as Solicitor General, a review of his over-all record hardly shows him to be a consistent or energetic defender of civil rights or civil liberties.

One scholar has studied three Solicitor Generals: Robert Bork, Erwin Griswold and Wade H. McCree (the first two appointed by Nixon, the third appointed by Carter). The study examined all of the amicus curiae briefs filed by the Solicitor General's office under these men, and evaluated the briefs in terms of their support of the constitutional rights of civil rights plaintiffs or criminal defendants. (O'Connor, "The Amicus Curiae Role of the U.S. Solicitor General in Supreme Court Litigation," Judicature, 1983 at 257.)

The study found that, as Solicitor General, the nominee argued in favor of the "pro-rights" position in 40.5% of his

amicus briefs. In contrast, Griswold argued the "pro-rights" position in 62% of the cases, and McCree took the "pro-rights" position in 79% of all cases. While the statistics may reflect the fact that Bork was involved in more criminal cases, in which he never once sided with the rights arguments of a criminal defendant, the study shows that Judge Bork took the "pro-rights" positions substantially less often than his predecessor or successor.

10. Summary

While the White House position paper identifies several cases where Judge Bork joined in holdings that favored individual civil rights plaintiffs, these cases do little to rebut Judge Bork's extensive record of opposing civil rights advances. In most of the cases selected by the White House, Judge Bork merely joined in the opinions of others in unanimous decisions. In light of his lifelong record, the nominee can hardly be seen as a strong supporter of civil rights.

B. Judge Bork Has Indicated That Women Should Not Be Included Within The Scope Of The Equal Protection Clause And Has Opposed The Equal Rights Amendment

The White House position paper asserts that "Judge Bork has consistently advanced positions that grant minorities and females the full protection of civil rights laws." (Chapter 11, p. 1) In fact, Judge Bork has made a number of statements that raise substantial concern about his commitment to gender equality.

1. Judge Bork Does Not Include Women Within The Coverage Of The The Equal Protection Clause

In an interview two months ago, Judge Bork was asked about the scope of the Equal Protection Clause of the Fourteenth Amendment. Said Bork:

Well, at this point, I suffer from a certain handicap. That is as a judge, I cannot speak freely about matters that are matters of current controversy. I do think the Equal Protection Clause probably should have been kept to things like race and ethnicity. (Worldnet, United States Information Agency, June 10, 1987, at 12.) (Emphasis added.)

Notably absent is the inclusion of women within Judge Bork's view of the Equal Protection Clause.

On another occasion, Judge Bork remarked:

Various kinds of claims are working their way through the judicial system, and the Supreme Court may ultimately have to face them...[including] the rights of women....The Court

should refer many of these issues to the political process, even though that will anger groups who have been thought to hope for easier, more authoritarian solutions. ("We Suddenly Feel That Law Is Vulnerable," Fortune, Dec. 1971, at 143.) (Emphasis added.)

And Judge Bork has criticised the courts for "legislating" with "made-up constitutional rights:"

This is a process that is going on. It happens with the extension of the Equal Protection Clause to groups that were never previously protected. When they begin to protect groups that were historically not intended to be protected by that clause, what they are doing is picking out groups that should not have any disabilities laid upon them. ("Foundations of Federalism: Federalism and Gentrification," Yale Federalist Society, April 24, 1982, at 9 of questions and answers.) (Emphasis added.)

Judge Bork has expressed dismay that courts would even consider extending the Equal Protection Clause to women:

It speaks volumes about the deterioration of the Equal Protection concept that it is even possible today to take seriously a challenge to the constitutionality of the male-only draft. (Untitled Speech, Seventh Circuit, 1981, at 8.)

One need not oppose the male-only draft or believe that it would be prohibited by the Equal Protection Clause in order to find that there is a "serious" argument for extending the Equal Protection Clause to women.

2. Judge Bork Has Opposed The Equal Rights Amendment

In 1986, when asked about his 1976 opposition to the Equal Rights Amendment, Judge Bork explained that he had opposed the ERA because it would constitutionalize issues of gender equality (though, he said, he no longer felt free to comment on the issue):

Now the role that...men and women should play in society is a highly complex business, and it changes as our culture changes. What I was saying was that it was a shift in constitutional methods of government to have judges deciding all of those enormously sensitive, highly political, highly cultural issues. If they are to be decided by government, the usual course would be to have them decided by a democratic process in which those questions are argued out. (Judicial Notice Interview, June 1986.)

3. Summary

Judge Bork has indicated that the Equal Protection Clause should not include women and he has opposed the Equal Rights Amendment. As was the case with respect to racial discrimination, the cases cited by the White House -- in most of which Judge Bork simply joined the opinions of others -- do little to balance this lifelong record.

C. The White House's Repeated Invocation of Judge Bork's Ollman Opinion Cannot Change the Nominee's Overall Record Of Taking Extremely Restrictive Views On First Amendment Issues

The White House position paper devotes nearly 15 pages to Judge Bork's position on the First Amendment or his decision in Ollman v. Evans. The position paper asserts that "Judge Bork's First Amendment cases suggest a strong hostility to any form of government censorship," and that "his record indicates he would be a powerful ally of First Amendment values on the Supreme Court." Throughout the position paper, Judge Bork's concurring opinion in Ollman is held out as proof that the nominee is a strong supporter of broad First Amendment protections.

Ollman and some of the other First Amendment cases cited in the White House position paper are only one small portion of Judge Bork's over-all First Amendment jurisprudence. There is a much larger picture, which, upon close examination, demonstrates that the nominee is hardly the First Amendment ally that he has been portrayed as thus far by the White House. Indeed, Judge Bork's First Amendment views are more accurately represented by his concern with what he describes "as a radical expansion of the First Amendment...in the last twenty-five years." ("Federalism and Gentrification," Yale Federalist Society, April 24, 1982, at 7.)

Judge Bork's views on the First Amendment can be examined by reviewing four areas: freedom of the press, freedom of speech and expression and the related right of assembly, advocacy and the separation of church and state.

1. Judge Bork Has Attacked Supreme Court Cases That Have Protected Important Rights Of The Press

In the First Amendment area, one core issue is when, if ever, the government may restrain the press before publication. A second core issue relates to when the government may punish the press after publication. The answer to these questions, both of which relate to the power of the government vis-a-vis the press, are at the heart of First Amendment jurisprudence.

The nominee's views on these two critical issues are at odds with well-established Supreme Court case law. Accordingly, there is reason for substantial concern that Judge Bork would vote to reverse decided cases at the core of First Amendment protection.

a. Judge Bork Has Cast Doubt On Leading Supreme Court Decisions Limiting Governmental Prior Restraints on Speech

The best recalled prior restraint case in recent history is the 1971 Pentagon Papers case (403 U.S. 713 (1971)), in which the Supreme Court lifted an injunction against the New York Times, the Washington Post and other newspapers that had lasted over two weeks. In the Court's view, "news delayed was news destroyed."

According to Judge Bork, the Supreme Court's ruling was "stampeded through to decision without either Court or counsel having time to learn what was at stake." ("The Individual, the State, and the First Amendment," University of Michigan, 1979, at 10.) "The New York Times," said Judge Bork, "which had delayed for three months was able to convince the Court that its claims were so urgent, once it was ready to go, that the judicial process could not be given time to operate, even on an expedited basis." (Id.) In fact, the government was given the opportunity to introduce evidence before the District Court. Nor did the government argue before the District Court that it required more time to prepare its case. Judge Bork's view that the Court acted too precipitously in deciding the Pentagon Papers case is at odds not only with the majority of the Court in the case but with well-established First Amendment jurisprudence, which assumes the impermissibility of any prior restraint lasting any longer than absolutely necessary.

b. Judge Bork Has Sharply Criticized Key Supreme Court Decisions Limiting The Power Of Government To Punish Publication

The nominee has been sharply critical of a number of major First Amendment rulings of the Supreme Court protecting journalists and others against sanctions for their speech. One such case is Cox Broadcasting v. Cohn (420 U.S. 469 (1975)), in which an Atlanta broadcaster referred to the name of a victim of a crime while stating that a rape/murder case was commencing. At issue was a Georgia statute that barred the disclosure of the name of a rape victim. The Supreme Court unanimously held the statute unconstitutional insofar as it punished the disclosure of information contained in public court records. Judge Bork has rejected this unanimous ruling, arguing that "one may doubt that press freedom" required it. (Michigan Speech at 10.)

Similarly, in Landmark Communication v. Virginia (435 U.S. 829 (1978)), the Court found unconstitutional -- again unanimously

-- a statute that made it illegal to punish lawfully obtained information about a secret inquiry into alleged judicial misconduct. Bork again concluded that "one may doubt" that the First Amendment required the ruling, and asserted that the case, like Cohn, was an example of "extreme deference to the press that is by no means essential or even important to its role." (Michigan Speech at 10.) (Emphasis added.)

c. Consistent With His Narrow View Of Protection Of The Press, Judge Bork Has Taken A Restrictive View Of The Right Of The Press To Obtain Information From The Government

Judge Bork's views on the right of the press to gather information can properly be gleaned from his decisions on requests under the Freedom of Information Act ("FOIA"). These cases often find the news media on one side of the issue, and the government on the other, with the latter seeking to control access.

In its "Summary of Judge Bork's Opinions on Media Issues," the Reporters Committee for Freedom of the Press found 17 cases in which Judge Bork joined the majority in dismissing or sharply curtailing requests under the FOIA or Sunshine Acts. No case is listed in which Judge Bork voted in favor of the release of more information than the least amount to be released by any other judge on his court.

d. Judge Bork's Restrictive View of Press Rights Contrasts Sharply With The Balanced Approach Of Justice Powell

In a 1979 article, Judge Bork adopted a restrictive view of several important press privileges. He argued that such issues as confidential sources and the disclosure of information about the editorial decision-making of the press "do not strike at the heart of either the sanctity of the law or the freedom of the press." ("The First Amendment Does Not Give Greater Freedom to the Press Than to Speech," Center Magazine, 1979, at 30.) He said that the Supreme Court decisions on these issues "could go either way without endangering either of those profound values." (Id.)

Judge Bork's narrow and restrictive view on these issues conflicts with the approach taken by Justice Powell. While Powell frequently provided the swing vote in cases that permitted the government to win majorities in reporter's privilege cases, he has limited the scope of the government's victory by his separate opinions in those cases.

One such case is Branzburg v. Hayes, (408 U.S. 665 (1972)). There, the majority in a 5-4 decision held that requiring newsmen to appear and testify before state or federal grand juries did not abridge the freedom of speech and press guaranteed by the First

Amendment. (Id. at 668.) Justice Powell joined in the majority opinion. He stressed, in what Justice Stewart, dissenting, termed an "enigmatic concurring opinion [which] gives some hope of a more flexible view in the future," (id. at 711), that the Court's holding was predicated on a finding of no abuse:"

[N]o harassment of newsmen will be tolerated. If a newsman believes that the grand jury investigation is not being conducted in good faith he is not without a remedy. Indeed, if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the court on a motion to quash and an appropriate protective order may be entered. The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions. (Id. at 711.)

This quotation illustrates Justice Powell's devotion to a case-by-case balancing approach. It contrasts sharply with Judge Bork's more narrow and absolute approach.

2. Despite Partial Recantations, Judge Bork Still Takes The Restrictive View That First Amendment Protection Only Extends To Speech That Relates To The Political Process

Any examination of Judge Bork's First Amendment views must begin with his "Neutral Principles" article. Written in 1971 when the nominee was a full Professor at Yale Law School, the article argues that constitutional protection should be accorded "only to speech that is explicitly political." Judges should never intervene, the nominee said, to "protect any other form of expression, be it scientific, literary or that variety of expression we call obscene or pornographic." ("Neutral Principles" at 20.)

After serving as Solicitor General and returning to Yale as Professor of Law, the nominee reaffirmed his views in 1979:

[T]here is no occasion...to throw constitutional protection around forms of expression that do not directly feed the democratic process. It is sometimes said that works of art, or indeed any form of expression, are capable of influencing political attitudes. But in these indirect and relatively remote relationships to the political process, verbal or

visual expression does not differ at all from other human activities, such as sports or business, which are also capable of affecting political attitudes, but are not on that account immune from regulation. (Michigan Speech at 9-10.)(Emphasis added.)

It is difficult to appreciate the full impact of this theory without some specific examples. Under Judge Bork's formulation, a town council could ban James Joyce's Ulysses without any fear of being held to have violated a citizen's First Amendment rights. Another town council could ban all science books discussing Albert Einstein's theory of relativity. And another legislature could ban all books by Sigmund Freud.

In the January 1984 American Bar Association Journal, Judge Bork modified his First Amendment views. In a two-column letter responding to an article written by a professor in the Nation magazine, Judge Bork stated:

I do not think that First Amendment protection should apply only to speech that is explicitly political....I have long since concluded that many other forms of discourse, such as moral and scientific debate, are central to democratic government and deserve protection....I continue to think that obscenity and pornography do not fit this rationale for protection. (Emphasis added.)

The precise language used in this letter is significant. Judge Bork could have elected to disavow completely the views expressed in his "Neutral Principles" article and Michigan speech. Instead, he chose to say only that First Amendment protection should extend to "moral" and "scientific" debate, as that debate is central to democratic government. Judge Bork did not say that protection should extend to artistic or literary expression, and he specifically repeated his opposition to extending such protection to anything that might be obscene or pornographic.

The White House position paper is significant in how it describes Judge Bork's 1984 ABA letter. "It is not true," says the paper, "that Judge Bork would extend the protection of the First Amendment only to political speech." Asserting that "Bork has since changed his views," the paper then quotes the section of the letter noted above. It also cites some of Judge Bork's opinions, which are addressed below.

What the position paper does not say is as important as what it does. It did not say that Bork meant to include within the protection of the First Amendment artistic or literary expression. And it cited no other writings or speeches to suggest that he might have broadened the terms of his letter.

In an interview two months ago, Judge Bork commented again on speech and expression:

There is a lot of moral and scientific speech which feeds directly into the political process. There is simply no point in making people tack on "and therefore let's pass a law" in order to make a protected speech....I cannot tell you how much more than that there is a spectrum of, I think political speech -- speech about public affairs and public officials -- is the core of the amendment, but protection is going to spread out from there, as I say, in the moral speech and the scientific speech, into fiction and so forth.....There comes a point at which the speech no longer has any relation to those processes. When it reaches that level, speech is really no different from any other human activity which produces self-gratification.... (Worldnet at 25.) (Emphasis added.)

Later in the interview, Judge Bork added:

Clearly as you get into art and literature, particularly as you get into forms of art -- and if you want to call it literature and art -- which are pornography and things approaching it -- you are dealing with something now that is in any way and form the way we govern ourselves, and in fact may be quite deleterious. I would doubt that courts ought to throw protection around that. (Id. at 26-27.) (Emphasis added.)

Based on the terms of these statements, a broad area of expression traditionally viewed as included within the scope of the First Amendment would be unprotected. A Rubens painting still could not be hung in a museum if the city council chose to prohibit it. The same would be true of a ban on performances by the Alvin Ailey Dance Troupe. In addition, Judge Bork appears to believe that there is no First Amendment protection for an undefined category of non-obscene speech, which some might see as provocative or "approaching" obscenity.

Judge Bork has not had occasion to rule on any cases that involved exclusively artistic or literary expression. In his opinions, however, he has been careful to note that the expression being protected is "political."

In Ollman v. Evans, for example, Judge Bork said that the plaintiff had "placed himself in the political arena and became the subject of heated political debate." (750 F.2d at 1002.) In addition, the adversary of the press in Ollman was not the government, but a private party. It was not a case involving the government's attempt to restrain the press from publishing information or to prevent access to information. Rather, it was a Marxist professor challenging two conservative columnists. As

discussed above, Judge Bork is far less protective of the press when its adversary is the government.

In other cases in which the expression could have been classified as artistic or scientific and given protection as such, Judge Bork has emphasized its political aspects in bringing it within the coverage of the First Amendment. (Lebron v. WMATA, 749 F.2d 893, 896 (D.C. Cir. 1984)); McBride v. Merrell Dow & Pharmaceuticals, 717 F.2d 1460, 1466 (D.C. Cir. 1983).) Indeed, as the White House position paper states with respect to Lebron, "the poster [which was the subject of the case] clearly represented political speech."

3. Judge Bork Has Taken A Narrow View Of The Right Of Assembly

Judge Bork has taken a very narrow view in his opinions of the rights of political demonstrators. In White House Vigil for ERA v. Watt (717 F.2d 568 (D.C. Cir. (1983))), for example, the majority, while deciding that protestors could not demonstrate as they wanted in front of the White House, expressly allowed the protestors to keep parcels of leaflets with them in order to be able to hand them out without having to leave for a storage area after each handful was disseminated. Judge Bork argued in dissent that the individuals should have been forbidden from keeping the parcels of leaflets with them. (Id. at 573.)

In Finzer v. Barry (798 F.2d 1450 (D.C. Cir. 1986), cert. granted, 107 S. Ct. 1282 (1987)), Judge Bork upheld the constitutionality of a statute barring demonstrations within 500 feet of any foreign embassy if -- but only if -- the speech is critical of the foreign government. He thus showed more deference to the sensibilities of foreign states than to the rights of American citizens peacefully to demonstrate.

The description in the White House position paper of Judge Bork's opinion in Finzer is telling as to the length the White House is willing to go to excuse Judge Bork's views. The position paper states:

Judge Bork's opinion...shows that, while hostile to government regulation of speech as such, he is not completely unwilling, in extremely limited circumstances, to find certain government interests sufficiently weighty to justify some narrowly drawn suppression of speech, especially in matters involving foreign relations.

In fact, Finzer demonstrates that Judge Bork is far too willing, after the mere incantation of the words "foreign relations," to permit the rights of Americans to express themselves to be overcome.

4. In Canvassing Judge Bork's First Amendment Views, The White House Position Paper Omits Any Reference To The Strong Indications That The Nominee Objects To Bedrock Principles Supporting The Separation of Church And State

Judge Bork has expressed grave doubts on several landmark Supreme Court decisions interpreting the religion clauses of the First Amendment. He has endorsed the view that the framers intended the Establishment Clause to do no more than ensure that one religious sect should not be favored over another, and was not intended to mean that the government should be entirely neutral toward religion -- a view rejected by eight Justices in Wallace v. Jaffree.

Norman Redlich, Dean of the New York University School of Law, recalls that in a 1984 speech at the law school, Judge Bork criticized the Court's decision in Engel v. Vitale (370 U.S. 421 (1962)) as a "non-interpretivist opinion." In Engel, the Court held that the establishment clause forbids state officials to compose an official school prayer and require its daily recital, even if the prayer is denominationally neutral and students could opt to be silent or absent from the classroom during such recital.

In a letter to Judge Bork dated May 3, 1982, Dean Redlich took issue with Judge Bork's assertion that the Court had strayed from "interpreting" the Constitution in Engel and that the decision was therefore, in Bork's terms, "non-interpretivist." In Dean Redlich's view, the decision was a plausible interpretation of the establishment clause. Judge Bork has denied taking a position on the constitutionality of school prayer (Washington Post, July 28, 1987), but that denial does not amount to a repudiation of what Dean Redlich reports Judge Bork to have said.

In speeches delivered in 1984 and 1985, Judge Bork rejected the Supreme Court's three-part test set forth in Lemon v. Kurtzman (403 U.S. 602 (1971)), for evaluating challenges that a given law establishes a state religion. Under Lemon, the statute must, first, have a secular legislative purpose. Second, its principal or primary effect must be one that neither advances nor inhibits religion. Third, the statute must not foster an excessive government entanglement with religion.

Judge Bork has attacked each part of the test. The first, he says, "cannot be squared with governmental actions that we know to be constitutional" and "appears to be inconsistent with the historical practice that suggests the intended meaning of the Establishment Clause." ("Religion and the Law," University of Chicago, Nov. 13, 1984, at 5.) With respect to the second part of the test, Judge Bork notes: "The Court can hardly quantify the effects of laws that are not on their face directed to religion.

In any event, the historical evidence cuts against this test, too." (Id. at 6.) Judge Bork finds that the third part is "impossible to satisfy. Government is inevitably entangled with religion. The test is self-stultifying because the test itself requires a determination of what qualifies as religion in order to know whether government is entangled with it." (Id.)

Judge Bork also has argued against the Supreme Court's decision in Aguilar v. Felton (473 U.S. 402 (1985)), which, together with a companion case, invalidated New York City's use of federal funds to pay public school employees teaching in parochial schools. Justice Powell was the swing vote in Aguilar. According to Judge Bork, Aguilar "illustrates the power of the three-part test to outlaw a program that had not resulted in any advancement of religion but seems entirely worthy." (Untitled Speech, Brookings Institution, Sept. 12, 1985, at 3.) In addition, Judge Bork stated:

A relaxation of current rigidly secularist doctrine would in the first place permit some sensible things to be done. Not much would be endangered if a case like Aguilar went the other way and public school teachers permitted to teach remedial reading to that portion of educationally deprived children who attend religious schools. I suspect that the greatest perceived change would be in the reintroduction of some religion into public schools and some greater religious symbolism in our public life. (Id. at 11.) (Emphasis added.)

D. Judge Bork Has Consistently Deferred To The Executive Branch And Has Supported Executive Powers Essentially Unlimited By Law

The White House position paper makes no mention of Judge Bork's consistent deference to the executive branch and support for the exercise of broad executive powers.

1. Judge Bork Has Opposed Legislation Creating A Special Prosecutor

When he was Acting Attorney General, the nominee expressed his opposition to legislation that would create a Special Prosecutor. He testified that "such a course would almost certainly not be valid and would, in any event, pose more problems than it would solve." ("Special Prosecutor and Watergate Grand Jury Legislation," Hearings Before the House Subcommittee on Criminal Justice of the Committee on the Judiciary, 93d Cong., 1st Sess., 1973, at 252.) Judge Bork's view is that a Special Prosecutor independent of the President is an unconstitutional interference with the separation of powers.

2. Judge Bork Has Shown Broad Deference To The Executive In National Security Matters

Judge Bork has been a proponent of broad deference to the Executive in national security matters, particularly with respect to press access to information. He has advocated, for example, amending the espionage laws to forbid newspapers from disclosing national security information deemed of "no public interest." ("Symposium on Foreign Intelligence: Legal and Democratic Controls," American Enterprise Institute, Dec. 11, 1979, at 15.) This is a notion that even former Central Intelligence Director William Colby saw as inconsistent with the First Amendment. (*Id.* at 21.)

3. Judge Bork's Opinions Have Declined To Exercise Any Meaningful Scrutiny Of Claims Against The Executive

In Abourzek v. Reagan (785 F.2d 1043 (D.C. Cir. 1986)), Judge Bork's dissent sounded a familiar theme: deference to the Executive's handling of foreign affairs and its interpretation of statutes. The majority held that the district court needed to restudy the Secretary of State's denial of non-immigrant visas to aliens who sought to visit the United States to give speeches in response to requests by U.S. citizens. The majority wanted additional proof that the Secretary had interpreted the statute consistently.

In Judge Bork's view, the power to exclude aliens is "largely immune from judicial review." (*Id.* at 1073.) The Executive, he said, may base its decision to exclude aliens upon the content of their beliefs. Finally, Judge Bork charged that the majority had begun "a process of judicial incursion into the United States' conduct of its foreign affairs." (*Id.* at 1076.)

Judge Bork has also deferred to local executives. In Williams v. Barry (708 F.2d 789 (D.C. Cir. 1983)), the court determined the extent to which the Constitution requires that due process be accorded the homeless before the District of Columbia could close their shelters. The lower court had held that the proposed closing implicated a protectable property interest, a ruling that was not appealed. It also had held that notice and an opportunity to be heard were necessary, but the majority on the Court of Appeals held that the question was not ready for judicial review until the District made a final decision.

In his concurrence, Judge Bork addressed the question of whether the homeless had any constitutional protection from arbitrary governmental action in the form of due process rights. Judge Bork said that it is "revolutionary" to subject what he described as "political decisions" to procedural due process requirements and to judicial review:

The Mayor is an elected official and his decision on the shelters is a political one. From the beginning of judicial

review it has been understood that such decisions need not be surrounded and hemmed in with judicially imposed processes. Indeed, the reasons for judges not interfering with the methods by which political decisions are arrived at are closely akin, if not identical, to the considerations underlying the political question doctrine....(Id. at 793.)

V.

**THE WHITE HOUSE HAS GIVEN AN INACCURATE AND INCOMPLETE
DESCRIPTION OF THE COURT'S DECISION THAT JUDGE BORK'S
FIRING OF ARCHIBALD COX WAS ILLEGAL**

In its section on "Robert Bork's Role in the 'Saturday Night Massacre,'" the White House position paper briefly describes Judge Gesell's opinion in Nader v. Bork (366 F. Supp. 104 (D.D.C. 1973)), the action challenging Bork's discharge of Watergate Special Prosecutor Archibald Cox. At best, the position paper's description is inaccurate and incomplete. More importantly, its omissions involve an issue that is fundamental to understanding the seriousness of Judge Bork's actions in October 1973.

A. Background

The plaintiffs in Nader v. Bork were Ralph Nader and three congressmen, who sought a ruling on the legality of the discharge of Archibald Cox as the Watergate Special Prosecutor. The sole defendant was Robert Bork, who at the time was the Acting Attorney General. As set forth in the position paper, Judge Bork was the Justice Department official who fired Mr. Cox.

As authorized by statute, a formal Department of Justice regulation set forth the duties and responsibilities of the Watergate Special Prosecutor: to investigate and prosecute offenses arising out of the Watergate break-in, the 1972 Presidential election, and allegations involving the President, members of the White House staff or presidential appointees. The Special Prosecutor was to remain in office until a date mutually agreed upon between the Attorney General and himself, and the regulation stated that "[t]he Special Prosecutor will not be removed from his duties except for extraordinary improprieties on his part." (*Id.*, at 107 and nn. 4-5.)

On the same day that this regulation was promulgated, Mr. Cox was designated as Watergate Special Prosecutor. Less than four months later -- on October 20, 1973 -- he was fired by Judge Bork under circumstances that Bork admitted did not constitute an extraordinary impropriety. (*Id.*) Thereafter, on October 23, Judge Bork rescinded the underlying Watergate Special Prosecutor regulation, retroactively, effective as of October 21. (*Id.*)

**B. The Position Paper's Description Is Inaccurate and
Incomplete On Several Important Issues**

The position paper describes Judge Gesell's opinion as follows:

The rescission of the regulations granting Cox independent prosecution authority was challenged by Ralph Nader in the

D.C. District Court. Judge Gesell entered an order declaring the rescission to be illegal, because the grant of independence implied a requirement that Cox consent to any rescission. (Chapter 8, at 3.)

For several reasons, this description is inaccurate and incomplete, and thus ultimately misleading. The White House position paper clearly implies that the only issue in Nader was a rather technical question of the validity of "the rescission of the regulations granting Cox independent prosecution authority." This creates the impression, in turn, that the legality of Judge Bork's firing of Special Prosecutor Cox was unchallenged, and that the issue was merely whether Judge Bork had taken the correct procedural steps in the proper order.

In fact, the plaintiffs in Nader challenged both "whether Mr. Cox was lawfully discharged by [Judge Bork] while the regulation was still in existence, and, if not, whether the subsequent cancellation of the regulation lawfully accomplished his discharge." (Nader v. Bork, 386 F. Supp. at 107.) The rescission question was thus but one of two questions addressed by Judge Gesell. The threshold question -- ignored by the White House position paper -- was whether the firing itself was lawful.

Moreover, Judge Gesell did not enter an order "declaring the rescission to be illegal." Rather, the Order specified: "The Court declares that Archibald Cox, appointed Watergate Special Prosecutor pursuant to 28 C.F.R. 0.37 (1973), was illegally discharged from that office." (Id. at 110.) Thus, the Order did not even deal with the rescission of the regulation; instead, it declared that Cox's firing by Bork was illegal.

As a result, the White House position paper's misstatement of the Order distorts the real thrust of the court's ruling. Consistent with his Order, Judge Gesell's first concern was whether Mr. Cox's firing was lawful, and he held that "[t]he firing of Archibald Cox in the absence of a finding of extraordinary impropriety was in clear violation of an existing Justice Department regulation having the force of law and was therefore illegal." (Id. at 108.)

Finally, the White House paper distorts even Judge Gesell's holding on the rescission of the underlying regulation. The paper asserted that "the grant of independence implied a requirement that Cox consent to any rescission," suggesting perhaps that Judge Gesell's holding simply addressed some sort of formal, technical-sounding consent requirement. Judge Gesell did not find any consent requirement, but rather that Judge Bork's rescission of the regulation was "arbitrary and unreasonable." (Id. at 109)

Moreover, he found

that this turnabout [abolishing the Office of Watergate Special Prosecutor and then reinstating it three weeks later to appoint Leon Jaworski] was simply a ruse to permit the discharge of Mr. Cox without otherwise affecting the Office of the Special Prosecutor--a result which could not legally have been accomplished while the regulation was in effect. (Id.)(Emphasis added.)

Thus, Judge Gesell ruled (1) that Judge Bork's discharge of Mr. Cox was illegal, and (2) that Judge Bork's rescission of the underlying regulation was arbitrary and unreasonable. These rulings were separate and independent. The firing itself was therefore unlawful because the regulation was still in place when Cox was actually fired on October 20. Moreover, the firing would not have been legal even if the regulation had been rescinded before the events leading up to the Saturday Night Massacre (i.e., the controversy surrounding Mr. Cox's subpoena of the White House tapes), because the rescission would still have been arbitrary and unreasonable in light of those events.

Judge Gesell's opinion and Order in Nader v. Bork is widely recognized as one of the most significant events of the Watergate era. For that reason, presumably, the drafters of the White House position paper felt compelled to address them. It is regrettable that the White House did so in such a distorted manner.

VI.

STARE DECISIS: RESPECT FOR AND ADHERENCE TO PRECEDENT

Apparently recognizing the longstanding and extensive attack that has been mounted by Judge Bork on a wide range of Supreme Court doctrines, the White House has attempted to portray the nominee as a man who would be humbled by elevation to the nation's highest court. However excessive his views may have been in the past, the White House seems to say, Judge Bork would, upon ascension to the Supreme Court, be reigned in by respect for the institution and its position as a co-equal branch of government. Simply put, this picture is not borne out by Judge Bork's extensive record.

A basic question that the Senate will face as it considers the nomination is this: What are Judge Bork's views on "stare decisis," the crucial doctrine that counsels respect for and adherence to precedent? According to the White House, while some fear that Bork will "seek to 'roll back' many existing precedents..., [t]here is no basis for this view in Judge Bork's record." The position paper also attempts to explain Judge Bork's criticism of "the reasoning of Supreme Court opinions" as something "that law professors do." And, the position paper claims that, "as a judge, [Bork] has faithfully applied the legal precedents of both the Supreme Court and his own Circuit Court." Finally, the position paper contends rather generally that Judge Bork "believes in abiding by precedent." A complete review of the nominee's record demonstrates conclusively the error of each assertion.

A. Judge Bork Has Conceded, In Clear And Unambiguous Terms, That His Views As A Judge "Have Remained About What They Were" When He Was An Academic

The suggestions in the White House position paper that Judge Bork's sweeping attacks on landmark decisions of the Supreme Court have simply been the typical musings of an academic seeking to provoke debate are flatly contradicted by Judge Bork's own statements to the contrary. His statements belie any assertion that his writings and speeches criticizing Supreme Court cases are merely abstract academic exercises, divorced from his leanings as a potential Justice.

Less than a year ago -- and more than four years after he began sitting as a member of the D.C. Circuit -- Judge Bork commented on his roles as an academic and as a jurist. In clear and unambiguous terms, the nominee stated:

Teaching is very much like being a judge and you approach the Constitution in the same way. (Interview with WQED, Pittsburgh, Nov. 19, 1986.) (Emphasis added.)

In a similar vein, Judge Bork said in a 1985 interview:

[M]y views have remained about what they were [since becoming a judge]. After all, courts are not that mysterious, and if you deal with them enough and teach their opinions enough, you're likely to know a great deal. So when you become a judge, I don't think your viewpoint is likely to change greatly. (District Lawyer Interview, 1985, at 31.) (Emphasis added.)

Any remaining doubts about whether the suggestions in the White House position paper are disingenuous should be put to rest by Judge Bork's additional comment in the same 1985 interview:

Obviously, when you're considering a man or woman for a judicial appointment, you would like to know what that man or woman thinks, you look for a track record, and that means that you read any articles they've written, any opinions they've written. That part of the selection process is inevitable, and there's no reason to be upset about it. (Id. at 33.) (Emphasis added.)

And, finally, to the extent that one may question whether Judge Bork's 1971 Indiana Law Journal article is relevant to the Senate's inquiry, the nominee leaves no doubt: "I finally worked out a philosophy which is expressed pretty much in that 1971 Indiana Law Journal piece." (Conservative Digest Interview, 1985 at 101.)

Judge Bork's own clear statements, therefore, inform the Senate as to where it should look in determining the nominee's jurisprudential views. Beyond these statements, there are several other reasons for carefully considering the Judge Bork's extra-judicial as well as his judicial record.

First, many of Judge Bork's "musings" have taken the form of testimony before Congress, where he was offering his opinions on issues upon which that body would presumably base legislation. Second, Judge Bork has maintained his drumbeat of criticism in articles, speeches and interviews while sitting as member of the D.C. Circuit; such criticism, in other words, did not cease upon the nominee's departure from academia. Third, the attempt to minimize the effects of Judge Bork's writings gives short shrift to the legal academic community and belittles the important contributions that scholarship has made to the development of the law.

Judge Bork's complete 25-year record, then, is relevant to his nomination. The attempt to limit the Senate's consideration to his opinions on the D.C. Circuit should be rejected.

**B. There Is Considerable Basis In Judge Bork's Record
For Concern That He Would Overturn Many Landmark
Supreme Court Decisions**

The claim that "no basis" exists in Judge Bork's record for concern that he would overturn precedents if confirmed as an Associate Justice is without merit. In fact, the record is replete with specific statements by the nominee that give great cause for concern.

**1. Judge Bork Has Said That The Appointment Power
Should Be Used To Correct "Judicial Excesses"**

One indication of Judge Bork's views on stare decisis stems from his remarks on the appointment power. He has said that the "answer" to "judicial excesses" can "only lie in the selection of judges, which means that the solution will be intermittent, depending upon the President's ability to choose well and his opportunities to choose at all." ("'Inside' Felix Frankfurter," The Public Interest, Fall Book Supplement, 1981, at 109-110.) During the 1982 hearings on his nomination to the D.C. Circuit, Judge Bork stated that "[t]he only cure for a Court which oversteps its bounds that I know of is the appointment power." ("Confirmation of Federal Judges," Hearings Before The Senate Judiciary Committee, 1982, at 7.) In a 1986 article, Judge Bork wrote that "[d]emocratic responses to judicial excesses probably must come through the replacement of judges who die or retire with judges of different views." ("Judicial Review and Democracy," Society, Nov./Dec. 1986, at 6.)

**2. Judge Bork Has Said That "Broad Areas
Of Constitutional Law" Ought To Be Reformulated
And That An Originalist Judge Should Have
"No Problem" In Overruling A Non-Originalist Precedent**

On several occasions, Judge Bork has expressed a clear willingness to overturn precedent. For example, in a January 1987 speech, Judge Bork, after describing himself as an "originalist," stated:

Certainly at the least, I would think that an originalist judge would have no problem whatever in overruling a non-originalist precedent, because that precedent by the very basis of his judicial philosophy, has no legitimacy. It comes from nothing that the framers intended. (Remarks on the Panel "Precedent, the Amendment Process, and Evolution of Constitutional Doctrine," First Annual Lawyers Convention of the Federalist Society, Jan. 31, 1987, at 124, 126.) (Emphasis added.)

Judge Bork also asserted in this same speech that:

[T]he role of precedent in constitutional law is less important than it is in a proper common law or statutory model.

[I]f a constitutional judge comes to a firm conviction that the courts have misunderstood the intentions of the founders, ...he is freer than when acting in his capacity as an interpreter of the common law or of a statute to overturn a precedent. (Id. at 125-26.)

While Judge Bork cautioned that a judge is not "absolutely free" in this regard (id.), these statements provide a keen insight into the nominee's views on the role of precedent in our constitutional system.

Also significant are Judge Bork's remarks in his well-known Indiana Law Journal article:

Courts must accept any value choice the legislature makes unless it clearly runs contrary to a choice made in the framing of the Constitution....It follows, of course, that broad areas of constitutional law ought to be reformulated. ("Neutral Principles" at 11.)(Emphasis added.)

Yet another indication of Judge Bork's eagerness for the Supreme Court to revisit certain fundamental issues appears in a 1985 local bar interview. When pressed about whether he could identify those constitutional doctrines he thought ripe for reconsideration by the Supreme Court, Judge Bork stated "Yes I can, but I won't." ("A Talk With Judge Bork," District Lawyer, June 1985, at 32.)(Emphasis added.)

One such doctrine may be the development of the Bill of Rights. In a 1986 speech, Judge Bork posed the question of "whether, given the state of the precedent, a judge that wanted to return to basic principles could do so." ("Federalism," Attorney General's Conference, Jan. 24-26, 1986, at 9.) Judge Bork answered:

The court's treatment of the Bill of Rights is theoretically the easiest to reform. It is here that the concept of original intent provides guidance to the courts and also a powerful rhetoric to persuade the public that the end to [judicial] imperialism is required and some degree of reexamination is desirable. (Id.) (Emphasis added.)

Judge Bork also has said that "constitutional law...is at least as badly in need of reform as antitrust," (Untitled Speech, William Mitchell College of Law, Feb. 10, 1984), about which he has remarked that "[a] great body of wrong, indeed, thoroughly perverse, Supreme Court [law] remains on the books...." (Untitled Speech, Lexecon Conference, Oct. 30, 1981.)

3. The Record Strongly Suggests That Judge Bork, If Confirmed, Would Vote To Overturn A Substantial Number Of Supreme Court Decisions

It is at this juncture difficult to identify precisely which doctrines "Justice" Bork would seek to reconsider immediately. The record strongly suggests, however, that the number would be substantial.

In a 1982 speech in which he discussed the debate over the different methods of constitutional interpretation, Judge Bork said:

[N]o writer on either side of the controversy thinks that any large proportion of the most significant constitutional decisions of the past three decades could have been reached through interpretation [of the Constitution]. (Untitled Speech, Catholic University, March 31, 1982, at 5.) (Emphasis added.)

Similarly, with respect to the Supreme Court's landmark decisions in such cases as Griswold v. Connecticut (381 U.S. 479 (1965)) and Roe v. Wade (410 U.S. 113 (1973)), Judge Bork remarked:

In not one of those cases could the result have been reached by interpretation of the Constitution, and these, of course, are only a small fraction of the cases about which that could be said. (Id. at 4.) (Emphasis added.)

Judge Bork's 1981 testimony on the Human Life bill also strongly suggests that he might vote to overturn a large number of cases. In the context of criticizing the decision in Roe v. Wade, Judge Bork testified that it is "by no means the only example of...unconstitutional behavior by the Supreme Court." ("The Human Life Bill," Hearings Before The Subcommittee on Separation of Powers, 1981, at 310.) In his written testimony, Judge Bork stated:

The judiciary have a right, indeed, a duty, to require basic and unsettling changes, and to do so, despite any political clamor, when the Constitution fairly interpreted demands it. The trouble is that nobody believes the Constitution allows, much less demands, the decision in Roe...or in dozens of other cases in recent years. (Id. at 315.) (Emphasis added.)

Along these same lines, Judge Bork has commented:

[T]he Court...began in the mid-1950s to make...decisions for which it offered little or no constitutional argument....Much of the new judicial power claimed cannot be derived from the text, structure, or history of the Constitution. ("Judicial Review and Democracy," Encyclopedia of the American Constitution, Vol. 2, at 1062 (1986).)

What are the "large proportion" of significant constitutional cases in the "last three decades" that could not have been reached through interpretation of the Constitution? What are the "dozens of cases" not "allowed" by the Constitution? What are the cases since the mid-1950s that are not supported by the Constitution? These are fundamental questions for the hearings in September, but they may not be answered there. But the Senate need not operate on a blank slate in such a case, because Judge Bork has already told us to look at his "track record," including "any articles" he has written. (District Lawyer, "Interview" at 33.)

Accordingly, Senators may turn for valuable insight to the nominee's many attacks on past precedents -- precedents that he would likely encounter during the two decades he might serve if confirmed to the Court. These attacks, only some of which are listed in Appendix B, may be the only available window to the "dozens of cases" that Judge Bork believes are not "allowed" by the Constitution.

C. Judge Bork's Application Of His Academic Views To His Judicial Decisions Is Illustrated By His Attack On The Privacy Cases In Dronenburg

Judge Bork has not only said that he approaches the Constitution "in the same way" both in academia and on the bench; he has actually done so. Indeed, in contrast to the suggestion in the White House position paper that Judge Bork has limited his criticism of Supreme Court cases to academia, the record shows that such criticism also has been leveled from the bench.

In Dronenburg v. Zech (741 F.2d 1388 (D.C. Cir. 1984)), for example, Judge Bork critically evaluated the entire line of the Supreme Court's privacy cases, commencing with Griswold v. Connecticut. His attack led four members of the D.C. Circuit, in their dissent from the denial of the petition for rehearing en banc, to caution the nominee that "surely it is not the function [of lower courts] to conduct a general spring cleaning of constitutional law." (746 F.2d 1579, 1580.)

D. Judge Bork's "Faithful Application" Of Supreme Court Precedent While A Circuit Court Judge Is Irrelevant Since He Has Been Constitutionally And Institutionally Bound To Follow The Supreme Court As A Lower Court Judge

As discussed previously, that Judge Bork may have "faithfully applied" Supreme Court precedents while on the D.C. Circuit, as claimed by the White House position paper, is irrelevant to his potential actions on the Supreme Court. As an intermediate court judge, he has been constitutionally and institutionally bound to respect and apply that precedent. As a Supreme Court Justice, he would not be so bound.

**E. Judge Bork Has Consistently Given Only One Example
Of A Constitutional Doctrine That He Regards As Too
Well-Settled To Overturn**

The White House position paper stresses that, according to Judge Bork, even "questionable" precedent should not be overturned if "it has become part of the political fabric of the nation." The position paper may be referring to Bork's statement in a 1985 District Lawyer interview that there are certain decisions around which "so many statutes, regulations, governmental institutions, [and] private expectations" have been built that "they have become part of the structure of the nation." Importantly, the sole example Judge Bork has ever given of the type of precedent that would meet this test is the interpretation of the commerce clause. (See District Lawyer Interview at 32; Federalist Society Convention Speech, Jan. 31, 1987, at 4.) He has never, based on the information reviewed thus far, offered any other example.

Judge Bork's rationale for invoking the commerce clause in this context is quite telling. He is willing to uphold decisions under the commerce clause because of his respect for government and for the institutional arrangements that have been built around the clause. This is far different from arguing that precedent should be upheld because of one's respect for his or her predecessors on the Court and their reasons for reaching a particular decision. Elevation to the Supreme Court should be a humbling experience -- but Judge Bork's reasons for upholding decisions expanding the commerce clause suggest that he would feel no such humility.

**F. Judge Bork Has Distinguished Between Precedents
From Higher Courts And Those Within The Same Court**

Importantly, Judge Bork has drawn a distinction between a judge's duty with respect to precedents from a higher court and those within the same court. At his 1982 confirmation hearings, Bork stated:

I think that as a court of appeals judge one has to adhere to [stare decisis] very strongly, and that is to follow the lead of the Supreme Court. It is less clear, for example, about precedent within a single court and whether that court should follow it or not. ("Confirmation of Federal Judges," Hearings Before the Senate Judiciary Committee, 1982, at 13.)

This strongly suggests that were the constitutional and institutional constraints that apply to an intermediate court judge removed, Bork would be more willing to overturn precedents.

G. In Contrast To Judge Bork, Justice Powell Emphasized That Stare Decisis Is A Doctrine That "Demands Respect In A Society Governed By Rule Of Law"

Respect for precedent was a powerful element of Justice Powell's jurisprudence. In his view, "the doctrine of stare decisis, while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a society governed by the rule of law." (City of Akron v. Akron Center For Reproductive Health, Inc., 462 U.S. 416, 419-420 (1983).) (Emphasis added.)

Justice Powell also underscored the "especially compelling reasons for adhering to stare decisis in applying the principles of Roe v. Wade." (Id. at 420 n. 1.) Roe, said Powell,

was considered with special care. It was first argued during the 1971 Term, and reargued -- with extensive briefing -- the following Term. The decision was joined by the Chief Justice and six other Justices. Since Roe was decided in January 1973, the Court repeatedly and consistently has accepted and applied the basic principle that a woman has a fundamental right to make the highly personal choice whether or not to terminate her pregnancy. (Id.)

H. Many Commentators Doubt That Judge Bork Would Abide By Precedent

Several commentators do not agree with the White House's assessment that Judge Bork, if confirmed, would abide by precedent. Owen Fiss, the Alexander Bickel Professor of Public Law at Yale University, has written:

As if to reassure the liberal coalition on the abortion issue, Mr. [Lloyd] Cutler insists that Judge Bork's 'writings reflect a respect for precedent.' Nothing could be farther from the truth: What Judge Bork's writings -- spanning almost 20 years as a professor -- reflect is not a concern for precedent but a dogmatic commitment to a comprehensive or general theory and a willingness to deride decisions that do not agree with his theory.

Judge Bork's performance on the Court of Appeals has not revealed a change in outlook. Indeed, his recent effort to confine the right-to-privacy decisions of the Supreme Court earned him a rebuke by his colleagues, who insisted that 'it is not...[the] function [of lower court judges] to conduct a general spring cleaning of constitutional law.' Elevating Judge Bork to the Supreme Court is not likely to instill within him a new reverence for authority, but rather to give him the power to write his views into law. (Letter to The New York Times, July 31, 1987.) (Emphasis added.)

Similarly, Oxford and New York University Professor Ronald Dworkin has recently commented:

Bork's views do not lie within the scope of the long-standing debate between liberals and conservatives about the proper role of the Supreme Court. Bork is a constitutional radical who rejects a requirement of the rule of law that all sides in that debate had previously accepted. He rejects the view that the Supreme Court must test its interpretations of the Constitution against principles latent in its own past decisions as well as other aspects of the nation's constitutional history. (Dworkin, "The Bork Nomination," New York Review of Books, Aug. 13, 1987.)

**I. The Effects Of Reversing The Important
Bodies Of Constitutional Law That Judge Bork Has
Criticized Would Be Grave**

The doctrine of stare decisis is a cornerstone of our constitutional and jurisprudential foundations. Like most such doctrines, of course, it is not absolute. As Archibald Cox states in his recently published book, some overruling of precedent is part of our constitutional tradition. (Cox, The Court and the Constitution (Houghton Mifflin Co. 1987) at 364.) "[W]hen taken with discretion," the step "is essential to the correction of errors." (Id.)

What happens when the step is not taken with discretion? If "Justice" Bork were to act on his criticism of any number of the decisions identified above -- were he, in other words, to overrule even the shortest of these lines of settled law -- the consequences would be grave. Such action could well carry the suggestion, in Mr. Cox's words, that "constitutional rights depend on the vagaries of individual Justices and the politics of the President who appoints them....Constitutionalism as practiced in the past could not survive if, as a result of a succession of carefully chosen Presidential appointments, the sentiment of a majority of the Justices shifted back and forth...so that the rights to freedom of choice [and] freedom from State-mandated prayer...were alternately recognized and denied." (Id. at 364.)

APPENDIX A

The following is a brief summary of the nine cases cited by the White House position paper in its comparison of Justice Powell and Judge Bork.

1. Goldman v. Secretary of Defense, 739 F.2d 657, aff'd, 475 U.S. 503. Judge Bork had no role in the original panel opinion, and simply joined an eight member per curiam decision denying rehearing en banc. (Judges Starr, Ginsburg and Scalia dissented from the denial.) Justice Powell joined the majority opinion (by Rehnquist) and a concurring opinion by Stevens (also joined by White). Although Powell's decision to join Stevens' concurring opinion may give some insight into the views of Powell, the reason Judge Bork decided against a rehearing is unclear. It seems highly speculative to assume that Judge Bork's decision to vote against a rehearing was based on the same legal reasoning which led Powell to vote against Goldman.

The facts of the case involve an Air Force captain's attempt to wear his yarmulke, in violation of Air Force rules. The D.C. Panel and the Supreme Court upheld the Air Force, and denied the right of the captain to wear the yarmulke.

2. National Association of Retired Federal Employees v. Horner, 633 F.Supp. 511, aff'd, 107 S.Ct 261 (1986). Judge Bork was part of an unsigned, per curiam opinion by a three judge panel. The plaintiffs sought a declaratory judgment that the Gramm-Rudman-Hollins Act deprived them of property without compensation by suspending scheduled COLA for retired federal employees. The panel granted summary judgment to defendant, holding that the statute providing COLA's did not establish a property right in the scheduled adjustment.

The Supreme Court summarily affirmed, unanimously, in a one paragraph notice. Even assuming that Judge Bork's reasoning can be determined from the unsigned, per curiam decision, it again seems highly speculative to assume that Powell agreed with all of Judge Bork's reasoning. Because of the inherently unclear reasoning behind a summary affirmation, these affirmations are given limited procedural effect. See Mardel v. Bradley, 432 U.S. 173 (1977). A summary affirmance represents an approval of the judgment below, but should not be taken as an endorsement of the reasoning of the lower court. Fusari v. Steinberg, 419 U.S. 379 (1975). Thus, arguing that Powell accepted Judge Bork's reasoning based on the Supreme Court's summary affirmance of a per curiam decision seems at least twice removed from reality.

3. Chaney v. Heckler, 724 F.2d 1030, rev'd, 470 U.S. 831 (1985). This is an administrative law case, discussing the scope of a court's review under the APA. The case involved an attempt by death row inmates to require the FDA to investigate and approve drugs used for lethal injections. The D.C. panel, of which Judge Bork was not a member, held that the FDA action was reviewable, and that FDA's refusal to take action was an abuse of discretion. The D.C. Court of Appeals, en banc, denied a motion for rehearing, with Scalia dissenting from the denial. Bork, Wilkey and Starr all joined Scalia's dissent (Scalia also dissented from the original panel decision).

The Supreme Court unanimously reversed the D.C. Panel. Rehnquist wrote the majority opinion; Brennan wrote a concurring opinion and Marshall concurred in the judgment. It is likely that Judge Bork would have agreed with the decision which limits judicial review over an agency. It is difficult to determine Powell's exact reasoning, other than to note that he did join Rehnquist's opinion.

4. CCNV v. Watt, 703 F.2d 586, rev'd, 468 U.S. 288 (1984). This case involved protestors sleeping in Lafayette Park. Judge Bork joined dissents by Scalia and Wilkey. Scalia's dissent was also joined by MacKinnon; Wilkey's was also joined by Tamm, MacKinnon and Scalia. Scalia's dissent flatly denied that sleeping can ever be worthy of first amendment protection, and sought to end all protection for symbolic speech.

The Supreme Court reversed. Powell did not write an opinion or concurrence but simply joined a seven-person majority in an opinion written by White. Brennan and Marshall dissented.

5. Catrett v. Johns-Manville Corp., 756 F.2d 181, rev'd, 106 S.Ct. 2548 (1986). This case involved a widow bringing a wrongful death action for her husband resulting from exposure to asbestos. The district court granted defendant's summary judgment motion, based solely on the plaintiff's failure to produce credible evidence to support her claim. Defendant offered no affidavits, declarations or evidence in its own behalf.

The Court of Appeals reversed the district court, holding that defendant's failure to offer any evidence in its behalf rendered its motion fatally defective. Judge Bork dissented, arguing that the district court had the discretion to accept the summary judgment motion, and that such motion may be accepted if no triable facts exist, regardless of any evidence offered. Judge Bork also argued that only admissible evidence may be used to defend against a summary judgment motion.

The Supreme Court, per Rehnquist, reversed the Court of Appeals. The Court held that the moving party in a summary judgment motion need not enter affirmative evidence on its own behalf. It also held that the "nonmoving party need not produce evidence in a form that would be admissible at trial in order to avoid summary judgment," thus disagreeing with part of Judge Bork's dissent. Rehnquist's opinion was joined by White, Marshall, Powell and O'Connor; Brennan's dissent was joined by Burger and Blackmun; Stevens also dissented. Thus Powell again joined in the opinion without writing anything, so it is not clear the extent to which he agrees with Judge Bork. Rehnquist's opinion is in partial agreement, and partial disagreement, with Judge Bork's dissent.

6. Paralyzed Vets of America v. CAB, 752 F.2d 694, rev'd 106 S.Ct. 2705 (1986). Organizations representing disabled citizens challenged the final regulations of the CAB with respect to commercial airlines. The organizations sought to have the anti-discrimination statutes applicable to all commercial airlines because of federal financial assistance to airports. The Court of Appeals upheld the challenge, holding that all airlines are required to meet the standards of section 504 of the Rehabilitation Act. Judge Bork dissented from a denial of rehearing en banc, by arguing that the court's opinion conflicted with Grove City College v. Bell.

The Supreme Court, per Powell, reversed the court of appeals, relying largely on Grove City. In this case, the views of Powell and Judge Bork seem similar. Marshall, Brennan and Blackmun dissented from the Court's holding.

7. Hohri v. United States, 793 F.2d 304, vacated, 55 U.S.L.W. 4716 (1987). This case involved an action by a Japanese-American organization and individuals seeking damages and declaratory relief for the World War II internment of Japanese-Americans. The district court concluded that all the claims were barred by either sovereign immunity or the statute of limitations. Respondents appealed to the Court of Appeals, which ruled that it had jurisdiction over a case involving both the Little Tucker Act and the Federal Tort Claims Act (FTCA), though claims involving the Little Tucker Act are within the exclusive jurisdiction of the Court of Appeals of the Federal Circuit. On the merits, the court held that the statute of limitations did not begin to run until 1980: Judge Bork was not on the panel that decided the case.

Judge Bork dissented from the denial of rehearing, on both the jurisdictional grounds and the substantive issue. Powell, writing for a unanimous Supreme Court, reversed only on the jurisdictional issue, not reviewing the substantive claims. Thus, Powell agreed with part of Judge Bork's analysis, and did not reach the issue substantively discussed in his opinion. The substantive portion of Judge Bork's dissent is approximately 75%

of the dissent, while only 25% is spent on the procedural questions.

8. Sims v. CIA, 709 F.2d 95 (D.C. Cir. 1983), aff'd in part, rev'd in part, 471 U.S. 159 (1985). Freedom of Information Act suit was brought seeking disclosure by the CIA of names of individuals and institutions who conducted secret research for the agency. The urt of Appeals required that a court must focus on the CIA's practical necessity of secrecy in determining whether the information should be released and that under FOIA information may be kept confidential only when the CIA proves that confidentiality was necessary to obtain the information. Judge Bork, in contrast, argued that an agency promise of secrecy automatically qualifies the agent as an intelligence source, and thus outside the boundary of the FOIA. He argued that the CIA's need to promise secrecy in return for information outweighed any rights of disclosure under FOIA.

The Supreme Court, in a unanimous opinion by Burger, affirmed in part and reversed in part. Marshall filed an opinion concurring in the result which Brennan joined. Burger's opinion held that no proof for the need of secrecy was necessary, and the FOIA did not apply if the intelligence sources were engaged in helping the CIA perform its statutory function. The Court seemed comfortable with the reasoning in Judge Bork's opinion, and generally granted the CIA broad discretion to withhold information under FOIA. The Court held that judges after the fact could not decide the issue of whether a grant of confidentiality was appropriate.

Powell only joined the majority opinion. Thus, it is againimpossible to determine the extent to which he agrees with Judge Bork's language.

9. Vinson v. Taylor, 760 F.2d 1330, aff'd and remanded, 106 S.Ct. 2399 (1986). The issue in this case is whether sexual harassment states a cause of action under Title VII. The D.C. Panel said yes, and further held that the fact that the parties later had a sexual relationship or that the plaintiff wore provocative clothing are not relevant factual matters. In a dissent from a denial of rehearing, Judge Bork argued that evidence of provocative clothing and the voluntary nature of a later sexual relationship should be admissible. Judge Bork also argued that employers should not be vicariously liable for a supervisor's sexual harassment when the employer was unaware of the situation.

The Supreme Court unanimously upheld the court of appeals. Again Powell did not write, but merely joined the majority opinion written by Rehnquist. The Rehnquist opinion clearly contradicts almost the entire Bork dissent; the only issue which Bork and Rehnquist agree upon is that evidence of the employee's sexually provocative actions may be admissible. However, even on this

issue, Rehnquist takes a far more limited view of admissibility than Judge Bork.

In short, if Powell's views are to be understood from Rehnquist's opinion, then Powell and Judge Bork seem to be quite far apart on this issue. Judge Bork voted for rehearing to reverse the court of appeals. Powell voted to affirm the decision. The White House position paper is flatly incorrect in stating that Judge Bork and Justice Powell agreed in this case.

APPENDIX B

LIST OF LANDMARK SUPREME COURT CASES REJECTED BY JUDGE BORK

CIVIL RIGHTS

(1) Shelley v. Kraemer, 334 U.S. 1 (1948) (Court held that the Fourteenth Amendment forbids state court enforcement of a private, racially restrictive covenant). Judge Bork "doubted" that it was possible to find a "neutral principle" which would "support" Shelley. ("Neutral Principles and Some First Amendment Problems," 47 Indiana Law Journal 1 (1971)).

(2) Reitman v. Mulkie, 387 U.S. 369 (1967) (Court invalidated a state referendum that prohibited open housing statutes, holding that the referendum "was intended to authorize, and did authorize, racial discrimination in the housing market. The right to discriminate is now one of the basic policies of the state.") Judge Bork has written that the "startling conclusion [in Reitman] can be neither fairly drawn from the Fourteenth Amendment nor stated in a principle capable of being uniformly applied." ("The Supreme Court Needs a New Philosophy," Fortune, Dec. 1968, at 166.)

(3-4) Baker v. Carr, 369 U.S. 186 (1962); Reynolds v. Sims, 377 U.S. 533 (1964) (state legislative reapportionment cases in which the Court adopted the principle of one-person, one vote). Judge Bork has stated that "on no reputable theory of constitutional adjudication was there an excuse for the doctrine it imposed...." ("The Supreme Court Needs a New Philosophy"). In 1971, Judge Bork reiterated his opposition. ("Neutral Principles"). In 1973, he testified that "I do not think there is a theoretical basis for [the principle of] one-man, one-vote." (Hearings on Nomination of Robert Bork to be Solicitor General (1973)).

(5-6) Katzenbach v. Morgan, 348 U.S. 641 (1966); Oregon v. Mitchell, 400 U.S. 112 (1970) (In Katzenbach, the Court upheld the provisions of the 1965 Voting Rights Act that banned the use of literacy tests in certain circumstances. In Mitchell, the Court upheld a national ban on literacy tests.) In 1972, Judge Bork wrote that the decision in Katzenbach was improper. (American Enterprise Institute for Public Policy Research, "Constitutionality of the President's Busing Proposals," May 1972). In 1981, he stated that the two cases were "very bad, indeed pernicious, constitutional law." (Hearings on the Human Life Bill Before the Subcommittee on Separation of Powers of the Senate Judiciary Committee, 97th Cong., 1st Sess. (1982).)

(7) Harper v. Virginia Board of Elections, 383 U.S. 663 (1966) (the Court outlawed the use of a state poll tax). In

1973, Judge Bork said that "as an equal protection case, [it] seemed to me wrongly decided." He went on to note that "[a]s I recall, it was a very small poll tax, it was not discriminatory and I doubt that it had much impact on the welfare of the Nation one way or the other." (Hearings on Nomination of Robert Bork to be Solicitor General). Judge Bork reiterated his opposition in 1985, giving Harper as an example of a case where the Court "made no attempt to justify [its decision] in terms of the historic constitution or in terms of any other preferred basis for constitutional decisionmaking." ("Foreword" in G. McDowell, The Constitution and Contemporary Constitutional Theory, 1985.)

(8) Bakke v. Board of Regents, 438 U.S. 265 (1978) (Court, with Justice Powell casting the crucial vote, held that universities may not use raw racial quotas but may consider race, among other factors, in making admissions decisions). Judge Bork has written that Justice Powell's majority opinion was "[j]ustified neither by the theory that the amendment is pro-black nor that it is colorblind," and concluded that "it must be seen as an uneasy compromise resting upon no constitutional footing of its own." (Wall Street Journal, "The Unpersuasive Bakke Decision," July 21, 1978).

PRIVACY

(9) Griswold v. Connecticut, 381 U.S. 479 (1965) (Court struck down a state law making it a crime to advise married couples about birth control.) Judge Bork has described it as an "unprincipled decision" ("Neutral Principles"), has stated that there is no "supportable method of constitutional reasoning underlying" it ("Judge Robert Bork is a Friend of the Constitution," 11 Conservative Digest 91 (1985)), and Judge Bork has stated that replacing Justice Douglas's approach in Griswold with "a concept of original intent" was "essential to prevent courts from invading the proper domain of democratic government." ("The Constitution, Original Intent, and Economic Rights", 23 San Diego Law Review 823 (1986)).

(10) Skinner v. Oklahoma, 316 U.S. 535 (1942) (Court struck down a law that authorized the involuntary sterilization of criminals). Judge Bork has said that Skinner was "as improper and intellectually empty as Griswold...." ("Neutral Principles".)

(11) Roe v. Wade, 410 U.S. 113 (1973) (recognizing a constitutional right to abortion). Judge Bork has testified that Roe "is, itself, an unconstitutional decision, a serious and wholly unjustifiable judicial usurpation of state legislative authority." (Hearings on the Human Life Bill).

RELIGIOUS AND ETHNIC MINORITIES IN PUBLIC EDUCATION

(12) *Meyer v. Nebraska*, 262 U.S. 390 (1923) (Court held that there was a right to teach or study a modern foreign language in school). Judge Bork described it as "wrongly decided." ("Neutral Principles.")

(13) *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (Court held that there was a right to operate or attend private schools). Also described as "wrongly decided," at most Judge Bork conceded that "perhaps Pierce's result could be reached on acceptable grounds, but there is no justification for the Court's methods." ("Neutral Principles.")

(14) *Engle v. Vitale*, 370 U.S. 421 (1962) (Court held that public school officials may not require students to recite a state-sanctioned prayer at the beginning of each day). Norman Redlich, Dean of the New York University School of Law, reported that Judge Bork criticized this decision as "noninterpretivist" in a 1982 speech at New York University Law School.

(15) *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (Court established a three-part test for evaluating challenges that a given law establishes a state religion. First, the statute must have a secular legislative purpose. Second, its principal or primary effect must be one that neither advances nor inhibits religion. Third, it must not foster an excessive governmental entanglement with religion.) Judge Bork has attacked each part of this test, arguing that it is "inconsistent" with the intended meaning of the Establishment Clause and that it is impossible to satisfy. ("Religion and the Law," Speech at the University of Chicago, November 13, 1984.)

(16) *Aguilar v. Felton*, 473 U.S. 402 (1985) (Court invalidated New York City's use of federal funds to pay public school employees teaching in parochial schools). Judge Bork has argued that Aguilar "illustrates the power of the three-part test to outlaw a program that had not resulted in any advancement of religion but seems entirely worthy." (Untitled Speech, Brookings Institution, September 12, 1985).

FREEDOM OF SPEECH

(17) *The Pentagon Papers*, 403 U.S. 713 (1971) (the Court dissolved an injunction against the Washington Post and New York Times and permitted them to publish the Pentagon Papers despite the government's claims of national security, finding that news delayed was news destroyed). Judge Bork placed this case in a list of cases of which he remarked that "[i]n some of these cases, it is possible to believe, the press won more than perhaps it ought to have." He went on to

state that "[s]urely, however, Pentagon Papers need not have been stamped through to decision without either Court or counsel having time to learn what was at stake." He concluded his remarks about the Pentagon Papers case by stating that "[t]hese cases are instances of extreme deference to the press that is by no means essential or even important to its role." ("The Individual, the State, and the First Amendment," Speech delivered at the University of Michigan in 1979.)

(18) Landmark Communication v. Virginia, 435 U.S. 829 (1978) (the Court blocked the criminal prosecution of a newsman who published the name of a judge who was being secretly investigated by the state judicial review commission). Judge Bork remarked that "one may doubt that press freedom requires permission...to publish the details of an investigation which the State may lawfully keep secret." He also described it as an instance "of extreme deference to the press that is by no means essential or even important to its role." (1979 Michigan Speech.)

(20) Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) (the Court struck down a statute that prohibited publication of a rape victim's name). Judge Bork commented that "one may doubt that press freedom requires permission to publish a rape victim's name," and also remarked that the case was an instance of "extreme deference to the press that is by no means essential or even important to its role." (1979 Michigan Speech.)

(20) Buckley v. Valeo, 424 U.S. 1 (1976) (the Court sustained the Federal Election Campaign Act's limitations on contributions to a candidate for office, but struck down its limits on a candidate's personal expenditures). Judge Bork stated that "[i]t is arguable that [Buckley was] the most important First Amendment case in our history...and it was there that the Amendment went soft at its center." (1979 Michigan Speech.)

(21-24) Cohen v. California, 403 U.S. 15 (1971); Rosenfield v. New Jersey, 408 U.S. 901 (1972); Lewis v. New Orleans, 408 U.S. 901 (1972); Brown v. Oklahoma, 408 U.S. 901 (1972) (In Cohen, the Court struck down a criminal conviction of an individual who wore a T-shirt with the slogan "Fuck the Draft." The Court held that suppressing words risks suppressing ideas, and wrote that "one man's vulgarity is another's lyric....The Constitution leaves matters of taste and style so largely to the individual." In the other three cases, the Court summarily vacated similar "offensive language" convictions.) Judge Bork has written that "[t]hese cases might better have been decided the other way on the ground of public offensiveness alone....If the First Amendment relates to the health of our political processes, then, far from protecting such speech, it offers additional

reason for its suppression." (1979 Michigan Speech.) In 1985, Bork reiterated his attack on Cohen as "moral relativism." ("Tradition and Morality in Constitutional Law," The Francis Boyer Lectures on Public Policy, 1985.)

Note: Bork has also criticized Justice Holmes's dissents (joined by Justice Brandeis) in Abrams v. United States, 250 U.S. 616 (1919) and Gitlow v. New York, 268 U.S. 652 (1925) where Holmes created the test that the government may only forbid speech when it presents a "clear and present danger". While these opinions were dissents, they have been historically adopted as superior. Judge Bork himself notes that "these dissents gave direction to, and may be said to have shaped, the modern law of the First Amendment." But Judge Bork has also said that "[t]he 'clear and present danger' requirement [is improper] because it erects a barrier to legislative rule where none should exist. The speech concerned has no political value within a republican system of government." ("Neutral Principles".) Later, he added that "in fact the superiority of the famous dissents by Justice Holmes and Brandeis is almost entirely rhetorical...." (1979 Michigan Speech.)

(25-26) Brandenburg v. Ohio, 395 U.S. 444 (1969); Hess v. Indiana, 414 U.S. 105 (1973). In Brandenburg, the Court struck down a conviction of a KKK leader who advocated violence, holding that such speech can only be restricted when it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." In Hess, the Court overturned a conviction of a demonstrator being removed from a campus street who told police that "We'll take the fucking street later (or again)," holding that it was "mere advocacy of illegal action at some indefinite future." Judge Bork has called these two cases "fundamentally wrong interpretations of the First Amendment." (1979 Michigan Speech.)

(27-28) Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976); Bates v. State Bar of Arizona, 433 U.S. 350 (1977). In Virginia Board, the Court struck down a statute prohibiting advertising the prices of prescription drugs. In Bates, the Court struck down a rule against lawyer advertisements. Judge Bork remarked that he was tempted to call these an "eccentric discovery," and said that he was tempted to see them as a reflection of a trend "in which the Constitution becomes diffuse and trivialized at the hands of an activist judiciary," but "that is not the sole force at work...the First Amendment seems to have gone soft at its center [as well]." ("The Individual, the State, and the First Amendment".)

ANTITRUST

(29) **Brown Shoe v. United States**, 370 U.S. 294 (1962) (Court outlined the factors to be used in assessing the effects of a merger and documented a congressional intent under the antitrust laws to protect small businesses). Judge Bork has said that "Brown Shoe was a disaster for rational, consumer-oriented merger policy." (The Antitrust Paradox).

(30) **Federal Trade Commission v. Procter & Gamble Co.**, 368 U.S. 568 (1967) (Court articulated its theory prohibiting some conglomerate mergers). Judge Bork has said that this case "makes sense only when antitrust is viewed as pro-small business -- and even then it does not make much sense." (The Antitrust Paradox).

(31) **Standard Oil Co. v. United States**, 337 U.S. 293 (1949) (Court defined the limits of exclusive dealing arrangements). Judge Bork has said this case rested "not upon economic analysis, not upon any factual demonstration, but entirely and astoundingly, upon the asserted inability of courts to deal with economic issues." (The Antitrust Paradox).

(32) **Dr. Miles Medical Co. v. John D. Park & Sons Co.**, 220 U.S. 373 (1911) (Court created a per se rule forbidding Resale Price Maintenance). Bork has described this as a "decisive misstep that has controlled a whole body of law." (The Antitrust Paradox).