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THE WHITE HOUSE
WASHINGTON

Date: 9/3/87

TO: BENEDICT COHEN

FROM: **ARTHUR B. CULVAHOUSE, JR**
Counsel to the President

FYI: X

COMMENT:

ACTION:

THE WHITE HOUSE

WASHINGTON

September 3, 1987

MEMORANDUM FOR HOWARD H. BAKER, JR.
KENNETH M. DUBERSTEIN
THOMAS C. GRISCOM
MARLIN FITZWATER

FROM: ARTHUR B. CULVAHOUSE, JR.
COUNSEL TO THE PRESIDENT

SUBJECT: Bork Blue Book

I noted in today's press summary that UPI reported that two consultants to Senator Biden have prepared a 72-page analysis indicating that the "Materials on Judge Robert H. Bork" book prepared by my staff and Department of Justice lawyers "distorts the record" and contains "major inaccuracies." Based solely upon the UPI story (copy attached), it looks like the Biden consultants' findings of "inaccuracies" and "distortions" focus on differing conclusions and interpretations, and not on substance. We have not seen that "analysis" (which probably is not an analysis, but an advocacy paper), but I have the following preliminary thoughts.

First, our so-called Blue Book is an advocacy piece, designed to show that Bork opponents were clearly wrong in stating that Robert Bork was a right wing ideologue who allows arch-conservative personal views to shape his judicial decisions. Secondly, this book was prepared under intense time pressure by many different lawyers, and it could contain some inadvertent inaccuracies even though the instructions were to be extremely fair, balanced and correct. Third, because it is an advocacy piece, opponents of Judge Bork would be expected to disagree with its conclusions -- for instance, you would hardly expect consultants for Senator Biden to agree that "Judge Bork has been solidly in the mainstream of American jurisprudence."

If this becomes an issue, my guidance is that we should be terse and not be defensive. If there are substantive or factual inaccuracies in the briefing book, we will correct them. Nevertheless, we stand by our conclusions that: Judge Bork is one of the most qualified individuals ever nominated to the Supreme Court; Judge Bork is the leading proponent of judicial restraint; and that Judge Bork's opinions as a member of the U. S. Court of Appeals have been solidly in the mainstream of American jurisprudence. We further stand by

the fact that not one of the more than 100 majority opinions written by Judge Bork have been reversed by the Supreme Court and that the Supreme Court has never reversed any of the over 400 majority opinions in which Judge Bork has joined.

I do not see any profit in getting into a name-calling battle with Senator Biden and his "consultants." I think it would only pique additional interest in their "report." What has happened in fact, however, is that the Bork opponents were far too shrill and extreme (and very unfair) in their early characterizations of Judge Bork, and those shrill statements have been very counterproductive. Indeed, the White House Blue Book, even if it is inaccurate in certain minor respects, is fundamentally and surely much more balanced, more fair, more accurate and more dignified in its characterizations of Judge Bork than the statements of those attacking Judge Bork.

Finally, we should absolutely refrain from describing Judge Bork as a "moderate." I don't think that anyone at the White House has used that term, but we certainly have been accused of trying to force the perception of Judge Bork from "conservative" to "moderate." There is no profit in applying such political terms to a judge. The important point is that Judge Bork's philosophy of judging -- that is, his philosophy of judicial restraint and reliance on the original intent of the Framers of the Constitution and upon precedent -- necessarily means that a judge's personal political views should not affect the outcome of a particular case. Judge Bork therefore is a "<u>judicial</u> conservative" and is not a "judicial activist," which means that the outcome of a particular case could be disappointing to "political conservatives" (as has been the case with Judge Bork on First Amendment issues) or disappointing to "political liberals" (<u>e.g.</u>, Judge Bork's opinions on criminal law issues). The purpose of the White House Blue Book was to emphasize those points and to indicate the spuriousness of the overall charges made by some opponents of the Bork nomination.

In addition, as I advised Tom Griscom, I think we should lower expectations regarding Judge Bork's performance at the Senate Judiciary Committee hearings. The very few press people I have spoken with say that Administration officials and Senators are claiming that Judge Bork will be "spectacular." Judge Bork may well be spectacular; he may not. I personally believe that he will have some very good moments and some rough moments. Accordingly, I think that we should assume he will be good, but not spectacular, and I would not want the nomination to lose momentum because of unduly raised expectations.

Attachment

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adv 10 am edt White House accused of distorting Bork record By ANDREA NEAL

WASHINGTON (UPI) _ The White House has distorted the record of Supreme Court nominee Robert Bork by portraying him as a moderate conservative when in fact he is likely to undo three decades of social progress, said a report released today by the Senate Judiciary Committee chairman.

The 72-page analysis, written by consultants to Sen. Joseph Biden, D-Del., depicts Bork as a judicial activist determined to advance President Reagan's conservative social agenda well into the next century.

Biden commissioned the report in response to a White House briefing book that paints Bork, 60, as a moderate conservative who would follow the "mainstream tradition" of retired Justice Lewis Powell, whom he was nominated to replace.

The White House paper, the report contends, "is a distortion of his record" and contains "major inaccuracies."

Both studies are likely to be used as ammunition by Republicans and Democrats when Biden's committee opens confirmation hearings on the nomination Sept. 15. The most recent head count indicated senators were evenly split on Bork.

A spokesman said Sen. Strom Thurmond of South Carolina, ranking Republican on the Judiciary Committee, had not seen the Biden report in advance Wednesday and had no immediate comment.

In a related development Wednesday, however, the American Civil Liberties Union, which has broken a 36-year-tradition of neutrality to oppose Bork's nomination, accused the administration of trying to "hide the real Robert Bork from the people" by concealing his clearly "radical" philosophy.

Support for the federal appeals court judge came from the American Farm Bureau Federation, which represents more than 3.5 million rural families.

Federation President Dean Kleckner said Wednesday, "Farmers are as much affected by judicial decisions as any other citizens. As farmers, we see the need to stand up and be counted this time."

Biden's consultants, Washington lawyer Jeffrey Peck and Duke University law professor Christopher Schroeder, concluded Bork is not an advocate of judicial restraint, as the White House claims, but instead "has often advocated and engaged in judicial activism."

"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," they wrote.

The report methodically challenged the White House briefing book on various issues, including Bork's stand on the First Amendment and abortion. While the White House called him "a powerful ally of First Amendment values," the report concluded he "would narrow many well-established First Amendment protections."

Likewise, the White House study pointed out Bork has never issued a ruling indicating whether he would vote to reverse Roe vs. Wade, the Supreme Court's 1973 decision legalizing most abortions. The Biden report said his writings and public comments reveal he is likely to provide the crucial fifth vote needed to reverse that landmark ruling.

The study also countered White House suggestions that Bork has protected civil rights consistently.

-more-

"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," the report said, citing his 1963 opposition to a bill guaranteeing blacks equality in public accommodations and his criticism of decisions banning literacy tests in voting.

The report urged the Senate to scrutinize Bork's record because the ideological balance of the high court 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," the report concluded.

adv 10 am edt

upi 09-03-87 12:25 aed

STATEMENT

Administration lawyers are continuing their analysis of the review released yesterday by Senate Judiciary Committee Chairman Joseph Biden and his consultants. The paper prepared by Senator Biden's consultants curiously and shrilly chooses to attack a White House position paper on Judge Bork rather than directly join the debate on Judge Bork's qualifications to be a member of the Supreme Court.

The White House position paper on Judge Bork focuses upon his distinguished record as Solicitor General of the United States and as a Judge on the United States Court of Appeals, records which received scant attention by Senator Biden's consultants. The White House stands by its belief that Judge Bork is one of the most qualified individuals ever nominated to the Supreme Court; that he is a Judge who for five years has been writing opinions that faithfully apply law and precedent to the cases that come before him; that not one of his more than 100 majority opinions has been reversed by the Supreme Court; that Judge Bork is the leading proponent of judicial restraint -- a jurist who believes that judges have no authority to create new "rights" based upon their personal philosophical views; and that Judge Bork is a legal scholar of the highest distinction and principle who, in the words of Justice Stevens, is very well qualified to be a Supreme Court Justice. Those points are advocated and, we believe, substantiated in a professional manner in the White House Briefing Paper. The White House Briefing Paper must be more effective than we thought since it elicited such a visceral reaction from Senator Biden's consultants.

Nothing in the Biden critique even begins to undermine our claims. Though it asserts that the White House position paper contains factual inaccuracies, on examination it is quite clear that Senator Biden's consultants merely disagree with our interpretation of Judge Bork's undisputed record.

Their use of evidence is itself grossly distorting. They go to great lengths to attempt to explain away as "uninformative" Judge Bork's sterling five-year record on the bench. Most people would consider this the best evidence of what kind of a Justice he will be. As Lloyd Cutler has said, his more than 400 judicial decisions "tell us far more about how Bork would perform as a Justice than his professorial writings ten to twenty years ago." It is simply remarkable that the authors of this report would dismiss his entire five-year judicial record as "uninformative."

The study also dismisses the next most probative evidence--Judge Bork's record as Solicitor General for four years. Their description of his civil rights advocacy in that position as "occasional" is astonishing--in 17 of the 19 amicus briefs which he filed in civil rights cases, he sided with the civil rights plaintiffs (and in the other two cases the Court adopted Judge Bork's position). No wonder only three paragraphs of this 72-page study are devoted to Robert Bork's four years as Solicitor General.

Additionally, the study repeatedly presents the authors' own extremist views of Supreme Court precedent and constitutional law as if they were the "mainstream" from which Judge Bork diverges. Indeed, in order to "prove" Judge Bork "wrong" they often quote dissents from his majority opinions.

We look forward to the hearings on Judge Bork's confirmation and to joining in the debate related to his nomination and qualifications. We would hope that such debate would be conducted in a professional and dignified way, focusing upon Judge Bork's qualifications and record as a Judge and Solicitor General. The Supreme Court stands at the pinnacle of a co-equal branch of government, and considering a nominee for the Supreme Court deserves no less than having his qualifications evaluated on the high road.

If the debate over Judge Bork's confirmation comes down to the question of whether he is a principled proponent of judicial restraint or a hidden activist, then we have no doubt that he will prevail.

THE WHITE HOUSE

WASHINGTON

September 4, 1987

MEMORANDUM FOR MARLIN FITZWATER
THOMAS C. GRISCOM

FROM: ARTHUR B. CULVAHOUSE, JR.
COUNSEL TO THE PRESIDENT

SUBJECT: Revision of Statement on Biden Critique

The first paragraph of the attached statement on the Biden critique has been slightly revised. In the second sentence, the word "shrilly" has been removed.

Attachment

STATEMENT

Administration lawyers are continuing their analysis of the review released yesterday by Senate Judiciary Committee Chairman Joseph Biden and his consultants. The paper prepared by Senator Biden's consultants curiously chooses to attack a White House position paper on Judge Bork rather than directly join the debate on Judge Bork's qualifications to be a member of the Supreme Court.

The White House position paper on Judge Bork focuses upon his distinguished record as Solicitor General of the United States and as a Judge on the United States Court of Appeals, records which received scant attention by Senator Biden's consultants. The White House stands by its belief that Judge Bork is one of the most qualified individuals ever nominated to the Supreme Court; that he is a Judge who for five years has been writing opinions that faithfully apply law and precedent to the cases that come before him; that not one of his more than 100 majority opinions has been reversed by the Supreme Court; that Judge Bork is the leading proponent of judicial restraint -- a jurist who believes that judges have no authority to create new "rights" based upon their personal philosophical views; and that Judge Bork is a legal scholar of the highest distinction and principle who, in the words of Justice Stevens, is very well qualified to be a Supreme Court Justice. Those points are advocated and, we believe, substantiated in a professional manner in the White House Briefing Paper. The White House Briefing Paper must be more effective than we thought since it elicited such a visceral reaction from Senator Biden's consultants.

Nothing in the Biden critique even begins to undermine our claims. Though it asserts that the White House position paper contains factual inaccuracies, on examination it is quite clear that Senator Biden's consultants merely disagree with our interpretation of Judge Bork's undisputed record.

Their use of evidence is itself grossly distorting. They go to great lengths to attempt to explain away as "uninformative" Judge Bork's sterling five-year record on the bench. Most people would consider this the best evidence of what kind of a Justice he will be. As Lloyd Cutler has said, his more than 400 judicial decisions "tell us far more about how Bork would perform as a Justice than his professorial writings ten to twenty years ago." It is simply remarkable that the authors of this report would dismiss his entire five-year judicial record as "uninformative."

The study also dismisses the <u>next most</u> probative evidence--Judge Bork's record as Solicitor General for four years. Their description of his civil rights advocacy in that position as "occasional" is astonishing--in 17 of the 19 amicus briefs which he filed in civil rights cases, he sided with the civil rights plaintiffs (and in the other two cases the Court adopted Judge Bork's position). No wonder only three paragraphs of this 72-page study are devoted to Robert Bork's four years as Solicitor General.

Additionally, the study repeatedly presents the authors' own extremist views of Supreme Court precedent and constitutional law as if they were the "mainstream" from which Judge Bork diverges. Indeed, in order to "prove" Judge Bork "wrong" they often quote dissents from his <u>majority</u> opinions.

We look forward to the hearings on Judge Bork's confirmation and to joining in the debate related to his nomination and qualifications. We would hope that such debate would be conducted in a professional and dignified way, focusing upon Judge Bork's qualifications and record as a Judge and Solicitor General. The Supreme Court stands at the pinnacle of a co-equal branch of government, and considering a nominee for the Supreme Court deserves no less than having his qualifications evaluated on the high road.

If the debate over Judge Bork's confirmation comes down to the question of whether he is a principled proponent of judicial restraint or a hidden activist, then we have no doubt that he will prevail.

THE WHITE HOUSE

WASHINGTON

September 4, 1987

MEMORANDUM FOR MARLIN FITZWATER
THOMAS C. GRISCOM

FROM: ARTHUR B. CULVAHOUSE, JR.
COUNSEL TO THE PRESIDENT

SUBJECT: Second Revision of Statement on Biden Critique

The attached statement on the Biden critique has been further marked-up. I believe that the earlier version was too combative and defensive. The middle four paragraphs could be deleted in their entirety.

Attachment

ABC REVISIONS

STATEMENT

Administration lawyers are continuing their analysis of the review released yesterday by Senate Judiciary Committee Chairman Joseph Biden and his consultants. The paper prepared by Senator Biden's consultants curiously chooses to attack a White House position paper on Judge Bork rather than directly join the debate on Judge Bork's qualifications to be a member of the Supreme Court.

The White House position paper on Judge Bork focuses upon his distinguished record as Solicitor General of the United States and as a Judge on the United States Court of Appeals, records which received scant attention by Senator Biden's consultants. The White House stands by its belief that Judge Bork is one of the most qualified individuals ever nominated to the Supreme Court; that he is a Judge who for five years has been writing opinions that faithfully apply law and precedent to the cases that come before him; that not one of his more than 100 majority opinions has been reversed by the Supreme Court; that Judge Bork is the leading proponent of judicial restraint -- a jurist who believes that judges have no authority to create new "rights" based upon their personal philosophical views; and that Judge Bork is a legal scholar of the highest distinction and principle who, in the words of Justice Stevens, is very well qualified to be a Supreme Court Justice. Those points are advocated and, we believe, substantiated in a professional manner in the White House Briefing Paper. The White House Briefing Paper must be more effective than we thought since it elicited such a visceral reaction from Senator Biden's consultants.

~~Nothing in~~ The ~~Biden~~ consultants' critique ~~even begins to~~ does not undermine our claims. Though it asserts that the White House position paper contains factual inaccuracies, on examination it is quite clear that Senator Biden's consultants merely disagree with our interpretation of Judge Bork's undisputed record.

~~Their use of evidence is itself grossly distorting.~~ They ~~go to great lengths to~~ attempt to explain away as "uninformative" Judge Bork's sterling five-year record on the bench. Most people would consider this the best evidence of what kind of a Justice he will be. As Lloyd Cutler has said, his more than 400 judicial decisions "tell us far more about how Bork would perform as a Justice than his professorial writings ten to twenty years ago." It is ~~simply~~ remarkable that the authors of this report would dismiss his entire five-year judicial record as "uninformative."

all of this is eligible for deletion

The study also dismisses the next most probative evidence--Judge Bork's record as Solicitor General for four years. Their description of his civil rights advocacy in that position as "occasional" is astonishing--in 17 of the 19 amicus briefs which he filed in civil rights cases, he sided with the civil rights plaintiffs (and in the other two cases the Court adopted Judge Bork's position). ~~No wonder~~ yet only three paragraphs of this 72-page study are devoted to Robert Bork's four years as Solicitor General.

Additionally, the study repeatedly presents the authors' own ~~[illegible]~~ views of Supreme Court precedent and constitutional law as if they were the "mainstream" from which Judge Bork diverges. Indeed, in order to "prove" Judge Bork "wrong" they often quote dissents from his majority opinions.

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We look forward to the hearings on Judge Bork's confirmation and to joining in the debate related to his nomination and qualifications. We would hope that such debate would be conducted in a professional and dignified way, focusing upon Judge Bork's qualifications and record as a Judge and Solicitor General. The Supreme Court stands at the pinnacle of a co-equal branch of government, and considering a nominee for the Supreme Court deserves no less than having his qualifications evaluated on the high road.

If the debate over Judge Bork's confirmation comes down to the question of whether he is a principled proponent of judicial restraint or a hidden activist, then we have no doubt that he will prevail.

JOSEPH R. BIDEN, JR., DELAWARE, CHAIRMAN

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United States Senate

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EMBARGOED UNTIL 10:00 AM EDT
Thursday, 9/3/87

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.

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 Univerity 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 WQED, 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 Barishnokov'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 accomodations 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 constititionally 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 Subcommitte 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 whenver 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 restaint 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 Constitutution

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 consitutional 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 Constitituion 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).)[1]

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

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[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 thougt 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 peope 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 it** 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.