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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> No Court is constitutionally responsible for the legislature's intelligence, only for its own. So it is with the specific antitrust laws. Courts that know better ought not to accept delegations to make rules unrelated to reality and which, therefore, they know to be utterly arbitrary.
>
> * * * * * * *
>
> It would have been best...if the courts first confronted with the Clayton Act and later the Robinson-Patman Act had said something along these lines: We can discern no way in which tying arrangements, exclusive dealing contracts, vertical mergers, price differences, and the like injure competition or lead to monopoly....For these reasons, and since the statutes in question leave the ultimate economic judgment to us, we hold that, with the sole exception of horizontal mergers, the practices mentioned in the statutes never injure competition and hence are not illegal under the laws as written. (Id. at 410) (Emphasis added.)

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

> [P]recedent is less important in Sherman Act jurisprudence than elsewhere; and this just as well. There is no particular reason why courts have to keep doing harm, rather than good, once they understood economic reality.
>
> The Clayton Act and the Robinson-Patman Act are somewhat different animals....[T]hey tell the judge to prohibit... practices only when they may tend to injure competition. If the judge sees that they do not tend to injure competition, I think it is entirely proper for him to say so and to change prior doctrine, unless he is constrained by a precedent from a higher court. (Remarks, Antitrust Conference on "Changing Antitrust Standards. Judicial Precedent, Management" Responsibility and the New Economics, 1983, at 6.)

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

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

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

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

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

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

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

> If, as the panel assumes, the only legitimate purpose of the antitrust laws is this concern with the potential for decrease in output and rise in prices, reliance on market power alone might be appropriate. But, I do not believe that the debate over the purposes of antitrust laws has been settled yet. Until the Supreme Court provides more definitive instruction in this regard, I think it premature to construct an antitrust test that ignores all other potential concerns of the antitrust laws except for restriction of output and price raising. (Emphasis added.)
>
> Until the Supreme Court indicates that the only goal of antitrust law is to promote efficiency, as the panel uses the term, I think it more prudent to proceed with a pragmatic, albeit nonarithmatic and even untidy rule of reason analysis, than to adopt a market power test as the exclusive filtering out device for all potential violaters who do not commmand a significant market share. (Id. at 231-32.) (Emphasis in original.)

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

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

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

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

7. Summary

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. Judge Bork Has Narrowly Interpreted Statutes Promoting Workplace Safety

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

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

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

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

IV.

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

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

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

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

1. 1963: Judge Bork Opposed The Public Accomodations Bill

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

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

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

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

In Judge Bork's view:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

10. Summary

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

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

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

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

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

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

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

On another occasion, Judge Bork remarked:

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

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

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

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

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

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

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

2. Judge Bork Has Opposed The Equal Rights Amendment

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

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

3. Summary

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Later in the interview, Judge Bork added:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. Judge Bork Has Opposed Legislation Creating A Special Prosecutor

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

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

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

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

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

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

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

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

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

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

V.

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

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

A. Background

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

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

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

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

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

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

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

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

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

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

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

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

Moreover, he found

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

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

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

VI.

STARE DECISIS: RESPECT FOR AND ADHERENCE TO PRECEDENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Judge Bork also asserted in this same speech that:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Along these same lines, Judge Bork has commented:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> As if to reassure the liberal coalition on the abortion issue, Mr. [Lloyd] Cutler insists that Judge Bork's 'writings reflect a respect for precedent.' Nothing could be farther from the truth: What Judge Bork's writings -- spanning almost 20 years as a professor -- reflect is not a concern for precedent but a dogmatic commitment to a comprehensive or general theory and a willingness to deride decisions that do not agree with his theory.
>
> Judge Bork's performance on the Court of Appeals has not revealed a change in outlook. Indeed, his recent effort to confine the right-to-privacy decisions of the Supreme Court earned him a rebuke by he colleagues, who insisted that 'it is not...[the] function [of lower court judges] to conduct a general spring cleaning of constitutional law.' Elevating Judge Bork to the Supreme Court is not likely to instill within him a new reverence for authority, but rather to give him the power to write his views into law. (Letter to The New York Times, July 31, 1987.) (Emphasis added.)

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

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

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

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

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

APPENDIX A

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

APPENDIX B

LIST OF LANDMARK SUPREME COURT CASES REJECTED BY JUDGE BORK

CIVIL RIGHTS

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

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

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

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

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

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

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

PRIVACY

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

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

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

RELIGIOUS AND ETHNIC MINORITIES IN PUBLIC EDUCATION

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

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

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

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

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

FREEDOM OF SPEECH

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

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

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

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

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

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

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

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

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

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

ANTITRUST

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

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

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

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