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The following folder of material

was received in O R M from the

office of Howard Baker:

Judge Berk Nomination

THE WHITE HOUSE  
WASHINGTON

September 17, 1987

MEMORANDUM FOR SENATOR BAKER

FROM:

JOHN C. TUCK *JCT*

SUBJECT:

SUMMARY OF SENATOR BAKER'S COMMUNICATIONS  
ACTIVITIES AND MEETINGS ON BEHALF OF JUDGE BORK

The following summarizes Senator Baker's communications activities and meetings on behalf of Judge Bork:

Communication activities

1. **Speeches**

Address to the NAACP in New York	- July 9, 1987
Address Minority Business Groups Briefing	- July 15, 1987
Address to Political Appointees	- July 21, 1987
Address to Political Appointees	- July 23, 1987
Address at Public Liaison Briefing	- July 29, 1987
Address to Junior Statesmen	- August 4, 1987
Address to California Republican Party Dinner in LOS Angeles	- August 24, 1987
Address to Citizens for the Republic Luncheon in Los Angeles	- August 25, 1987
Address to American Farm Bureau Board of Directors in Chicago	- September 1, 1987

09/17/87 10:00 a.m.

## 2. Television

McNeill/Lehrer Interview - August 5, 1987

Interviews with CBS & ABC - August 6, 1987

Interviews with NBC & CNN - August 7, 1987

Interview with Citizens Network - August 10, 1987

Interview with Today Show - August 13, 1987

Interview with CNN - August 13, 1987

Interview with Face the Nation - August 16, 1987

Interview with CBS - August 26, 1987

CONUS - September 11, 1987

WOMT (Omaha, Nebraska)

WBBM (Chicago, Illinois)

KPRC (Houston, Texas)

KOB (Albuquerque, New Mexico)

KWTV (Oklahoma City, Oklahoma)

WBTW (Charlotte, North Carolina)

Interview with Meet the Press - September 13, 1987

One-on-One - September 14, 1987

KATV (Little Rock, Arkansas)

KCBS (Los Angeles, California)

WCBS (New York, New York)

WBRC (Birmingham, Alabama)

WXIA (Atlanta, Georgia)

WMC (Memphis, Tennessee)

Interview with CNN - September 14, 1987

## 3. Reporters/Written Press

U.S. News and World Report - July 16, 1987

Time Magazine, Wall Street Journal, The Washington Times - July 30, 1987

Time and Newsweek Interviews - August 12, 1987

Hugh Sidey Interview - August 12, 1987

## 4. Telephone Calls

Senator John Stennis	- July 21, 1987
Senator Lawton Chiles	- July 22, 1987
Senator Bob Graham	- July 21, 1987
Senator Alan Dixon	- July 21, 1987
Senator Bennett Johnston	- July 21, 1987
Senator Sam Nunn	- July 21, 1987
Senator Wyche Fowler	- July 22, 1987
Senator Terry Sanford	- July 21, 1987
Senator Richard Shelby	- July 22, 1987
Roger Smith, Chairman, GM	- August 6, 1987
Senator Bob Packwood	- August 13, 1987
Nicholas Katzenbach	- September 14, 1987

Meetings

Senior Staff Meeting	- July 6, 1987
Meeting with Senators Thurmond, Dole, Specter and Grassley	- July 8, 1987
Meeting with Senator Robert Byrd and Judge Bork	- July 9, 1987
New York Times Editorial Board Session in New York	- July 9, 1987
Meeting with Jewish Leaders	- July 15, 1987
Senior Staff Meeting	- July 16, 1987
Meeting with Senator Weicker and Judge Bork	- July 28, 1987
U.S. Chamber of Commerce Working Luncheon	- July 29, 1987
Senior Staff Meeting	- August 3, 1987
Bork Mock Hearing	- August 6, 1987
Senior Staff Meeting	- August 9, 1987
Senior Staff Meeting	- August 11, 1987
Jewish Leaders Meeting	- August 12, 1987
Fall Agenda Strategy Meeting	- August 20, 1987
LA Times Editorial Board Breakfast	- August 25, 1987

09/L7/87 10:00 a.m.

LA Times Editorial Board Session	- August 25, 1987
Pre-Brief and Judge Bork Meeting in California	- August 28, 1987
Senior Staff Meeting	- August 28, 1987
Washington Times Editorial Board	- September 8, 1987
Senior Staff Meeting	- September 9, 1987
Senior Staff Meeting	- September 11, 1987
Bork Mock Hearing	- September 11, 1987
Will Ball Meeting	- September 11, 1987
USA Today Editorial Board	- September 14, 1987
Senior Staff Meeting	- September 16, 1987

cc: K. Duberstein  
T. Griscom

09/17/87 10:00 a.m.

THE WHITE HOUSE  
WASHINGTON

September 16, 1987

MEMORANDUM FOR TOM GRISCOM

FROM: ELIZABETH BOARD *EB*  
SUBJECT: Regional Media Activities #4

*Bork  
file  
HHB  
activities*

This is update #4 on the media activities arranged by the Office of Media Relations to carry out the Bork nomination communications plan. There are no repeats from the earlier memos. (The Conus interviews with Senator Baker in last week's memo were replaced by those listed below.)

The following interviews are definitely booked in our target areas:

RADIO

- \* ABC Radio Network, Abraham Sofaer on the "Michael Jackson Show" carried by 88 stations nationwide, 9/16
- \* ABC Radio Network, Elliott Richardson live on the "Owen Spann Show," carried by 100 stations nationwide, 9/18
- \* ABC Radio Network, Frank Donatelli live on the "Ray Briem Show," carried by 71 stations nationwide, 9/16
- \* Los Angeles/syndicated, Carl Anderson on a 30-minute talk show carried by 35 stations nationwide, 9/8
- \* WKIS-AM, Orlando, Frank Lavin live interview 9/14
- \* WJNO-AM, West Palm Beach, Abraham Sofaer live interview 9/15
- \* WKMX-AM, Enterprise, AL, Terry Eastland on talk show 9/20
- \* The Conus Howard Baker interview was distributed by AP Radio to 1000 member stations

TELEVISION

- \* KPRC-TV, Houston, Howard Baker interviewed by local anchor through Conus, 9/11
- \* WBBM-TV, Chicago, Howard Baker by local anchor through Conus 9/11
- \* KOB-TV, Albuquerque, Howard Baker by local anchor through Conus 9/11
- \* KWTW, Oklahoma City, Howard Baker by local anchor through Conus 9/11
- \* WOWT-TV, Omaha, Howard Baker interviewed by Conus 9/11
- \* WBTW, Charlotte, Howard Baker by Conus 9/11

--continued--

- \* WAGA-TV, Atlanta, Frank Donatelli interviewed by Storer Washington bureau 9/11
- \* WITI-TV, Milwaukee, Donatelli by Storer 9/11
- \* WXIA-TV, Atlanta, Howard Baker interview with local anchor through One-on-One 9/14
- \* KATV-TV, Little Rock, Howard Baker with local anchor through One-on-One 9/14
- \* WBRC-TV, Birmingham, Howard Baker with local anchor through One-on-One 9/14
- \* WUSA-TV, Washington (Maryland target), A. B. Culvahouse interview 9/14
- \* WCPX-TV, Orlando, Donatelli interview on 9/14
- \* The Conus Howard Baker interview was distributed to 90 other television stations in the Conus Network

Non-target interviews:

RADIO

- \* KMOX, St. Louis, Frank Lavin live interview 9/14
- \* WOR Radio, New York, Frank Donatelli live interview 9/15

TELEVISION

- \* KCST-TV, San Diego, Frank Donatelli interviewed by Storer 9/11
- \* WSBK-TV, Boston, Donatelli by Storer 9/11
- \* WJBK-TV, Detroit, Donatelli by Storer 9/11
- \* WJKW-TV, Cleveland, Donatelli by Storer 9/11
- \* WTVG-TV, Toledo, Donatelli by Storer 9/11

EDITORIALS

<u>Arizona Republic</u> (Phoenix, circ. 330,000)	signed by: Howard Baker
<u>Arizona Republic</u>	Gary Born University of Arizona law professor
<u>Arizona Daily Star</u> (Tucson, circ. 80,000)	Gary Born
<u>Dallas Morning News</u> (circ. 378,000)	Gary Born
<u>Augusta Chronicle &amp; Herald</u> (circ. 90,000)	Ken Cribb

Mailing an editorial written in Spanish by Rudy Beserra to 1000 Hispanic newspapers and TV and radio stations.

Many other surrogates asked to write editorials and submit them on their own. It is difficult to track these because we do not get all the target newspapers.

LETTERS TO THE EDITOR

Chicago Tribune  
(circ. 760,000)

Jack C. Terrazas, Jr.  
Hispanic USA magazine

MAILINGS

All of the mailings outlined in the Communications Plan were carried out.

Additional mailings:

- \* Remarks by the President to the National Law Enforcement Council (including remarks on Bork) to Business, Crime/Law Enforcement, Aging, (250) 7/29
- \* President's speech to the nation, 8/14, to Hispanic print, and the Captive Nations list (400)
- \* Photo of the President with law enforcement leaders, 9/11, with his remarks at the meeting, a fact sheet on Judge Bork and criminal law and a transcript of the press conference to Law Enforcement Press (100)
- \* List of organizations endorsing the nomination and the WH Issue Brief to Dailies, Columnists, Jewish, Asian Americans, Catholics, Business, Broadcast Media, Aging and Crime/Law Enforcement (3000), 9/16
- \* Editorial in Spanish to the Hispanic media (1000) 9/16

ADDITIONAL PROJECTS

Bork Cuts:

A new selection of cuts were recorded for the White House Actualities Line 800 number. The number of calls have increased (1000 recorded in one 26-hour period) but no total is available for the week. The Bork cuts are available on the line whenever there is no current actuality from one of the President's speeches.

###

## Judge Robert H. Bork and the Criminal Law

Since his appointment as a Judge of the U.S. Court of Appeals for the D.C. Circuit in 1982, Judge Bork has built a strong record on criminal justice issues. While he has opposed expansive interpretations of procedural rights that would enable apparently culpable individuals to evade justice, he has not hesitated to overturn convictions when constitutional or evidentiary considerations compelled such a result. Several of his decisions are noteworthy for stressing adherence to statutory requirements.

- o In Monk v. Secretary of the Navy (1986), Judge Bork's opinion held that there is no general right to collaterally attack a court martial conviction, and that a habeas corpus action may only be brought in the district where a prisoner is held. Thus, a court-martialed Marine imprisoned in Kansas could not file a habeas petition in Washington against the Navy Secretary.
- o In Demjanjuk v. Meese (1986), a Bork opinion rejected Nazi war criminal Demjanjuk's habeas corpus bid to avoid deportation. The opinion stressed the absence of legislation implementing the Genocide Convention, which Demjanjuk had invoked on his behalf.
- o In United States v. Mount (1985), Judge Bork concurred in a panel decision affirming defendant's conviction of making a false statement in a passport application. Bork's separate concurrence emphasized that the court had no power to exclude evidence obtained from an illegal foreign search, but, even assuming that it did, it would be inappropriate to apply a "shock the conscience" test to determine what evidence should be excluded.
- o In United States v. James (1985), Judge Bork's opinion upholding a conviction for narcotics possession ruled that the "knock and announce" statute allows the police to enter and prevent evidentiary destruction, when the accused were well aware of the purpose underlying a police visit.
- o In United States v. Singleton (1985), the district court suppressed evidence in defendant's retrial for robbery, even though that evidence had been deemed reliable in a previous court of appeals review of the first trial (in the first trial, the judge had entered a verdict of acquittal, notwithstanding the jury's guilty verdict). Applying "the law of the case," Judge Bork ruled that the lower court at retrial had erred in

suppressing the evidence, by failing to adhere to the earlier appeals court holding.

- o In United States v. Garrett (1983), Judge Bork held that the Speedy Trial Act was tolled for the time it took to revoke defendant's bond (because of his violation of its terms), in affirming defendant's conviction as an "aider-and-abettor" to a criminal conspiracy.
- o In United States v. Lewis (1983), Judge Bork's opinion affirmed defendant's conviction for possession of an unregistered firearm. Defendant had challenged his conviction on the grounds that (1) the government's case was insufficient when it closed; and (2) his outstanding arrest warrant for a previous assault was improperly admitted. Applying D.C. Circuit case law, Judge Bork held that the government had presented sufficient evidence, and that the arrest warrant was properly admitted to rebut an inference from the defendant's own testimony.
- o In United States v. Harley (1982), Judge Bork affirmed defendant's conviction for possession of a controlled substance. Judge Bork's opinion held that the government properly had invoked the qualified privilege not to reveal a surveillance location at a criminal trial (thus, the trial court properly barred cross-examination that would have revealed such a location). Also, Judge Bork ruled that the government's failure to introduce any evidence before the grand jury that the substance defendant allegedly sold police was heroin did not render evidence insufficient to support the grand jury's probable cause finding that defendant distributed heroin.

On the other hand, Judge Bork has ruled in favor of defendants when the law requires it.

- o In United States v. Brown (1987), Judge Bork joined in a panel decision overturning the convictions of members of the "Black Hebrews" sect, on the ground that the trial court erred in dismissing a certain juror (and thereby violated defendant's constitutional right to a unanimous jury). Judge Bork's decision to void nearly 400 separate verdicts in what is believed to be the longest and most expensive trial ever held in a D.C. district court highlights his devotion to vindicating the constitutional rights of all citizens.
- o In United States v. Foster (1986), Judge Bork participated on a panel that reversed defendant's conviction for illegal firearms possession, citing insufficient evidence.

- o In United States v. Vortis (1986), Judge Bork participated in a per curium decision requiring the government to make statutory findings in order to justify a pre-trial detention order.

During his tenure as Solicitor General of the United States, (1973-1977), Judge Bork argued many cases involving substantive and procedural criminal law before the Supreme Court.

- In the landmark Supreme Court case of Gregg v. Georgia (1976), Judge Bork, acting as amicus curiae, argued that the death penalty was constitutional, not a violation of the Eighth Amendment's prohibition of cruel and unusual punishments. The Supreme Court agreed, in a decision supported by Justice Lewis Powell.
- While serving as Solicitor General, Judge Bork argued for a broad view of consent as a valid basis for a police search, i.e., that a search is valid where consented to by an individual who reasonably appeared to have authority over the area and hence authority to give consent; and that the Exclusionary Rule should not apply where police officers reasonably believed that they had consent. U.S. v. Matlock (1974).
- In U.S. v. Edwards (1974) Judge Bork argued that the Fourth Amendment did not necessitate a warrant to search an individual who is already lawfully in custody.
- As Solicitor General, Judge Bork successfully argued that the Fourth Amendment's warrant requirement does not require police officers to obtain a warrant to make an arrest in a public place, so long as they have probable cause to believe that the suspect has committed, or is committing, an offense. United States v. Watson (1976). The Court also agreed that where the defendant's actions in public gave officers probable cause, her retreating indoors did not render an immediate arrest impermissible under the Fourth Amendment. United States v. Santana (1976).
- In Wolff v. McDonnell (1974), Judge Bork successfully argued on behalf of the United States, as amicus curiae, that the procedures required in probation and parole hearings need not be applied in ordinary prison disciplinary proceedings, and that prison officials should be permitted to inspect incoming mail from attorneys to prisoners under limited conditions, and for the limited purpose of determining whether or not such parcels contained contraband.

- Also, Judge Bork argued that the transfer of inmates between prisons did not deprive prisoners of a liberty interest, and so did not give rise to a right to notice and a hearing before such a transfer could be effected. The Supreme Court agreed. Meachum v. Fano (1976).

August 28, 1987

PRESIDENT'S MEETING WITH LAW ENFORCEMENT LEADERS  
SUPPORTING THE NOMINATION OF JUDGE BORK

1. Governor Jim Thompson  
Former U.S. Attorney, Northern District of Illinois
2. Larry Thompson  
Former U.S. Attorney, Northern District of Georgia (Atlanta)  
Partner, King & Spaulding
3. Fred Foreman  
President-Elect, National District Attorneys Association  
(15,00 members)  
District Attorney (Waukegan, Illinois)
4. Det. Dewey R. Stokes (Columbus, OH)  
President, Fraternal Order of Police (200,000 members)
5. Col. Robert Landon (Montana)  
President, International Association of Chiefs of Police  
(25,000 members)
6. Don Omodt (Minnesota)  
Past-President, National Sheriffs' Association (25,000  
members)
7. Trooper Thomas J. Iskrzycki (New Jersey)  
Chairman, National Troopers Coalition (50,000 members)
8. John Bellizzi, Jr.  
Member, Board of Directors  
International Narcotics Enforcement Officers Association  
(10,000 members)
9. Robert Bonner (Los Angeles)  
U.S. Attorney, Central District of California
10. Donald Baldwin (Washington, DC)  
Executive Director, National Law Enforcement Council

## BORK NOMINATION

### GENERAL OVERVIEW

- Judge Robert Bork is one of the most qualified individuals ever nominated to the Supreme Court. He is a preeminent legal scholar; a practitioner who has argued and won numerous cases before the Supreme Court; and a judge who for five years has been writing opinions that faithfully apply law and precedent to the cases that come before him.
- As Lloyd Cutler, President Carter's Counsel, has recently said: "In my view, Judge Bork is neither an ideologue nor an extreme right-winger, either in his judicial philosophy or in his personal position on current social issues....The essence of [his] judicial philosophy is self-restraint." Mr. Cutler, one of the nation's most distinguished lawyers and a self-described "liberal democrat and...advocate of civil rights before the Supreme Court," compared Judge Bork to Justices Holmes, Brandeis, Frankfurter, Stewart, and Powell, as one of the few jurists who rigorously subordinate their personal views to neutral interpretation of the law.
- As a member of the Court of Appeals, Judge Bork has been solidly in the mainstream of American jurisprudence.
  - Not one of his more than 100 majority opinions has been reversed by the Supreme Court.
  - The Supreme Court has never reversed any of the over 400 majority opinions in which Judge Bork has joined.
  - In his five years on the bench, Judge Bork has heard hundreds of cases. In all of those cases he has written only 9 dissents and 7 partial dissents. When he took his seat on the bench, 7 of his 10 colleagues were Democratic appointees, as are 5 of the 10 now. He has been in the majority in 94 percent of the cases he has heard.
  - The Supreme Court adopted the reasoning of several of his dissents when it reversed opinions with which he had disagreed. Justice Powell, in particular,

has agreed with Judge Bork in 9 of 10 cases that went to the Supreme Court.

- Judge Bork has compiled a balanced record in all areas of the law, including the First Amendment, civil rights, labor law, and criminal law. In fact, his views on freedom of the press prompted scathing criticism from his more conservative colleague, Judge Scalia.
- Some have expressed the fear that Judge Bork will seek to "roll back" many existing judicial precedents. There is no basis for this view in Judge Bork's record. As a law professor, he often criticized the reasoning of Supreme Court opinions; that is what law professors do. But as a judge, he has faithfully applied the legal precedents of both the Supreme Court and his own Circuit Court. Consequently, he is almost always in the majority on the Court of Appeals and has never been reversed by the Supreme Court. Judge Bork understands that in the American legal system, which places a premium on the orderly development of the law, the mere fact that one may disagree with a prior decision does not mean that that decision ought to be overruled.
- Judge Bork is the leading proponent of "judicial restraint." He believes that judges should overturn the decisions of the democratically-elected branches of government only when there is warrant for doing so in the Constitution itself. He further believes that a judge has no authority to create new rights based upon the judge's personal philosophical views, but must instead rely solely on the principles set forth in the Constitution.
- Justice Stevens, in a speech before the Eighth Circuit Judicial Conference, stated his view that Judge Bork was "very well qualified" to be a Supreme Court Justice. Judge Bork, Justice Stevens explained, would be "a welcome addition to the Court."

#### QUALIFICATIONS

Any one of Judge Robert Bork's four positions in private practice, academia, the Executive Branch or the Judiciary would have been the high point of a brilliant career, but he has managed all of them. As The New York Times stated in 1981, "Mr. Bork is a legal scholar of distinction and principle."

- Professor at Yale Law School for 15 years; holder of two endowed chairs; graduate of the University of Chicago Law School, Phi Beta Kappa and managing editor of the Law Review.
- Among the nation's foremost authorities on antitrust and constitutional law. Author of dozens of scholarly works, including The Antitrust Paradox, a leading work on antitrust law.
- An experienced practitioner and partner at Kirkland & Ellis.
- Solicitor General of the United States, 1973-77, representing the United States before the Supreme Court in hundreds of cases.
- Unanimously confirmed by the Senate for the D.C. Circuit in 1982, after receiving the ABA's highest rating-- "exceptionally well qualified"--which is given to only a handful of judicial nominees each year.
- As an appellate judge, he has an outstanding record: not one of his more than 100 majority opinions has been reversed by the Supreme Court.
- The Supreme Court adopted the reasoning of several of his dissents when it reversed opinions with which he had disagreed. For example, in Sims v. CIA, Judge Bork criticized a panel opinion which had impermissibly, in his view, narrowed the circumstances under which the identity of confidential intelligence sources could be protected by the government. When the case was appealed, all nine members of the Supreme Court agreed that the panel's definition of "confidential source" was too narrow and voted to reverse.

#### GENERAL JUDICIAL PHILOSOPHY

Judge Bork has spent more than a quarter of a century refining a careful and cogent philosophy of law.

- His judicial philosophy begins with the simple proposition that judges must apply the Constitution, the statute, or controlling precedent--not their own moral, political, philosophical or economic preferences.
- He believes in neutral, text-based readings of the Constitution, statutes and cases. This has frequently led him to take positions at odds with those favored by

political conservatives. For example, he testified before the Senate Subcommittee on Separation of Powers that he believed the Human Life Bill to be unconstitutional; he has opposed conservative efforts to enact legislation depriving the Supreme Court of jurisdiction over issues like abortion and school prayer; and he has publicly criticized conservatives who wish the courts to take an active role in invalidating economic regulation of business and industry.

- He is not a political judge: He has repeatedly criticized politicized, result-oriented jurisprudence of either the right or the left.
- Judge Bork believes that there is a presumption favoring democratic decisionmaking, and he has demonstrated deference to liberal and conservative laws and agency decisions alike.
- He has repeatedly rebuked academics and commentators who have urged conservative manipulation of the judicial process as a response to liberal judicial activism.
- Judge Bork believes judges are duty-bound to protect vigorously those rights enshrined in the Constitution. He does not adhere to a rigid conception of "original intent" that would require courts to apply the Constitution only to those matters which the Framers specifically foresaw. To the contrary, he has written that it is the "task of the judge in this generation to discern how the framers' values, defined in the context of the world they knew, apply to the world we know." His opinions applying the First Amendment to modern broadcasting technology and to the changing nature of libel litigation testify to his adherence to this view of the role of the modern judge.
- He believes in abiding by precedent: he testified in 1982 regarding the role of precedent within the Supreme Court:

I think the value of precedent and of certainty and of continuity is so high that I think a judge ought not to overturn prior decisions unless he thinks it is absolutely clear that that prior decision was wrong and perhaps pernicious.

He also has said that even questionable prior precedent ought not be overturned when it has become part of the political fabric of the nation.

- As The New York Times said in a December 12, 1981, editorial endorsing his nomination to our most important appellate court in 1981:

Mr. Bork...is a legal scholar of distinction and principle....One may differ heatedly from him on specific issues like abortion, but those are differences of philosophy, not principle. Differences of philosophy are what the 1980 election was about; Robert Bork is, given President Reagan's philosophy, a natural choice for an important judicial vacancy.

#### FIRST AMENDMENT

- During his five years on the bench, Judge Bork has been one of the judiciary's most vigorous defenders of First Amendment values.
- He has taken issue with his colleagues, and reversed lower courts, in order to defend aggressively the rights of free speech and a free press. For example:
  - In Ollman v. Evans and Novak, Judge Bork greatly expanded the constitutional protections courts had been according journalists facing libel suits for political commentary. Judge Bork expressed his concern that a recent and dramatic upsurge in high-dollar libel suits threatened to chill and intimidate the American press, and held that those considerations required an expansive view of First Amendment protection against such suits.

Judge Bork justified his decision as completely consistent with "a judicial tradition of a continuing evolution of doctrine to serve the central purpose" of the First Amendment. This reference to "evolution of doctrine" provoked a sharp dissent from Judge Scalia, who criticized the weight Judge Bork gave to "changed social circumstances". Judge Bork's response was unyielding: "It is the task of the judge in this generation to discern how the framer's values, defined in the context of the world they knew, apply to the world we know."

Judge Bork's decision in this case was praised as "extraordinarily thoughtful" in a New York Times column authored by Anthony Lewis. Lewis further described the opinion as "too rich" to be adequately summarized in his column. Libel lawyer Bruce Sanford

said, "There hasn't been an opinion more favorable to the press in a decade."

- In McBride v. Merrell Dow and Pharmaceuticals Inc., Judge Bork stressed the responsibility of trial judges in libel proceedings to ensure that a lawsuit not become a "license to harass" and to take steps to "minimize, so far as practicable, the burden a possibly meritless claim is capable of imposing upon free and vigorous journalism." Judge Bork emphasized that even if a libel plaintiff is not ultimately successful, the burden of defending a libel suit may itself in many cases unconstitutionally constrain a free press. He wrote: "Libel suits, if not carefully handled, can threaten journalistic independence. Even if many actions fail, the risks and high costs of litigation may lead to undesirable forms of self-censorship. We do not mean to suggest by any means that writers and publications should be free to defame at will, but rather that suits--particularly those bordering on the frivolous--should be controlled so as to minimize their adverse impact upon press freedom."
- In Lebron v. Washington Metropolitan Area Transit Authority, Judge Bork reversed a lower court and held that an individual protestor had been unconstitutionally denied the right to display a poster mocking President Reagan in the Washington subway system. Judge Bork characterized the government's action in this case as a "prior restraint" bearing a "presumption of unconstitutionality." Its decision to deny space to the protestor, Judge Bork said, was "an attempt at censorship," and he therefore struck it down.

- Judge Bork's record indicates he would be a powerful ally of First Amendment values on the Supreme Court. His conservative reputation and formidable powers of persuasion provide strong support to the American tradition of a free press. Indeed, precisely because of that reputation, his championing of First Amendment values carries special credibility with those who might not otherwise be sympathetic to vigorous defenses of the First Amendment.
- In 1971 Judge Bork wrote an article suggesting that the First Amendment is principally concerned with protecting political speech. It has been suggested that this might mean that Bork would seek to protect only political speech. But Judge Bork has repeatedly made his position on this issue crystal clear: in a letter published in the ABA Journal in 1984, for

example, he said that "I do not think...that First Amendment protection should apply only to speech that is explicitly political. Even in 1971, I stated that my views were tentative....As the result of the responses of scholars to my article, 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." He also testified before Congress to this effect in 1982. He has made unmistakably clear his view that the First Amendment itself, as well as Supreme Court precedent, requires vigorous protection of non-political speech.

- On the appellate court, Judge Bork has repeatedly issued broad opinions extending First Amendment protection to non-political speech, such as commercial speech (FTC v. Brown and Williamson Tobacco Corp.), scientific speech (McBride v. Merrell Dow and Pharmaceuticals, Inc.) and cable television programming involving many forms of speech (Quincy Cable Television v. FCC).

#### CIVIL RIGHTS

- As Solicitor General, Judge Bork was responsible for the government arguing on behalf of civil rights in some of the most far-reaching civil rights cases in the Nation's history, sometimes arguing for more expansive interpretations of the law than those ultimately accepted by the Court.
- Among Bork's most important arguments to advance the civil rights of minorities were:
  - Beer v. United States -- Solicitor General Bork urged a broad interpretation of the Voting Rights Act to strike down an electoral plan he believed would dilute black voting strength, but the Court disagreed 5-3.
  - General Electric Co. v. Gilbert -- Bork's amicus brief argued that discrimination on the basis of pregnancy was illegal sex discrimination, but six justices, including Justice Powell, rejected this argument. Congress later changed the law to reflect Bork's view.
  - Washington v. Davis -- The Supreme Court, including Justice Powell, rejected Bork's argument that an employment test with a discriminatory "effect" was unlawful under Title VII.

- Teamsters v. United States -- The Supreme Court, including Justice Powell, ruled against Bork's argument that even a wholly race-neutral seniority system violated Title VII if it perpetuated the effects of prior discrimination.
  - Runyon v. McCrary -- Following Bork's argument, the Court ruled that civil rights laws applied to racially discriminatory private contracts.
  - United Jewish Organization v. Carey -- The Court agreed with Bork that race-conscious redistricting of voting lines to enhance black voting strength was constitutionally permissible.
  - Lau v. Nichols -- This case established that a civil rights law prohibited actions that were not intentionally discriminatory, so long as they disproportionately harmed minorities. The Court later overturned this case and narrowed the law to reach only acts motivated by a discriminatory intent.
- As a member for five years of the United States Court of Appeals for the D.C. Circuit, Judge Bork has compiled a balanced and impressive record in the area of civil rights.
  - He often voted to vindicate the rights of civil rights plaintiffs, frequently reversing lower courts in order to do so. For example:
    - In Palmer v. Shultz, he voted to vacate the district court's grant of summary judgment to the government and hold for a group of female foreign service officers alleging State Department discrimination in assignment and promotion.
    - In Ososky v. Wick, he voted to reverse the district court and hold that the Equal Pay Act applies to the Foreign Service's merit system.
    - In Doe v. Weinberger, he voted to reverse the district court and hold that an individual discharged from the National Security Agency for his homosexuality had been illegally denied a right to a hearing.
    - In County Council of Sumter County, South Carolina v. United States, Judge Bork rejected a South Carolina county's claim that its switch to an "at-large" election system did not require preclearance from the Attorney General under the Voting Rights Act. He later held that the County

had failed to prove that its new system had "neither the purpose nor effect of denying or abridging the right of black South Carolinians to vote."

- In Norris v. District of Columbia, Judge Bork voted to reverse a district court in a jail inmate's Section 1983 suit against four guards who allegedly had assaulted him. Judge Bork rejected the district court's reasoning that absent permanent injuries the case must be dismissed; the lawsuit was thus reinstated.
- In Laffey v. Northwest Airlines, Judge Bork affirmed a lower court decision which found that Northwest Airlines had discriminated against its female employees.
- In Emory v. Secretary of the Navy, Judge Bork reversed a district court's decision to dismiss a claim of racial discrimination against the United States Navy. The District Court had held that the Navy's decisions on promotion were immune from judicial review. In rejecting the district court's theory, Judge Bork held: "Where it is alleged, as it is here, that the armed forces have trespassed upon constitutionally guaranteed rights through the promotion and selection process, the courts are not powerless to act. The military has not been exempted from constitutional provisions that protect the rights of individuals. It is precisely the role of the courts to determine whether those rights have been violated."

- Judge Bork has rejected, however, claims by civil rights plaintiffs when he has concluded that their arguments were not supported by the law. For example:

- In Paralyzed Veterans of America v. Civil Aeronautics Board, Judge Bork criticized a panel decision which had held that all the activities of commercial airlines were to be considered federal programs and therefore subject to a statute prohibiting discrimination against the handicapped in federal programs. Judge Bork characterized this position as flatly inconsistent with Supreme Court precedent. On appeal, the Supreme Court adopted Judge Bork's position and reversed the panel in a 6-3 decision authored by Justice Powell.
- In Vinson v. Taylor, Judge Bork criticized a panel decision in a sexual harassment case, both because of evidentiary rulings with which he disagreed and because the panel had taken the position that employers were automatically liable for an

employee's sexual harassment, even if the employer had not known about the incident at issue. The Supreme Court on review adopted positions similar to those of Judge Bork both on the evidentiary issues and on the issue of liability.

- In Dronenberg v. Zech, Judge Bork rejected a constitutional claim by a cryptographer who was discharged from the Navy because of his homosexuality. Judge Bork held that the Constitution did not confer a right to engage in homosexual acts, and that the court therefore did not have the authority to set aside the Navy's decision. He wrote: "If the revolution in sexual mores that appellant proclaims is in fact ever to arrive, we think it must arrive through the moral choices of the people and their elected representatives, not through the ukase of this court." The case was never appealed, but last year the Supreme Court adopted this same position in Bowers v. Hardwick--a decision in which Justice Powell concurred.
- In Hohri v. United States, Judge Bork criticized a panel opinion reinstating a claim by Americans of Japanese descent for compensation arising out of their World War II internment. Judge Bork denounced the internment, but pointed out that in his view the Court of Appeals did not have statutory authority to hear the case. He characterized the panel opinion as one in which "compassion displaces law." In a unanimous opinion authored by Justice Powell, the Supreme Court adopted Judge Bork's position and reversed the panel on appeal.
- Judge Bork has never had occasion to issue a ruling in an affirmative action case. While a law professor, he wrote an op-ed piece in 1979 for The Wall Street Journal in which he criticized the recently issued Bakke decision. Since then, however, the Supreme Court has issued many other decisions affecting this issue, and Judge Bork has never in any way suggested that he believes this line of cases should be overruled.
- In 1963 Bork wrote an article in the New Republic criticizing proposed public accommodations provisions that eventually became part of the Civil Rights Act as undesirable legislative interference with private business behavior.
- But ten years later, at his confirmation hearings for the position of Solicitor General, Bork acknowledged that his position had been wrong:

I should say that I no longer agree with that article....It seems to me I was on the wrong track altogether. It was my first attempt to write in that field. It seems to me the statute has worked very well and I do not see any problem with the statute, and were that to be proposed today, I would support it.

- The article was not even raised during his unanimous Senate confirmation to the D.C. Circuit, ten years later, in 1982.
- His article, as does his subsequent career, makes clear his abhorrence of racism: "Of the ugliness of racial discrimination there need be no argument."

#### LABOR

- Judge Bork's approach to labor cases illustrates his deep commitment to principled decisionmaking. His faithful interpretation of the statutes at issue has resulted in a balanced record on labor issues that defies characterization as either "pro-labor" or "pro-management."
- He has often voted to vindicate the rights of labor unions and individual employees both against private employers and the federal government.
  - In an opinion he authored for the court in United Mine Workers of America v. Mine Safety Health Administration, Judge Bork held on behalf of the union that the Mine Safety and Health Administration could not excuse individual mining companies from compliance with a mandatory safety standard, even on an interim basis, without following particular procedures and ensuring that the miners were made as safe or safer by the exemption from compliance.
  - In concurring with an opinion authored by Judge Wright in Amalgamated Clothing and Textile Workers v. National Labor Relations Board, Judge Bork held that despite evidence that the union, at least in a limited manner, might have engaged in coercion in a very close election that the union won, the National Labor Relations Board's decision to certify the union should not be overturned nor a new election ordered.
  - In Musey v. Federal Mine Safety and Health Review Commission, Judge Bork ruled that under the Federal

Coal Mine and Health and Safety Act the union and its attorneys were entitled to costs and attorney fees for representing union members.

- In Amalgamated Transit Union v. Brock, Judge Bork, writing for the majority, held in favor of the union that the Secretary of Labor had exceeded his statutory authority in certifying in federal assistance applications that "fair and equitable arrangements" had been made to protect the collective bargaining rights of employees before labor and management had actually agreed to a dispute resolution mechanism.
- In United Scenic Artists v. National Labor Relations Board, Judge Bork joined an opinion which reversed the Board's determination that a secondary boycott by a union was an unfair labor practice, holding that such a boycott occurs only if the union acts purposefully to involve neutral parties in its dispute with the primary employer.
- Similar solicitude for the rights of employees is demonstrated by Northwest Airlines v. Airline Pilots International, where Bork joined a Judge Edwards' opinion upholding an arbitrator's decision that an airline pilot's alcoholism was a "disease" which did not constitute good cause for dismissal.
- Another opinion joined by Judge Bork, NAACP v. Donovan, struck down amended Labor Department regulations regarding the minimum "piece rates" employers were obliged to pay to foreign migrant workers as arbitrary and irrational.
- A similar decision against the government was rendered in National Treasury Employees Union v. Devine, which held that an appropriations measure barred the Office of Personnel Management and other agencies from implementing regulations that changed federal personnel practices to stress individual performance rather than seniority.
- In Oil Chemical Atomic Workers International v. National Labor Relations Board, Judge Bork joined another Edwards' opinion reversing NLRB's determination that a dispute over replacing "strikers" who stopped work to protest safety conditions could be settled through a private agreement between some of the "strikers" and the company because of the public interest in ensuring substantial remedies for unfair labor practices.

- In Donovan v. Carolina Stalite Co., Judge Bork reversed the Federal Mine Safety and Health Review Commission, holding that a state gravel processing facility was a "mine" within the meaning of the Act and thus subject to civil penalties.
- Black v. Interstate Commerce Commission, a per curiam opinion joined by Judge Bork, held that the ICC had acted arbitrarily and capriciously in allowing a railroad to abandon some of its tracks in a manner that caused the displacement of employees of another railroad.
- Where the statute, legitimate agency regulation, or collective bargaining agreement so dictated, however, he has not hesitated to rule in favor of the government or private employer.
- In National Treasury Employees Union v. U.S. Merit Systems, Judge Bork held that seasonal government employees laid off in accordance with the conditions of their employment were not entitled to the procedural protections that must be provided to permanent employees against whom the government wishes to take "adverse action."
- In Prill v. National Labor Relations Board, Judge Bork dissented from the panel to support the National Labor Relations Board decision that an employee's lone refusal to drive an allegedly unsafe vehicle was not protected by the "concerted activities" section of the National Labor Relations Act. Judge Bork concluded that the Board's definition of "concerted activities," which required that an employee's conduct must be engaged in with or on the authority of other employees and not solely by and on behalf of the employee himself, was compelled by the statute.
- In International Brotherhood of Electrical Workers v. National Labor Relations Board, Judge Bork wrote an opinion for the court upholding a National Labor Relations Board decision against the union which held that an employer had not committed an unfair labor practice by declining to bargain over its failure to provide its employees with a Christmas bonus. The court found that the company's longstanding practice to provide bonuses had been superseded by a new collective bargaining agreement which represented by its terms that it formed the sole basis of the employer's obligations to its employees and did not specify a Christmas bonus.

- In Dunning v. National Aeronautics and Space Administration, Judge Bork joined Judges Wald and Scalia in denying an employee's petition for review of a Merit Systems Protection Board decision to affirm a 15-day suspension imposed by NASA for insubordination.

#### CRIMINAL LAW

- As Solicitor General, Robert Bork argued and won several major death penalty cases before the United States Supreme Court. He has expressed the view that the death penalty is constitutionally permissible, provided that proper procedures are followed.
- Judge Bork is a tough but fairminded judge on criminal law issues.
- He has opposed expansive interpretations of procedural rights that would enable apparently culpable individuals to evade justice.
  - In United States v. Mount, for example, he concurred in a panel decision affirming a defendant's conviction for making a false statement in a passport application. He wrote a separate concurrence to emphasize that the court had no power to exclude evidence obtained from a search conducted in England by British police officers, and that even assuming that it did, it would be inappropriate for the court to apply a "shock the conscience" test.
  - In U.S. v. Singleton, he overruled a district court order that had suppressed evidence in a defendant's retrial for robbery which had been deemed reliable in a previous court of appeals review of the first trial.
- On the other hand, however, Judge Bork has not hesitated to overturn convictions when constitutional or evidentiary considerations require such a result.
  - In U.S. v. Brown, Judge Bork joined in a panel decision overturning the convictions of members of the "Black Hebrews" sect, on the ground that the trial court, by erroneously dismissing a certain juror who had questioned the sufficiency of the government's evidence, had violated the defendants' constitutional right to a unanimous jury. Judge Bork's decision to void nearly 400 separate verdicts in what is believed to be the longest and most

expensive trial ever held in a D.C. district court highlights his devotion to vindicating the constitutional rights even of criminal defendants.

#### ABORTION

- Judge Bork has never stated whether he would vote to overrule Roe v. Wade. Some have suggested, however, that Judge Bork ought not to be confirmed unless he commits in advance not to vote to overrule Roe v. Wade. Traditionally, judicial nominees do not pledge their votes in future cases in order to secure confirmation. This has long been regarded as clearly improper. Indeed, any judicial nominee who did so would properly be accused not only of lacking integrity, but of lacking an open mind.
- In 1981, Judge Bork testified before Congress in opposition to the proposed Human Life Bill, which sought to reverse Roe v. Wade by declaring that human life begins at conception. Judge Bork called the Human Life Bill "unconstitutional".
- Judge Bork has in the past questioned only whether there is a right to abortion in the Constitution.
- This view is shared by some of the most notable, mainstream and respected scholars of constitutional law in America:
  - Harvard Law Professors Archibald Cox and Paul Freund.
  - Stanford Law School Dean John Hart Ely.
  - Columbia Law Professor Henry Monaghan.
- Stanford law professor Gerald Gunther, the editor of the leading law school casebook on constitutional law, offered the following comments on Griswold v. Connecticut, the precursor to Roe v. Wade: "It marked the return of the Court to the discredited notion of substantive due process. The theory was repudiated in 1937 in the economic sphere. I don't find a very persuasive difference in reviving it for the personal sphere. I'm a card-carrying liberal Democrat, but this strikes me as a double standard."
- Judge Ruth Bader Ginsburg, one of Judge Bork's colleagues on the D.C. Circuit, has written that Roe v. Wade "sparked public opposition and academic

criticism...because the Court ventured too far in the change it ordered and presented an incomplete justification for its action."

- The legal issue for a judge is whether it should be the court, or the people through their elected representatives, that should decide our policy on abortion.
- If the Supreme Court were to decide that the Constitution does not contain a right to abortion, that would not render abortion illegal. It would simply mean that the issue would be decided in the same way as virtually all other issues of public policy--by the people through their legislatures.

#### WATERGATE

- During the course of the Cox firing, Judge Bork displayed great personal courage and statesmanship. He helped save the Watergate investigation and prevent disruption of the Justice Department. As Lloyd Cutler has recently written, "[I]t was inevitable that the President would eventually find someone in the Justice Department to fire Mr. Cox, and, if all three top officers resigned, the department's morale and the pursuit of the Watergate investigation might have been irreparably crippled."
- At first, Bork informed Attorney General Elliott Richardson and Deputy Attorney General William Ruckelshaus that he intended to resign his position. Richardson and Ruckelshaus persuaded him to stay. As Richardson has recently said, "There was no good reason for him to resign, and some good reason for him not to." Richardson and Ruckelshaus felt that it was important for someone of Bork's integrity and stature to stay on the job in order to avoid mass resignations that would have crippled the Justice Department.
- After carrying out the President's instruction to discharge Cox, Bork acted immediately to safeguard the Watergate investigation and its independence. He promptly established a new Special Prosecutor's office, giving it authority to pursue the investigation without interference. He expressly told the Special Prosecutor's office that they had complete independence and that they should subpoena the tapes if they saw fit--the very action that led to Cox's discharge.

- Judge Bork framed the legal theory under which the indictment of Spiro Agnew went forward. Agnew had taken the position that a sitting Vice President was immune from criminal indictment, a position which President Nixon initially endorsed. Bork wrote and filed the legal brief arguing the opposite position, i.e. that Agnew was subject to indictment. Agnew resigned shortly thereafter.
- In 1981, The New York Times described Judge Bork's decisions during Watergate as "principled."

#### BALANCE ON THE SUPREME COURT

- Judge Bork's appointment would not change the balance of the Supreme Court. His opinions on the Court of Appeals--of which, as previously noted, not one has been reversed--are thoroughly in the mainstream. In every instance, Judge Bork's decisions are based on his reading of the statutes, constitutional provisions, and case law before him. A Justice who brings that approach to the Supreme Court will not alter the present balance in any way.
- The unpredictability of Supreme Court appointees is characteristic. Justice Scalia, a more conservative judge than Bork, has been criticized by some conservatives for his unpredictability in his very first term on the Court. Justice O'Connor has also defied expectations, as Professor Lawrence Tribe noted: "Defying the desire of Court watchers to stuff Justices once and for all into pigeonholes of 'right' or 'left,' [her] story...is fairly typical: when one Justice is replaced with another, the impact on the Court is likely to be progressive on some issues, conservative on others."
- There is no historical or constitutional basis for making the Supreme Court as it existed in June 1987 the ideal standard to which all future Courts must be held.
  - No such standard has ever been used in evaluating nominees to the Court. The record indicates that the Senate has always tried to look to the nominee's individual merits--even when they have disagreed about them.
  - The issue of "balance" did not arise with respect to FDR's eight nominations to the Court in six years or LBJ's nominees to the Warren Court, even though, as Professor Tribe has written, Justice Black's

appointment in 1937 "took a delicately balanced Court...and turned it into a Court willing to give solid support to F.D.R.'s initiatives. So, too, Arthur Goldberg's appointment to the Court... shifted a tenuous balance on matters of personal liberty toward a consistent libertarianism...."

July 29, 1987

all sent to  
HHB at  
9/12 —  
3:00 pm

# AB'S talking POINTS

1. Judge Bork is one of the most qualified individuals ever nominated to the Supreme Court. His nomination has been endorsed by former Chief Justice Burger, and Justice John Paul Stevens has said he would be a well qualified, welcome addition to the Court.
2. Judge Bork believes in judicial restraint, which means that judges should interpret the law, not invent the law based on their own personal point of view.
3. He is a mainstream jurist -- not one of the more than 400 majority opinions which he has written or joined has been reversed by the Supreme Court (The Supreme Court has reviewed about 17 of those decisions and the disappointed party below unsuccessfully petitioned for certiorari in many other cases).
4. [If it comes up] We are not surprised by the ABA Committee vote. There has been a small group in recent months who consistently have opposed President Reagan's nominees, no matter how qualified. It is important to remember that 2/3 of the Committee gave Judge Bork the highest possible rating for the Supreme Court. We will ~~have~~ take a 2/3 favorable vote at every stage of Judge Bork's process.

TOMMY G. / ELIZABETH BOARD  
TALKING POINTS  
SELECTION AND CONFIRMATION PROCESS

Q: The Reagan Administration says the Senate should not judge Robert Bork on the basis of his ideology. Yet isn't it true that the President clearly took Bork's conservative ideology into account in making this nomination?

A: This Administration poses no "litmus tests" to judicial candidates, in the sense that they have to be on one side or the other of a specific issue.

Judge Bork, for example, has criticized the Balanced Budget Amendment -- a proposal Ronald Reagan is currently advocating as part of his "Economic Bill of Rights."

Beyond qualifications, the President looks for an approach to the law that he believes is consistent with the intent of the Framers -- namely, that judges should interpret the law, not invent it.

Q: The Senate has always considered the ideology of Supreme Court nominees. Why complain now?

Certainly, some Senators have mentioned ideology during the floor debate on previous Supreme Court nominations. But it has never been the view of the majority of the Senate that nominees should be considered on any basis apart from qualifications.

In fact, during the 1981 consideration of Sandra Day O'Connor, Senator Joseph Biden said in debate that it was not the Constitutional responsibility of the Senate to "apply a philisophic [sic.] litmus test." He said that the Senate should use "more objective criteria" in considering Supreme Court nominees, and he spelled them out: intellectual capacity; background and training; character; and judicial temperament.

That, of course, is the President's position as well.

THE WHITE HOUSE  
WASHINGTON

HOWARD -

Materials for Meet the Press.

- ① Metzgerbaum is focused on anti-trust. BORK is supported by 15 Former ASST Antitrust Section Heads -- letter enclosed.
- ② Enclosed is the Watergate Special Prosecution Force's reference to how Bork protected their investigation. From their final report.
- ③ Also Enclosed is the summary from yesterday's Justice Department response to BORK CRITICS

AB

JUDICIAL PHILOSOPHY

Q: Will Bork tip the balance of the Court to the right?

While there is no such thing as "balance" on the Court -- there are different majorities on various issues and they change all the time -- there is no evidence to suggest that Bork's voting record will be substantially different from that of retiring Justice Powell.

Bork, Like Powell, is a mainstream jurist. In fact, Lloyd Cutler, former counsel to President Carter, said recently that in time, Bork will be more to the middle than to the right of the Court as a whole.

As an appeals court judge, Bork has been in the majority of 94 percent of the cases he has heard. And in nine out of the ten times the Supreme Court reviewed a case in which Judge Bork had participated, Lewis Powell -- the moderate Justice whom Bork was nominated to replace -- found himself in agreement with Bork's position.

Q. Won't Bork's narrow method of constitutional interpretation deny Americans basic rights?

A: Bork respects the Constitution and believes that the Framers of that document -- and the people who ratified it -- meant what they said. And the Constitution requires that judges interpret the law, not invent it.

But this doesn't mean that the court should be a rubber stamp for the legislature.

Judge Bork is a strong defender of the First Amendment's free speech and free press guarantees. He praised the Supreme Court's decision in Brown v. Board of Education. As a judge, he has consistently upheld the civil rights of plaintiffs who had been victims of unlawful race and sex discrimination, frequently reversing lower courts to do so.

All these views are consistent with -- actually, required by -- a philosophy of judicial restraint, because they are mandated by the Constitution itself.

(Judicial philosophy, continued)

Q: Won't Bork vote to overturn a generation of cases with which he has voiced disagreements in the past?

Remember that many of the statements some are using to undermine Bork's record were made when Bork was a law professor. That, of course, is what law professors do: Think and write about the law in challenging, unusual ways.

As a judge, he has faithfully applied the legal precedents of both the Supreme Court and his own Circuit Court.

Here's what Bork has said about precedent: "I think the value of precedent and of certainty and of continuity in the law is so high that I think a judge ought not to overturn prior decisions unless he thinks it is absolutely clear that the prior decision was wrong and perhaps pernicious."

Q: Isn't Bork an "activist" judge when it comes to implementing his right-wing agenda?

A: One of his colleagues tells a story about a law professor at the University of Chicago who said: "If someone proposed a law that guaranteed substantial wage increases for law professors, I'd be first in line to lobby for it. But not Bob Bork. He's a man of principle."

Bork's philosophy is the essence of self-restraint. He opposes "conservative" activism by the courts as strenuously as he opposes "liberal" activism.

CIVIL RIGHTS

Q: All I hear is that Bork would trash our civil rights laws if he ended up on the Supreme Court. Is this true?

A: Judge Bork has demonstrated throughout his public career that he will faithfully uphold the spirit and the letter of our Nation's civil rights laws.

As a judge, he has joined or authored opinions that establish, for example:

- That the military is subject to judicial review of civil rights claims regarding selection of senior officers;
- That female stewardesses may not be paid less than male pursers to do the same job; and
- That inferences of intentional discrimination can be made based solely on statistical evidence.

As Solicitor General, Bork sided with the minority or female plaintiffs in 17 out of 19 civil rights cases in which he was free to argue his own interpretation of the law. In all but two civil rights cases he has heard as a federal appeals court judge, he has sided with the minority or female plaintiffs raising a substantive legal claim of unlawful discrimination.

Q: Where does Bork stand on the civil rights of women?

A: All evidence suggests Bork will faithfully defend the civil rights of women.

As Solicitor General, Bork at times advocated a broader interpretation of civil rights laws than the Supreme Court was willing to accept. For example, Bork argued in a "friend-of-the-court" brief that discrimination on the basis of pregnancy was illegal discrimination. Six Justices voted to reject this argument; Congress later changed the law to reflect Bork's view.

FREE SPEECH

Q: I understand Bork views narrowly our Constitutional protection of free speech.

A: Not true at all.

By way of illustration, Judge Bork decided in a case involving the Washington, D.C. subway system that an individual protester had been unconstitutionally denied the right to display a poster mocking President Reagan, with the caption: TIRED OF THE JELLYBEAN REPUBLIC? The decision to deny display of the poster, Bork held, was "an attempt at censorship."

Q: What about Bork and the press?

A: Bork will be a strong defender of First Amendment values on the Supreme Court. One of his decisions dramatically expanded First Amendment protections to political commentary. His nomination has been praised by many leading experts on media law issues.

Interestingly, Bork has said that if he hadn't become a lawyer, he would have become a journalist.

ABORTION

Q: What are Judge Bork's personal views on abortion?

A: Neither the President nor any member of the Administration asked Judge Bork for his personal views on abortion or any other policy issue.

Q: Would Judge Bork vote to overturn Roe v. Wade?

A: Judge Bork has never indicated whether he would vote to overrule Roe v. Wade.

Some have suggested, however, that Judge Bork ought not to be confirmed unless he commits in advance not to vote to overrule Roe v. Wade. It would be a violation of judicial ethics for a nominee to pledge his vote in future cases in order to secure nomination. This has long been regarded as clearly improper, and no nominee has ever done so.

PRIVACY RIGHTS

Q: Why doesn't Judge Bork think that the people have a right to privacy?

A: Judge Bork does agree, as do virtually all prominent legal scholars, that the Constitution provides citizens the right to privacy in specified contexts -- that is why there are such things as search warrants, for example.

Bork simply believes that this right is clearly specified in the Constitution, and that there is no "blank check" for judges to overturn laws using this argument.

One of the most revered Justices, Hugo Black of Alabama, said in a leading case on the so-called right to privacy that he valued his privacy as much as the next man, but he didn't feel the Court could overturn laws unless it could point to specific provisions of the Constitution. Bork essentially shares this view.

RELIGION

Q: Would Bork vote to require mandatory prayer in public schools?

A: To my knowledge, Judge Bork has almost never expressed his views on the First Amendment's religion clauses.

It would of course be inappropriate for me to speculate on Bork's decision in any case which may come before the Court.

Of course, no Court would ever require prayer.

Let me add, however, that the precedent on this and other issues is well established, and Judge Bork has frequently stated his belief in the importance of respect for judicial precedent.

CITICORP CENTER  
183 EAST 53 STREET  
NEW YORK 10022  
TEL: 483-1000  
CABLE: "SNNK"  
TELEX: WU 120098  
TELEX: WUI 008709

FOUR EMBARCADERO CENTER  
SAN FRANCISCO 94111  
TEL: 881-5500  
CABLE: "NUMLATUS, S. F."  
TELEX: ITT 470594

725 SOUTH FIGUEROA STREET  
21 ST FLOOR  
LOS ANGELES 90017-5430  
TEL: 239-0300

# SHEARMAN & STERLING

53 WALL STREET  
NEW YORK 10005

(212 483-1000

CABLE: "NUMLATUS" TELEX: ITT 421295 WUI 667290

WRITER'S DIRECT DIAL NUMBER

(212) 837-6670

August 7, 1987

21 AVENUE GEORGE V  
75006 PARIS  
O11-33-14-723-88-48  
"NUMLATUS PARIS"  
TELEX: 842-880286

ST. HELEN'S, 1 UNDERSHAFT  
LONDON EC3A 8HX  
O11-44-1-283-8100  
"NUMLATUS LONDON EC3"  
TELEX: 851-884274

29<sup>TH</sup> FLOOR CITICORP CENTRE  
18 WHITFIELD ROAD  
CAUSEWAY BAY  
HONG KONG  
O11-852-5-807-7222  
CABLE: "NUMLA HX"  
TELEX: 780 833-14

POST OFFICE BOX 2948  
ABU DHABI  
UNITED ARAB EMIRATES  
O11-971-2 324477  
CABLE: "NUMLATU"  
TELEX: 949 22662EM

Mr. Benjamin C. Bradlee  
Executive Editor  
The Washington Post  
1150 15th Street, N.W.  
Washington, D.C. 20071

Dear Sir:

I am Immediate Past Chairman of the Section of Antitrust Law of the American Bar Association. I write this letter on behalf of myself and the previous Chairmen of the Section listed below.\* We write to take issue with Colman McCarthy's criticisms in his article of July 12, 1987 stating that Judge Robert Bork's views on antitrust law are "over the edge" and anticonsumer.

To the contrary, Judge Bork's writings in this area have been among the most influential scholarship ever produced. While not all of us would subscribe to its every conclusion, we strongly believe that The Antitrust Paradox, which he published in 1978, is among the most important works written in this field in the past 25 years.

It is indicative of the value of Judge Bork's contributions that The Antitrust Paradox has been referred to by the United States Supreme Court and by the U.S. Circuit Courts of Appeals in 75 decisions since its publication.

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\* The opinions expressed herein are those of the individuals listed below and are not intended to represent those of the Section of Antitrust Law or the American Bar Association.

Perhaps the clearest evidence of its influence is that it has been cited approvingly by no fewer than six majority opinions written by Justices commonly viewed as having widely varied judicial philosophies: by Justice Brennan in Cargill v. Monfort of Colorado, Inc., 107 S.Ct. 484, 495 n. 17 (1986); by Justice Powell in Matsushita Electrical Industries v. Zenith Radio Co., 106 S.Ct. 1348, 1357 (1986); by Justice Stevens in Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 105 S.Ct. 2847, 2858 and n. 29, 31, 2860-61 n. 39 (1985) and NCAA v. Board of Regents, 468 U.S. 85, 101 (1984); and by former Chief Justice Burger in Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1978) and United States v. United States Gypsum Co., 438 U.S. 422, 442 (1978). Justice O'Connor also relied on The Antitrust Paradox in her concurring opinion in Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 36 (1984), as did Justice Blackmun in his dissent in National Society of Professional Engineers v. United States, 435 U.S. 679, 700 n.\* (1978). It should also be noted that every member of the present Supreme Court joined one or another of these opinions.

In light of the fact that six of the nine present Justices have cited Judge Bork's book and that all of them have joined opinions citing it, Mr. McCarthy's claim that Judge Bork's antitrust views are "so far on the fringes of irrelevant extremism that [Bork] disqualifies himself from the debate" demonstrates more clearly than anything we could say that Mr. McCarthy does not know what he is talking about.

Mr. McCarthy is also quite wrong in his suggestion that Judge Bork's antitrust writings are anticonsumer. To the contrary, the central thesis of Judge Bork's book, as summarized in chapter 2, is that:

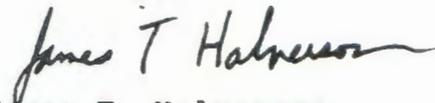
- (1) The only legitimate goal of American antitrust law is the maximization of consumer welfare; therefore,
- (2) "Competition", for purposes of antitrust analysis, must be understood as a term of art signifying any state of affairs in which consumer welfare cannot be increased by judicial decree.

R. Bork, The Antitrust Paradox 51 (1978).

It is true that Judge Bork has also stressed that protection of consumer welfare is sometimes inconsistent with protection of some businesses from legitimate competition. The key point, here, however, is that Judge Bork advocates pro-competitive policies which promote the very efficiency that makes the enhancement of consumer welfare possible.

Thus, we fear that it is Mr. McCarthy, and not Judge Bork, who is out of touch with the center of legitimate, judicial and economic thought about the proper direction of antitrust analysis. Fortunately, the mainstream view, which no one has helped promote more than Judge Bork, is that the proper antitrust policy is one which encourages strong private and government action to promote consumer welfare rather than unnecessary government intervention to protect politically favored competitors.

Sincerely,



James T. Halverson  
Shearman & Sterling  
New York, New York  
Immediate Past Chairman  
Section of Antitrust Law  
American Bar Association

On behalf of himself and:

Richard A. Whiting  
Steptoe & Johnson  
Washington, D.C.  
Section Chairman, 1984-85

Richard W. Pogue  
Jones, Day, Reavis & Pogue  
Cleveland, Ohio  
Section Chairman, 1983-84

Carla A. Hills  
Weil, Gotshal & Manges  
Washington, D.C.  
Section Chairman, 1982-83

E. William Barnett  
Baker & Botts  
Houston, Texas  
Section Chairman, 1981-82

Harvey M. Applebaum  
Covington & Burling  
Washington, D.C.  
Section Chairman, 1980-81

Earl E. Pollack  
Sonnenschein, Carlin,  
Nath & Rosenthal  
Chicago, Illinois  
Section Chairman, 1979-80

Allen C. Holmes  
Cleveland, Ohio  
Section Chairman, 1978-79

Ira M. Millstein  
Weil, Gotshal & Manges  
New York, New York  
Section Chairman, 1977-78

Edwin S. Rockefeller  
Schiff Hardin & Waite  
Washington, D.C.  
Section Chairman, 1976-77

John Iazard  
King & Spaulding  
Atlanta, Georgia  
Section Chairman, 1974-75

Julian O. von Kalinowski  
Gibson, Dunn & Crutcher  
Los Angeles, California  
Section Chairman, 1972-73

Richard K. Decker  
Of Counsel  
Lord, Bissel & Brook  
Chicago, Illinois  
Section Chairman, 1971-72

Frederick M. Rowe  
Kirkland & Ellis  
Washington, D.C.  
Section Chairman, 1969-70

Miles W. Kirkpatrick  
Morgan, Lewis & Bockius  
Washington, D.C.  
Section Chairman, 1968-69