- The report goes to great lengths to explain why Judge Bork's record on the Court of Appeals, and the decisions he has rendered in over 400 cases, are irrelevant. (See Section III A.) This is a breathtaking exclusion of what most people are likely to regard as the most probative evidence of what kind of a judge he would be: i.e., what kind of judge he has been.

- Why do they call his record in over 400 cases "uninformative" and seek to rely instead on law review articles 15-20 years old? Perhaps because his judicial record renders their position untenable. For example, on civil rights, Lloyd Cutler pointed out:

> "Bork took part [on the Court of Appeals] in 24 race, sex, and age discrimination cases. In 14 of these cases, the decision turned on a procedural issue or on factual findings of the trial court. In the ten remaining cases involving substantive legal issues as to the scope of the protected right, Bork voted in the plaintiff's favor seven times. In two of the three cases in which Bork voted against the plaintiff, the Supreme Court upheld Bork's position."

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

- Indeed, it is interesting to note that they even claim that his record as Solicitor General was less supportive of individual rights than those of his predecessor and successor because he sided with criminal defendants less often in criminal cases than did his predecessor and successor. The authors do not make any genuine attempt to criticize his record as Solicitor General. They just wish it would go away.

- For some reason, the authors believe that when a judge joins rather than authors an opinion, that opinion does not reflect the judge's views. Most judges would be quite surprised to hear this, since they only join opinions which do reflect their views and often demand substantial rewriting from the authoring judge before they join. Thus, when the authors claim that Justice Powell's agreement with Judge Bork in a host of cases cannot be inferred because Justice Powell joined

rather than authored the Supreme Court opinion adopting Bork's position, they are speaking nonsense.

- The authors seem to think it proves their point that Judge Bork was incorrect in a given case to cite a dissenting judge's opinion to that effect. For example, in Dronenberg v. Zech, the case in which Judge Bork held that the Constitution does not confer a "right" to homosexuality, the four dissenting judges charged that Judge Bork had engaged in a "spring cleaning of constitutional law." Apparently, a majority of the D.C. Circuit disagreed, since those four judges were in dissent. And the majority was correct, as evidenced by the fact that the Supreme Court then adopted Judge Bork's position one year later in Bowers v. Hardwick.

- For the most part, this report is simply a rehash of the heavily ideological criticisms that have been heard all summer long. What is striking is the extent to which the authors present their often eccentric views on law as if they were the governing doctrine. For example, they criticize Judge Bork for refusing to use the Ninth Amendment to create new rights not mentioned in the Constitution. They neglect to mention that the Supreme Court has never upheld a claim under the Ninth Amendment, and bringing such a claim is widely regarded as the easiest way to get laughed out of the courtroom. To take another example, they devote an entire section to attacking Judge Bork's view on antitrust. In so

doing, they take issue with the views of 15 past chairmen of the ABA Section on Antitrust Law, who wrote in a recent letter that "no one has helped promote" the "mainstream view" in antitrust more than Judge Bork. They explained:

> "It is indicative of the value of Judge Bork's contributions that The Antitrust Paradox [Bork's book] has been referred to by the United States Supreme Court and by the U.S. Circuit Courts of Appeals in 75 decisions since its publication. Perhaps the clearest evidence of its influence is that it has been cited approvingly by no fewer than six majority opinions written by Justices commonly viewed as having widely varied judicial philosophies: by Justice Brennan in Carquill v. Monfort of Colorado, Inc., 107 S.Ct. 484, 495 n. 17 (1986); by Justice Powell in Matsushita Electrical Industries v. Zenith Radio Co., 106 S.Ct. 1348, 1357 (1986); by Justice Stevens in Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 105 S.Ct. 2847, 2858 and n. 29, 31, 2860-61 n. 39 (1985) and NCAA v. Board of Regents, 468 U.S. 85, 101 (1984); and by former Chief Justice Burger in Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1978) and United States v. United States Gypsum Co., 438 U.S. 422, 442 (1978). Justice O'Connor also relied on The Antitrust Paradox in her concurring opinion in Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 36 (1984), as did Justice Blackmun in his dissent in National Society of Professional Engineers v. United

States, 435 U.S. 679, 700 n.* (1978). It should also be noted that every member of the present Supreme Court joined one or another or these opinions.

- There is simply no value in engaging in a page by page refutation of this study, although we will be happy to address any specific points that require response. Judge Bork's record in public service--as a federal judge and as Solicitor General--obviously makes his opponents quite uncomfortable. They hope that if they ignore it, and focus attention on his academic writings from a decade or more ago, others will too. But his record will not go away, and we intend to continue discussing it at every opportunity. We stand by the Briefing Book.

This report reveals far more about the extremism of its authors than it does about Judge Bork.

STATEMENT

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

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

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

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

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

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

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

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

Peter Russell

THE WHITE HOUSE

WASHINGTON

September 4, 1987

MEMORANDUM FOR MARLIN FITZWATER
THOMAS C. GRISCOM

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

SUBJECT: Revision of Statement on Biden Critique

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

Attachment

STATEMENT

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

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

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

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

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THE WHITE HOUSE

WASHINGTON

September 4, 1987

MEMORANDUM FOR MARLIN FITZWATER
THOMAS C. GRISCOM

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

SUBJECT: Second Revision of Statement on Biden Critique

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

Attachment

ABC REVISIONS

STATEMENT

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

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

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

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

ERRORS AND OMISSIONS IN THE "RESPONSE PREPARED TO WHITE HOUSE ANALYSIS OF JUDGE BORK'S RECORD"

September 8, 1987

HIGHLIGHTS

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ERRORS AND OMISSIONS IN THE "RESPONSE PREPARED TO WHITE HOUSE ANALYSIS OF JUDGE BORK'S RECORD"

On Thursday, September 3, Senator Biden issued a report prepared at his request reviewing Judge Bork's record. The report criticized an earlier White House document performing a similar review on the ground that it "contain[ed] a number of inaccuracies" and that "the picture it paint[ed] of Judge Bork is a distortion of his record." It claimed that it would undertake "to depict Judge Bork's record more fully and accurately."

In fact, however, the Biden Report is a highly partisan and incomplete portrayal of the nominee. If it were a brief filed on the question, its misleading assertions and omissions go far enough beyond the limits of zealous advocacy to warrant Rule 11 sanctions. It contains 81 clear distortions and mischaracterizations. Among the most significant:

- The Report claims that Judge Bork's perfect record of nonreversal by the Supreme Court in the more than 400 majority opinions he has written or joined is "uninformative" -- flippantly dismissing the clearest, most extensive, and most recent evidence of Judge Bork's views.

- The Report mischaracterizes Judge Bork's well-known views on free speech, claiming, for example, that he has doubts about the First Amendment's proscription of prior restraints. In fact Judge Bork's only case involving prior restraints -- which the Report fails to discuss -- clearly indicates that he would invalidate them.

- The Report contends that Judge Bork has consistently opposed virtually every major civil rights advance on which he has taken a position, despite the fact that as Solicitor General, he argued for and won several major civil rights victories, and despite his excellent record on civil rights issues as a federal judge.

- The Report falsely claims that there is strong evidence to suggest that Judge Bork would overturn a substantial number of Supreme Court cases. It ignores his repeated affirmations of the importance of abiding by existing precedent. It does not cite a single instance in which Judge Bork has said that he would overturn a Supreme Court precedent. Instead it incorrectly infers that Judge Bork's criticism of a case is tantamount to an announcement that he would overrule it, despite his express statements to the contrary.

The attached study presents a detailed response to the allegations in the Biden Report.

CONTENTS

ERRORS AND OMISSIONS IN THE "RESPONSE PREPARED TO WHITE HOUSE ANALYSIS OF JUDGE BORK'S RECORD"

The Response Prepared to White House Analysis of Judge Bork's Record commissioned by Senate Judiciary Committee Chairman Joseph Biden (hereafter the "Biden Report" contains numerous errors, mischaracterizations, and omissions. Seventy-six of the most significant errors are described in this report.

Section I -- The Biden Report's Summary

1. The Biden Report states that "members of the D.C. Circuit charged Judge Bork with attempting to 'wipe away selected Supreme Court opinions in the name of judicial restraint' and with 'conducting a general spring cleaning of constitutional law.'" The charges are taken from a dissenting opinion, Dronenburg v. Zech, 746 F.2d 1579, denying rehearing of 741 F.2d 1388 (D.C. Cir. 1984). A majority of the D.C. Circuit evidently did not feel that Judge Bork's opinion did anything of the sort, since it let the opinion stand. Carter appointee Judge Ruth Bader Ginsburg wrote separately in order to explain specifically why she felt there was nothing improper about Judge Bork's opinion, and stated that the dissenters' use of the term "bends 'judicial restraint' out of shape." 746 F.2d at 1581 n. 1.

2. The Biden Report fails to include any of the subsequent history of the case in which those charges were made, which demonstrates that they were baseless:

> -- A year and a half later, in Bowers v. Hardwick, 106 S. Ct. 284 (1986), the Supreme Court reached the same conclusion that Judge Bork arrived at in the opinion the dissenters were criticizing, ruling 5-4 that the Constitution does not protect private homosexual conduct. It specifically noted, as a reason for construing its prior privacy decisions narrowly, that "[t]he Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made law having little or no cognizable roots in the language or design of the Constitution."
>
> -- Finally, Justice Powell specifically stated in a concurrence in that case that "there is no fundamental right, i.e. no substantive right under the Due Process Clause, to engage in" private homosexual conduct. 106 S. Ct. at 2847.

3. The Biden Report is misleading because it does not indicate that the opinion of Judge Bork to which the judges were referring refused to find a constitutional right to engage in private homosexual conduct, a right whose existence the Supreme Court also had not recognized at the time.

4. The Biden Report's claim that "Judge Bork has repeatedly rejected [Griswold v. Connecticut,] the decision upholding the right of married couples to use contraceptives" is misleading in the extreme. Judge Bork has never ruled on a case involving married couples' use of contraceptives. Nor has he stated or indicated anywhere that if he had to decide such a case as a lower court judge, he would do anything other than follow the relevant Supreme Court case. Nor has he stated or indicated that he would overrule that case as a Supreme Court Justice.

5. All Judge Bork has done is to criticize the Supreme Court case's reasoning and decline to extend that reasoning to new areas such as homosexual rights. That is a very common approach for judges to take toward precedents with which they disagree. See, e.g., Shearson American Express v. McMahon, 107 S. Ct. 2332 (1987). Every lawyer who is even slightly sophisticated knows that there is a world of difference between disagreeing with a case's reasoning and declining to extend that reasoning, on the one hand, and disregarding or overruling it, on the other. But the Biden Report's use of the verb "reject" in instances such as this, where all Judge Bork has done is either criticize or at most refuse to extend a precedent, causes the reader to believe that in all those instances Judge Bork would also disregard or overrule the precedent. Since the authors of the Biden Report are evidently sophisticated lawyers, they certainly know better. Their selection of a verb that confuses the two questions is accordingly deliberate obfuscation. See also Biden Report 3 ("Judge Bork has repeatedly and consistently rejected the right to be free from governmental interference with one's private life"); Biden Report 4 ("Judge Bork has rejected many of the Supreme Court's leading antitrust decisions"); Biden Report 4 ("in the area of church-state relations, Judge Bork has rejected several Supreme Court decisions").

6. The Biden Report's characterization of Judge Bork as some kind of antitrust radical is absurd. Biden Report 3-4. As noted in a letter signed by 15 past chairmen of the American Bar Association's Antitrust Section, Judge Bork's seminal work, The Antitrust Paradox, has been relied on in opinions written or joined by all nine of the current Supreme Court Justices. One can only conclude that if Judge Bork's views on antitrust are "a vivid demonstration of his judicial activism," Biden Report 3, the entire Supreme Court as presently constituted is a bastion of judicial activism--in which case Judge Bork's appointment to it is unlikely to make a great deal of difference.

7. The Biden Report's statement that "Judge Bork's writings show that he would protect only speech that is tied to the political process, and that he would not protect artistic and literary expression such as Shakespeare's plays, Rubens' paintings, and Barishnikov's ballet" is flatly incorrect. As Judge Bork stated in his Worldnet interview:

"there is a spectrum ... 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, into moral speech and scientific speech, into fiction and so forth."

8. The Biden Report's reference to "Judge Bork's willingness to overturn numerous landmark Supreme Court decisions," Biden Report 5, is utterly without basis. Judge Bork has never stated that he would overturn any Supreme Court cases--as the Report tacitly recognizes earlier in a stunning double negative ("Judge Bork ... has never said that the Supreme Court should not overturn its prior decisions establishing and extending the right to privacy," id. at 3).

9. The Biden Report's claim that "Judge Bork's extensive record shows that he has opposed virtually every major civil rights advance on which he has taken a position, including such issues as the public accomodations [sic] bill, open housing, restrictive covenants, literacy tests, poll taxes, and affirmative action" is utterly unfounded. It is preposterous to argue that Judge Bork, who briefed and argued and won, among others, Runyon v. McCrary, 427 U.S. 160 (1976), a case significantly extending the civil rights laws' coverage of private conduct, and Lau v. Nichols, 414 U.S. 563 (1974), a case establishing the illegality of conduct with no discriminatory intent but only discriminatory effects, has "opposed virtually every major civil rights advance on which he has taken a position."

10. The Biden Report fails to indicate that in every instance the Biden Report cites as evidence for its claim except for the 1963 Public Accommodations bill (with respect to which, as the Report recognizes, Judge Bork later changed his mind) Judge Bork in no way disagreed with the policy ends sought to be accomplished by the proponents of the civil rights measures. Moreover, there is nothing in Judge Bork's life that in any way suggests any form of bigotry.

11. Instead, what Judge Bork has done is criticize the reasoning of several decisions. The Biden Report's analysis of these criticisms is misleading because it fails to indicate that they are part of a broad scholarly consensus on those cases. With respect to Shelley v. Kraemer, 334 U.S. 1 (1948), the racial covenants case, and Reitman v. Mulkie, 387 U.S. 369 (1967), the open housing case, for example, Professor Tribe stated in American Constitutional Law that "[t]o contemporary commentators, Shelley and Reitman appear as highly controversial decisions" and that "the critical consensus has it [that] ... the Court's finding of state action [is not] supported by any reasoning which would suggest that 'state action' is a meaningful requirement rather than an empty formality." See also id. at 1157 n. 37 ("The standard critique of Shelley is definitively stated in Wechsler, 'Toward Neutral Principles of Constitutional

Law,' 73 Harv. L. Rev. 1, 29-31 (1959). The Reitman opinion has been criticized even by defenders of its result.")

12. There is a striking contrast between Professor Tribe's measured, scholarly treatment of critics of these decisions in his hornbook and the denunciation of Judge Bork as an opponent of civil rights on the basis of his criticism of them in a report whose conclusions Professor Tribe approved. It indicates that the Biden Report's indignation at Judge Bork's criticism is feigned for political purposes for the benefit of non-lawyers. It hopes that nonlawyers will be unaware of (a) the significant controversy surrounding the reasoning of these opinions among distinguished legal scholars of all political persuasions and (b) the difference between disagreeing with a case's reasoning and disapproving of its outcome on policy grounds.

Section II -- Establishing the Context

13. The single major distortion in this section is that the effect of a Bork appointment would be to permit "a determined President ... [to] bend [the Court] to political ends that he can not achieve through the legislative process."

-- The Biden Report cites no instance of how Judge Bork's appointment would have that effect.

-- Even if its apocalyptic claims regarding Judge Bork's willingness to reverse prior constitutional cases were true, as they are not, the authors of the Report know full well that the only effect would be to permit the political process to decide questions that the courts have placed beyond its reach. For example, even if Roe v. Wade or Griswold v. Connecticut were reversed, the effect would not be that abortion or access to contraceptives would suddenly become illegal. Rather, Congress or the states would have to pass laws to that effect.

14. Thus even accepting its premises, the Biden Report's claim that a Bork appointment would permit the President to accomplish his social agenda through the Supreme Court is extremely misleading. All it could possibly do is allow the President and the Congress to fight out these issues in the political arena.

Section III
Judge Bork's record of Judicial Restraint

15. The Biden Report claims that Judge Bork's perfect record of nonreversal by the Supreme Court is "uninformative." (Biden Report at p. 14) Thus, it flippantly -- and misleadingly -- dismisses five years and hundreds of opinions and votes that are incontestably the best evidence of Judge Bork's measure as a Justice. As Lloyd Cutler has said, Bork's opinion in Ollman v. Evans alone "tells us far more about how Bork would perform as a

justice than his professorial writings ten to twenty-five years ago."

16. The Biden Report's rationale for its remarkable exclusionary rule--that "[a]s an intermediate court judge, the nominee has been constitutionally and institutionally bound to respect and apply Supreme Court precedent"--is a palpable misrepresentation. All lower court judges are "constitutionally and institutionally bound" to apply the Supreme Court's precedents; the real question is whether they are willing and able to fulfill that obligation. Many of Judge Bork's liberal, activist colleagues on the U.S. Court of Appeals for the D.C. Circuit have been repeatedly, and sometimes scathingly, reversed by the Supreme Court for ignoring or misreading binding precedent; e.g., the five occasions on which the Supreme Court overruled D.C. Circuit majority opinions and adopted Judge Bork's dissents.

17. Contrary to the Biden Report's conclusion, Judge Bork's impeccable record of nonreversal shows his respect for stare decisis and his skill at conscientiously applying existing Supreme Court caselaw to facts. This faithful application of law and precedent over his entire tenure as a judge augurs well for his service on the Supreme Court and renders the Biden Report's account of his record thoroughly misleading.

18. The Biden Report (p. 15) grossly distorts the Supreme Court's decision in Meritor Savings Bank v. Vinson, 106 S.Ct. 2399 (1986). The Report's claim that the Vinson Court unanimously rejected the reasoning of Judge Bork's dissent is flatly incorrect. As even the Report concedes, "[t]he Court did agree with Judge Bork on the evidentiary issue." Examination of the opinions makes clear that the Court agreed with the substance of Judge Bork's reasoning on liability, as well. It is the Biden Report, not the White House position, which supplies a "factually inaccurate and misleading description" of Vinson.

19. The Biden Report (at p.16) misrepresents Judge Bork's position in Planned Parenthood Federation v. Heckler, 712 F.2d 650 (D.C.Cir. 1983), in which he agreed with the majority in rejecting the claim of statutory authority advanced by the Reagan Administration, which premised its family-notification requirements on a 1981 amendment to Title X. Judge Bork's disagreement with the majority belies the Biden Report's claim that his opinion was "anything but deferential and non-activist": he would have followed the Supreme Court's well-settled rule in SEC v. Chenery by remanding to the agency for articulation of alternative bases for its holding. It is simply Orwellian to suggest that Judge Bork's proposal to remand to the agency for further consideration is less "deferential" to its administrative expertise than the majority's final and conclusive ruling, which left no further scope for agency consideration. It is

similarly misleading to suggest that Judge Bork's deference to the agency was somehow "activist."

20. The Biden Report apparently attempts to diminish the significance of Judge Bork's perfect record of nonreversal by the Supreme Court by emphasizing that the Supreme Court has until recently never granted review for one of Judge Bork's majority opinions (Biden Report at p. 17). The report apparently implies that one therefore cannot assume anything about the quality of his opinions--which is akin to saying that you can't judge whether someone is law-abiding because he has never been arrested and tried. If Judge Bork were writing activist opinions that departed from the law, the losing litigants would appeal. The fact that fewer than one in ten of the losing litigants in his cases sought Supreme Court review is a sign of the strength of his opinions, not an indication that they can be discounted. The same inference should be drawn from the fact that until this term the Supreme Court never chose to grant review of any of his opinions: the Court's writ of certiorari (literally, to make more certain) is principally used to rectify what the Justices perceive as important errors in lower court opinions. Their failure to grant review for his opinions is a significant compliment, not a slight.

21. The Biden Report is particularly disingenuous on this point, because it argues later that many of Judge Bork's opinions have been important and radical departures from binding precedent. If Judge Bork's record were really the parade of horribles that the report claims, it would be inconceivable that the Supreme Court would not grant certiorari and reverse him. The Biden Report cannot have it both ways.

22. The Biden Report's disingenuousness is particularly apparent because it glosses over without mention the fact that none of the more than 300 majority opinions joined but not authored by Judge Bork over his five years on the bench has ever been reversed--a remarkable and highly unusual testimonial to his legal judgment. Similarly, the Biden Report ignores the fact that although Judge Bork rarely dissents (he has been in the majority of his court 94 % of the time) his dissents carry great weight with the Supreme Court, which has repeatedly adopted his rationales over the holdings of the majority.

23. The Biden Report further attempts to exclude the most probative evidence of Judge Bork's suitability by distorting his own statements about his cases. The report cites Judge Bork's statement that the ideological divisions on his court make no difference in 9/10's of all his cases, then goes on to give the following grossly inaccurate summary of his remarks: "According to Judge Bork, therefore, 90% of his cases on the D.C. Circuit are non-ideological and, consequently, non-controversial." (Biden Report at p. 17). Aside from blatantly putting words in the Judge's mouth, the authors' assumption that only

ideologically charged cases are difficult, controversial, or worthy of the public's or the Supreme Court's attention speaks volumes about their own extremist, rigidly ideological view of the law -- a view that enables them to assert, and apparently to believe, that Judge Bork's "circuit court record says nothing about his suitability for the Supreme Court. . . ." (Id.)

24. In fact, Judge Bork's statements about the irrelevance of ideology to his work on the court show his own professionalism, and they echo the professionalism of his colleagues on the bench across the political spectrum--an attitude towards the law strikingly at odds with that shown in the Biden Report. Judge Bork's colleague Judge Harry Edwards, a Democratic appointee, has written that "efforts to tag judges as 'liberal' or 'conservative' are fundamentally misguided," citing as evidence of this the remarkable degree of agreement on decisions between himself and Judge Bork. And Chief Judge Patricia Wald, another Democratic appointee, wrote a blistering critique of lawyers who "simplistically characterize" judges as "liberal" or "conservative," warning lawyers "not [to] try to handicap old myths about nonexistent fueds or rumors about philosophic differences between us." It is a warning the authors of the Biden Report have failed to heed.

25. The Biden Report misrepresents the dissimilarity between the judicial philosophies of retiring Justice Lewis Powell and Judge Bork. It incorrectly claims that no similarity can be discerned in the fact that Justice Powell and Judge Bork voted substantially the same way in nine of the ten cases that went before the Supreme Court, because "a careful analysis . . . shows that Judge Bork and Justice Powell both wrote opinions in only two [of the cases]." (Biden Report at p. 18). This so-called "careful analysis does not explain why we should disregard the fact that the two jurists joined in substantially the same conclusions--whether they actually wrote or not--in nine of ten cases.

26. Neither President Reagan nor Judge Bork has ever claimed that Justice Powell's jurisprudence is identical to that of Judge Bork. It is the opponents of Judge Bork who argue that Lewis Powell's successor should be required to replicate his jurisprudence -- a jurisprudence that, in many areas, these same opponents have scathingly criticized in the past. Judge Bork's proponents have merely pointed out that he is a fairminded proponent of judicial restraint -- a judicial conservative, not a political one. Lloyd Cutler, President Carter's Counsel, has written that while all judges pay lip service to judicial restraint, "few rigorously observe it. Justices Oliver Wendell Holmes, Louis D. Brandeis, Felix Frankfurter, Potter Stewart, and Lewis F. Powell, Jr., were among those few, and Judge Bork's articles and opinions confirm that he would be another." The President himself has merely stated that "[i]t's hard for a fairminded person to escape the conclusion that if you want

someone with Justice Powell's detachment and statesmanship, you can't do better than Judge Bork" -- a demonstrably true statement.

27. The Biden Report fails to take account of the evidence which indicates that even beyond the question of general judicial temperament and craftsmanship, however, there are broad convergences between the jurisprudence of these two judges. Justice Powell, for example, has been a leading architect of the reinvigoration of the doctrines of standing and justiciability for which Judge Bork has been so roundly criticized. And Justice Powell cast the decisive vote in Hardwick v. Bowers, which reached the same result that Judge Bork propounded in Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984)--that the Constitution and Supreme Court precedent did not vouchsafe a right to practice homosexual sodomy. (See also, Nos. 1-3 above).

28. In criminal jurisprudence Justice Powell, like Judge Bork, has been a leading exponent of the truthseeking function of criminal trials, contrary to the consistent advocacy of the American Civil Liberties Union, a prominent opponent of Judge Bork. Justice Powell has repeatedly, over more than a decade, rejected the arguments of the ACLU and other liberal advocacy organizations that capital punishment is per se unconstitutional.
Similarly, Judge Bork has repeatedly refuted these same arguments in print. Just last term, Justice Powell cast the decisive vote in the McClesky case, a 5-4 decision that rebuffed an equal protection challenge which would have effectively ended capital punishment.

29. The Biden Report fails to acknowledge another interesting parallel between Justice Powell and Judge Bork: Justice Powell, like Judge Bork, was vituperated by leftist feminist and civil rights organizations and spokesmen during his confirmation hearings for the Supreme Court.

> -- Congressman Conyers on behalf of the Black Caucus testified that Powell was "inconsistent with the kind of jurist [who] . . . is desperately needed for the Court in the 1970's and 1980's." (Senate Hearings on the Confirmation of Louis Powell, 1971).
>
> -- Henry L. Marsh III, testifying on behalf of the Old Dominion Bar Association of Virginia, stated that Powell's confirmation in the face of his "record of continued hostility to the law, his continual war on the Constitution, would . . . demonstrate to us that this Senate is not concerned with the rights of black citizens in this country." (Id.)
>
> -- Wilma Scott Heide, the President of the National Organization of Women, testified that Powell's confirmation

would mean that "justice for women would be ignored or further delayed which means justice denied." (Id.)

-- Catherine G. Rohraback, President of the National Lawyers' Guild, testified that nominees Powell and Rehnquist "would be incapable of dealing fairly and impartially with issues arising out...the struggle of blacks, other third world people, women and other oppressed groups for social, political and economic equality." She stated that Powell had defended "unconstitutional" wiretapping, and that "[i]n his political views, Mr. Powell does not 'bend' or 'twist' the Constitution, to use the President's language. Rather, he totally ignores it." (Id.)

-- Paul O'Dwyer, a prominent New York liberal attorney, testified that Justice Powell and his fellow nominee William H. Rehnquist had been "eloquent spokesmen for wiretapping and other insidious governmental techniques designed to stifle dissent and to challenge personal liberties guarenteed by the Constitution and the Bill of Rights. . . ." He told the Judiciary Committee that in national security cases "Mr. Powell claim[s] that the President is above the law, the Constitution, and the fourth amendment. . . ." On the Supreme Court, O'Dwyer said, Powell "would be but [the] echo" of the executive branch. (Id.)

The charges routinely brought by these extremist special-interest groups against distinguished judicial appointees are as false with respect to Judge Bork as they were with respect to Justice Powell.

30. The Biden Report grossly distorts Judge Bork's opinion in Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984). In Dronenburg Judge Bork reviewed Supreme Court precedents on the right to privacy and concluded that they did not encompass a constitutionally-protected right to practice homosexual sodomy. Although the Supreme Court later reached precisely the same conclusion in Hardwick v. Bowers--a decision in which Justice Powell concurred--the report misleadingly claims that "Judge Bork's theory of lower court constitutional jurisprudence in Dronenburg . . . has never been expressed or endorsed by the Supreme Court." (Biden Report at p. 18). The Biden Report goes on to cite from the dissent in Dronenburg to prove that Judge Bork's opinion was judicially 'unrestrained'--a peculiar way to prove the point, since both a clear majority of Judge Bork's own court and the Supreme Court shared his 'activist' and 'unrestrained' view of this area of the law. It is interesting that Professor Archibald Cox's new book The Court and the Constitution took Dronenburg as a paradigmatic case and noted that while the author "would give the Court a somewhat larger and more creative role," Judge Bork's opinion in the case

"stated the conservative judge's reasons clearly and persuasively."

31. The Biden Report inaccurately implies that the criticisms contained in the majority opinion in United States v. Meyer, No. 85-6169 (D.C. Cir. July 31, 1987) are in some way directed at Judge Bork personally, rather than at the jurisprudence of the almost one-half of the D.C.Circuit that jointly issued a dissent to the majority's reversal of course. Though the report asserts that Judge Bork is the "head of the faction" seeking rehearing en banc of the cases, there is not a scrap of evidence in the opinions -- either majority or dissent -- to suggest that this is the case or that the majority was specifically stigmatizing Judge Bork's jurisprudence (Biden Report at p. 19). The report's attempt to depict a broadside fired at virtually half the D.C. Circuit as a personal critique of Judge Bork's jurisprudence is wholly unwarranted.

32. The Biden Report's characterization of Judge Bork's view of the privacy cases as "indicative of [his] willingness to discard the text, history and tradition of the Constitution in order to achieve the results he desires" is Orwellian (Biden Report at pp.20-26). It suggests that Judge Bork personally "desires" outlawing contraceptives [Griswold], mandatory sterilization of criminals [Skinner] and workers [American Cyanamid], denial of divorced parents' visitation rights to children [Franz], outlawing of the teaching of foreign languages [Meyer] or of parochial schools [Pierce]. The Biden Report does not produce on shred of evidence that this is the case. These suggestions are slandorous and contemptible -- like suggesting that Justice Frankfurter dissented in Screws v. United States because he "desired" racist murders.

33. The Biden Report assertions about Judge Bork's personal policy views are also directly contradicted by the many instances on which Judge Bork has, on legal grounds, opposed laws that further policies of which he affirmatively approves, such as a balanced budget amendment. Thus, Judge Bork's legal views of cases tell us exactly nothing about his policy preferences, indicating that he is willing to set them aside in deciding legal issues. As the revered civil libertarian Justice Hugo Black wrote in dissenting from Griswold, "I like my privacy as well as the next one, but I am nevertheless compelled to admit that a government has the right to invade it unless prohibited by some specific constitutional provision...."

34. The Biden Report quotes Judge Bork's legal criticisms of Roe v. Wade but attempts to dismiss as irrelevant the fact that they were expressed in testimony opposing the "Human Life Bill" -- conservative legislation to strip the courts of jurisdiction to hear abortion cases (Biden Report at p. 20). It is unclear why an alleged result-oriented activist--as they claim Judge Bork is--would have so many scruples about the legislature

trampling on the Constitution and so few about the courts doing so. This directly contradicts the Biden Report's charge that Judge Bork's only concern is "to achieve the results he desires." (Id.)

35. The Biden Report attempts to misrepresent the holding of Oil, Chemical and Atomic Workers International v. American Cynamid Co., 741 F.2d 444 (D.C. Cir. 1984) by juxtaposing it with Skinner v. Oklahoma, 316 U.S. 535 (1942), a constitutional law case (Id. at 21). In fact, American Cynamid was a straight statutory construction issue which had nothing to do with constitutional law, much less the right to privacy or Skinner.

36. The Biden Report's presentation of Judge Bork's critical views on Meyer v. Nebraska and Pierce v. Society of Sisters obscures the fact that his views are thoroughly representative of scholarly opinion (Biden Report at pp. 22-23). The opinions in these cases were written by conservative Justice McReynolds, of whom one authority on the Court has written that "[p]olitically and jurisprudentially...[he] came to embrace a philosophy of reaction to progress second to none, and in his personal demeanor on the bench was a disgrace to the Court [because of his anti-Semitism and racism]....Certainly, [he] deservedly earned the all but unanimous condemnation of the Court experts, who have rated him at the top of their brief list of failures." (Abraham, Justices and Presidents 176, 177-78 (2d ed. 1985)). The Report also fails to indicate that Meyers was dissented from by Oliver Wendell Holmes.

37. The Biden Report inaccurately states that Judge Bork "ignores the famous dissent of Justice Brandeis" in Olmstead v. United States, 277 U.S. 438 (1928), in which Justice Brandeis discussed the protections of privacy afforded by the Fourth and Fifth Amendments as being "intended to secure conditions favorable to the pursuit of happiness," including "the right to be left alone--the most comprehensive of rights and the right most valued by civilized man." (Biden Report at p.25). In fact, Judge Bork's jurisprudence is firmly based on the insight of Brandeis' Olmstead dissent, which sought to apply the guarantees of the Fourth Amendment to wiretapping--a technology nonexistent at the time of the Constitution's adoption. Judge Bork incorporated this expansive view of original intent into his most famous opinion, Ollman v. Evans:

> "It is the task of the judge in this generation to discern how the framers' values, defined in the context of the world they knew, apply to the world we know. The world changes in which unchanging values find their application. "The fourth amendment was framed by men who did not foresee electronic surveillance. But that does not make it wrong for judges to apply the central value of that amendment to electronic invasions of personal privacy." (750 F.2d at 995).

38. More generally, Judge Bork recognizes that the Constitution contains a right to privacy--not the generalized, judge-made, open-ended "right" scathingly criticized by Justice Black and others, but the specific guarantees of the Fourth Amendment, fairly read to accommodate the changes wrought by two centuries. It is the authors of the Biden Report, not Judge Bork, who have failed to take Justice Brandeis' teaching in Olmstead properly into account.

39. The Biden Report is again wholly misleading in its claim that Judge Bork's views are "fundamentally at odds with those of Justice Harlan." (Biden Report at p. 25). Judge Bork has repeatedly expressed his admiration for the views of Justice John Marshall Harlan, whose scholarly and conservative outlook on the law has led many eminent lawyers and scholars to class Judge Bork with him jurisprudentially. Justice Harlan's views of the Due Process Clause of the Fourteenth Amendment, which were based on the "ordered liberty" test propounded in Palko v. Connecticut, were not the basis for the Court's decisions in Griswold and Roe. It is thus bizarre for the authors of the report to criticize Judge Bork for his respectful disagreement with this aspect of Justice Harlan's jurisprudence, given the wide areas of agreement shared by these two jurists.

40. The Biden Report misrepresents the mainstream view of the 9th Amendment in criticizing Judge Bork's refusal to use that Amendment to create new law (Biden Report at p. 26). Characteristically, the authors present their own extremist ideology as if it were governing precedent. They neglect to mention that the Supreme Court has never upheld a claim under the 9th Amendment. As with Dronenburg and antitrust law, the Report pillories Judge Bork for taking position which are in the mainstream of American jurisprudence and which have been authoritatively stated by the Supreme Court.

41. The Biden Report distorts Judge Bork's view of the Bill of Rights, maintaining that he seeks "the 'narrowed' definition of individual rights that the framers feared." (Id. at p. 27). This is nonsense. Judge Bork's record as Solicitor General and as an appellate court judge establishes his devotion to the Bill of Rights. And he is no exponent of "narrow" interpretations: as he told the Judiciary Committee in 1982 prior to his unanimous confirmation to the Court of Appeals, judicial imperialism is a better term than activism for courts that have "gone too far and lost [their] roots in the Constitution," because "a court should be active in defending those rights which the Constitution spells out." ("Confirmation of Federal Judges," Hearings Before the Judiciary Committee, 1982, at 14) (Emphasis supplied.)

42. The Biden Report distorts Judge Bork's views of standing. Contrary to its claims that Bork has taken a "very narrow," "crabbed," "novel and unprecedented" view of standing, Judge

Bork's views of standing are thoroughly in the mainstream. It is the Report that is advocating "novel" legal views. Justice Powell has taken the lead in reinvigorating the doctrines governing access to the courts in his opinions in U.S. v. Richardson, Warth v. Selden and Simon v. Eastern Kentucky Welfare Rights Organization. His views -- repeatedly attacked by liberal commentators -- are indistinguishable from Judge Bork's.

43. The Biden Report misrepresents Judge Bork's opinion in Vander Jagt v. O'Neill, 699 F.2d 1166 (D.C. Cir. 1983). In Vander Jagt, the supposedly political and reactionary Judge Bork voted to reject a suit by House Republicans against the Democratic leadership -- a fact that sheds light on the Report's claims about his "activism." Unmentioned by the Report is the fact that the Supreme Court in Allen v. Wright quoted approvingly and at length from Bork's "novel" opinion in Vander Jagt to reach its conclusion. Clearly it is Judge Bork who is in the mainstream on access cases, and the authors of the report who are outside it.

44. The same is true of the Biden Report's distortions of Bork's antitrust record. As was stated in a letter from 15 past chairmen of the ABA's Antitrust Section, "Judge Bork's writings in this area have been among the most influential scholarship ever produced . . . [N]o one has helped promote [the mainstream view of antitrust] more than Judge Bork." The chairmen's letter points out that Judge Bork's leading work on antitrust, the Antitrust Paradox, has been referred to in 75 decisions of the Supreme Court and the courts of appeals in the ten years since its publication, and has been cited in opinions written or joined by all nine present Justices of the Supreme Court. Thus, the Biden Report's claim that Bork is outside the mainstream of antitrust law is absurd.

45. The Biden Report misrepresents Judge Bork's decision in Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210 (D.C. Cir 1986). Far from "promot[ing] his extreme views . . . [and] [s]ingle-handedly repudiating numerous Supreme Court cases to the contrary," as the Report claims, Judge Bork conscientiously parsed conflicting Supreme Court precedent to follow the latest expression of the Court's views. Whatever else the Report could have called Bork's efforts in Rothery, they were not "single-handed": his opinion was joined in toto by Carter appointee Ruth Bader Ginsburg, while fellow Carter appointee Judge Wald "concur[red] in the result and much of the reasoning of the panel's opinion."

Section IV -- Specific Questions.

Civil Rights

46. The Biden Report claims that Judge Bork's dismay over the possibility that a male-only draft might be challenged under the Equal Protection Clause indicates that he is skeptical as to whether women are protected under that provision. (Biden Report at 49). To the extent this obviously off the cuff statement indicates much of anything, it indicates instead that he is skeptical whether men are protected under that clause, since the likely plaintiff in such a suit would not be a woman seeking to be drafted, but a man objecting to being drafted.

See also Nos. 9-12 above.

Freedom of the Press

47. The Biden Report utterly distorts Judge Bork's record on the First Amendment. The Biden Report claims that "Judge Bork has cast doubt on leading Supreme Court decisions limiting governmental prior restraints on speech." It relies for that purpose on an ambiguous statement in an unpublished speech Judge Bork gave at the University of Michigan. It omits any discussion of Judge Bork's only case on point, Lebron v. Washington Metropolitan Area Transit Authority, 749 F.2d 893 (D.C. Cir. 1984). In that case, Judge Bork went out of his way to rule that a D.C. regulation barring deceptive advertisements was invalid on the ground that it constituted a prior restraint, rather than limiting himself to the ground preferred by Judge Starr that the advertisement at issue was not deceptive. Especially given that the narrower ground was clearly available, Judge Bork's conscious decision to rely on the broader one as well is a much clearer indication of his commitment to the bar on prior restraints than the Michigan speech is an indication of any reservations about it. The Biden Report's failure even to mention the case in this context practically inverts Judge Bork's record in this area.

48. The Biden Report's claim that "Judge Bork has sharply criticized key Supreme Court decisions limiting the power of government to punish publication," coupled with the evidence it cites for that claim, almost speaks for itself. The "sharp critici[sm]" to which it refers is from the same Michigan speech, and consists of the statement that "one may doubt that press freedom" required the release of the name of a rape victim or information from a secret inquiry into judicial misconduct.

49. The same can be said of the Biden Report's attempt to contrast Judge Bork's position regarding reporters' claims to a First Amendment right to refuse to disclose confidential sources with Justice Powell's view on the matter. As the careful reader will notice, Justice Powell wrote an opinion noting that it was a hard question, to be decided case by case, but that generally there is no such right in the absence of harassment by state authorities. Judge Bork wrote an article stating that it was a close question that could be decided either way.

50. The Biden Report's claim in the text of the full report that Judge Bork would restrict First Amendment protection to "speech that relates to the political process" is simply misleading (as opposed to the claim in the executive summary that he would not protect literary and artistic speech, which is flatly false). As Judge Bork's Worldnet interview made clear, in his view the First Amendment provides some protection for "moral and ... scientific speech" and "fiction and so forth," although probably not pornography. While the interview indicates that he would not extend as much protection to speech that is not expressly political as to speech that is, it says nothing about how much protection he would extend to the former. Since Judge Bork's Ollman opinion would provide more protection for political speech than present law, there is ample room for him to protect speech that is not expressly political less than political speech and still protect it at least as much as the Supreme Court. While Judge Bork also indicates that "pornography and things approaching it" probably are not protected, there is no basis whatsoever for the Report's conclusion that he would include among such things a Rubens painting or an Alvin Ailey Troupe Performance, or that his views on pornography are any different from the Supreme Court's.

Bork on The Establishment Clause

51. In its discussion of Judge Bork's views on the Establishment Clause, the Biden Report misconstrues his views on the clause generally and about particular cases. The Report states that Judge Bork "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" (Biden Report at p. 57). (Emphasis supplied.) In fact, Judge Bork has never "endorsed" a particular view of the Establishment Clause -- at most he has observed that:

> "The establishment clause might have been read merely to preclude the recognition of an official church, or to prevent discriminatory aid to one or a few religions- ....Instead [it has] been interpreted to give [it] far greater breadth and severity." ("Religion and the Law," University of Chicago, Nov. 13, 1984, at 1-2).

52. The Biden Report is misleading in describing Judge Bork's views on the leading prayer in school case, Engel v. Vitale, 370 U.S. 421 (1962). The report does not give sufficient weight to Judge Bork's statement to the Washington Post that he has not taken a position on the constitutionality of school prayer. Instead, the report concludes, based on a letter sent to Judge Bork discussing a speech he made at the N.Y.U. Law School, that Judge Bork has "rejected" this case (Biden Report at p 57. See also Appendix B, Biden Report).

53. The Biden Report excludes substantial evidence that supports Judge Bork's claim that he has not addressed the issue:

-- No text of Judge Bork's address at N.Y.U. is available. The written notes from which he spoke make no mention of Engel. The relevant portion states:

> "I want to draw your attention to two other features of non-I[nterpretivist] judicial review--the nationalization of a single set of moral values and what I call the gentrification of the Constitution.
>
> Roe v. Wade is the classic case of each.
>
> The dramatic expansion of const[itutional] rights under E[qual] P[rotection] clause, substantive version of D[ue] P[rocess] Cl[ause], 1st Amendment--nationalizes moral and social values although there is no national consensus."

-- No other person present at the event recalls Judge Bork criticizing the Engel case.

-- Judge Bork made no mention of how he would vote on the school prayer cases in the two other significant occasions on which Judge Bork discussed his view of religion and the law: (1) an address at the University of Chicago on November 13, 1984 and (2) an address at the Brookings Institution Seminar for Religious Leaders on September 12, 1985 (See Washington Post, letter to the editor from Rabbi Joshua Haberman, August 6, 1987).

54. In alleging that Judge Bork criticized Engel v. Vitale in the 1982 N.Y.U. Law School speech, the Biden Report relies entirely upon the recollection of one attendee, Dean Norman Redlich. The report cites a letter sent by Dean Redlich to Judge Bork shortly after the address. However, the text of the Redlich letter does not substantiate the Biden Report claim that "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.'" (Biden Report at 57). Rather, the letter included the following passage:

> "I do not understand why you lumped together the issues of school prayer, busing, and abortion, although I recognize that at one point in your remarks you said you were concentrating on Roe v. Wade. The present attack on the courts derives from all three issues and you failed to distinguish among them. I agree that Roe v. Wade can be attacked as non-interpretavist [sic]. Engel v. Vitale, however, was an interpretation of the establishment clause. The attacks on that decision were no less strident because it was

> interpretavist. The result, not the method, sparked the criticism." (Dean Redlich Letter at p. 1).

It appears more likely, however, that Judge Bork focused on Roe v. Wade as his example as a non-interpretivist decision, and discussed school prayer only as an issue which, as a factual matter, had sparked political opposition to the courts. This political opposition created a climate in which jurisdiction-stripping legislation, which Judge Bork opposed, was being seriously considered. This observation is one which Judge Bork has made in other speeches as well. This reconstruction of his spoken remarks is supported by Dean Redlich's letter, which described Judge Bork's reference to Engel in the context of "the present attack on the courts" since Judge Bork had never before criticized the decision in Engel.

55. The Biden Report misconstrues Judge Bork's criticism of the three part test set forth in Lemon v. Kurtzman, 403 U.S. 602 (1971). In his speech at the University of Chicago Judge Bork stated that his criticism of Lemon is that the three part test "is not useful in enforcing the values underlying the establishment clause." (University of Chicago speech at pp.4-5) He points out that the Supreme Court itself has not always applied the test (Id. at 6-7). Contrary to the premise stated in the Biden Report, Judge Bork's remarks about Lemon are not a criticism of the viewpoint that the government should be entirely neutral towards religion. Rather, they are a comment that the test is flawed in its ability to promote another value -- strict separation of religion from all government action, a value the court precedents do not support.

56. The Biden Report is at best incomplete and at worst misleading in its omission of the fact that Judge Bork's criticism of the Lemon test is well within the mainstream of American legal scholarship. Judge Bork himself states that his thoughts are not original, but can be found in Dean Jesse Choper's writings (University of Chicago speech at p. 5). In addition, Senator Daniel Patrick Moynihan and others have criticized the Supreme Court's jurisprudence on the Establishment Clause by citing numerous contradictory and inexplicable results:

> -- A state may lend to parochial school children geography textbooks that contain maps of the United States, but the state may not lend maps of the United States for use in geography class.
>
> -- A state may lend textbooks on American colonial history, but it may not lend a film on George Washington, or a film projector to show it in history class.
>
> -- A state may lend classroom workbooks, but may not lend workbooks in which the parochial school children write, thus rendering them non-reusable.

-- A state may pay for bus transportation to religious schools, but may not pay for bus transportation from the parochial school to the public zoo or Natural History Museum for a field trip.

-- A state may pay for diagnostic services conducted in the parochial school, but therapeutic services must be given in a different building.

-- Speech and hearing "services" conducted by the state inside the sectarian school are forbidden, but the state may conduct speech and hearing diagnostic testing inside the sectarian school.

-- Exceptional parochial school students may receive counselling, but it must take place outside the parochial school, such as in a trailer parked down the street.

-- A state may give cash to a parochial school to pay for the administration of state-written tests and state-ordered reporting services, but it may not provide funds for teacher-prepared tests on secular subjects.

-- Religious instruction may not be given in public school, but the public school may release students during the day for religious classes elsewhere, and may enforce attendance at those classes with its truancy laws.

57. The Biden Report accurately reports that Judge Bork has criticized Aguilar v. Felton, 473 U.S. 402 (1985). But the report's description of the case fails to indicate that the decision has been roundly criticized both by other members of the Supreme Court and the legal academic community. In Aguilar the Court struck down public funding for non-religious programs which supplied state-employed special education teachers for deprived children who attended parochial schools. In Aguilar there was a valid secular motive of providing remedial help to underprivileged children, and there was no hidden subsidy of religion (since the program was optional and not otherwise offered by the schools). Indeed, the sole reason the Court found the program violated the establishment clause was that the system of monitoring that New York City had adopted in order to ensure that the program was not unconstitutionally religious in content constituted excessive entanglement of church and state. It is small wonder that Judge Bork cited Aguilar as illustrative of why he believes "present doctrine is so unsatisfactory." As he noted in his Brookings speech, "it has been suggested that the program struck down in Aguilar might become constitutionally permissible if the teachers were placed in trailers outside the schoolhouse, with the children coming to them rather than the other way around. Odd as it may seem, precedent supports the idea that the crucial issue is whether the publically-funded

teachers physically entered the private building." This echoes a point made by Justice O'Connor's dissent: "Impoverished children who attend parochial schools may also continue to benefit from Title I Programs offered off the premises of their schools--possibly in portable classrooms just over the edge of school property." Aguilar, 105 S.Ct. at 3248 (O'Connor, J., dissenting.)

Section V
Bork's Role in Watergate and Nader v. Bork

58. The Biden Report contains serious errors and omissions in its discussion of Judge Bork's role in firing the first Watergate Special Prosecutor, Archibald Cox. By focusing exclusively on the court case, Nader v. Bork, 366 F. Supp. 104 (D.D.C. 1973), the report ignores Judge Bork's substantial role in securing the appointment of a second special prosecutor and in ensuring that the Watergate prosecution would continue after Professor Cox was fired.

59. The Biden Report's discussion of Nader v. Bork is seriously misleading because it conceals the fact that the decision by Judge Gesell was later vacated upon the order of the D.C. Circuit Court of Appeals (see Unpublished Order, U.S. Court of Appeals for the D.C. Circuit, August 20, 1975, amended October 22, 1975) Thus, the Biden Report fails to indicate that the decision is of no legal precedence whatsoever. The Court of Appeals held that the case was moot.

60. The Biden Report fails to indicate that the significant reason that Judge Gesell dismissed the cause of action by Ralph Nader was because he was not an injured party (366 F. Supp. 104). The person who could claim he was injured, Archibald Cox, refused to join the suit. He stated at his press conference that precipitated the firing that "Of course there are ways of firing me." Later, Professor Cox testified to Congress that he believed the President, through the Attorney General had the authority to discharge him (see "Senate Hearings on the Special Prosecutor," October 31, 1973, at p. 102).

61. The Biden Report falsely implies that the Watergate Special Prosecutor was established pursuant to a special act of Congress (Biden Report at p 61). Rather, the office was created by Attorney General Eliott Richardson pursuant to his general statutory authority to create positions in the Justice Department (see 28 U.S.C. §508-510). In fact, these statutes specifically allow the Attorney General to transfer functions among different officials at the Department of Justice. While Attorney General Richardson had promised the Senate that he would create an independent prosecutor during his confirmation

process, this action could not create special statutory authorization for the position.

62. The Biden Report erroneously implies that the opinion in Bork v. Nader is significant because it declared the discharge of Professor Cox to be illegal. The opinion itself recognizes that the relevant Supreme Court case (Humphrey's Executor) relied heavily upon the fact that in that case Congress had expressly legislated to restrict the President's ability to remove a government official. As discussed above, there is no such Congressional Act with respect to the Watergate Special Prosecutor.

63. The Biden Report mischaracterizes the issues of "whether the firing [of Professor Cox] itself was lawful" as the "threshold question" in the Nader case. Since the independence granted to the Watergate Special Prosecutor was derived solely from the Attorney General's regulations, the White House paper correctly analyses the question of whether these regulations were validly rescinded as the threshold question and determines that they were.

64. The Biden Report fails to inform the reader that Judge Bork's position that the delay in rescinding the Attorney General's regulations (from Saturday night when Professor Cox was fired until Tuesday, the next working day) was widely supported. Professor Cox himself referred to the delay as a "technical defect." (See "Senate Hearings on the Special Prosecutor," October 31, 1973, at p. 102).

65. The Biden Report blatantly misstates the grounds upon which Judge Gesell found the rescission of the Attorney General's regulations arbitrary and unreasonable. Judge Gesell's opinion relied upon the fact that a new special prosecutor was appointed three weeks later under substantially identical regulations to conclude that the rescission of the initial regulations was an arbitrary and unreasonable act, done solely to replace Professor Cox, which could not be done under the terms of the regulations (386 F.Supp. at 109). Although the Biden Report quotes this passage, the report then manufactures from whole cloth the rationale that the firing was arbitrary and unreasonable because of the circumstances leading up to the discharge (i.e., that Professor Cox had decided to defy President Nixon and go to court for the White House tapes). The Biden Report uses this novel argument to bootstrap its conclusion that the firing would have been illegal even if the rescission of the regulation had been completed before the discharge.

Section VI - Stare Decisis

66. The Biden Report's discussion of Judge Bork's views on Stare Decisis, i.e., the adherence to prior precedent, in constitutional law is fundamentally flawed by a complete lack of understanding of the theories Judge Bork has articulated on precedent. Repeatedly the Biden Report equates criticism by Judge Bork of a prior decision with the conclusion that he would overrule the decision once on the Supreme Court. (This conceptual error is not only logically fatal to the authors' arguments about Stare Decisis, but also permeates the discussion of cases in Appendix B).

67. The Biden Report conceals Judge Bork's complete views on Stare Decisis. First, the Biden Report omits Judge Bork's statement to the Senate Judiciary Committee during his confirmation hearings for the D.C. Court of Appeals in 1982, when he was asked by Senator Baucus, "While I have you here...do you have any general guiding principles as to when a Supreme Court judge should adhere to the principle [of Stare Decisis] in looking at, revisiting Supreme Court cases?" Bork responded:

> "Well, yes. I think it is a parallel to what [Professor] Thayer said about the function of a judge when he is reviewing a legislative act for constitutionality. He said he really ought to be absolutely clear that it is unconstitutional before he strikes down the legislative act, if not absolutely clear, awfully clear.
>
> I think the value of precedent and of certainty and of continuity in the law is so high that I think a judge ought not to overturn a prior decision unless he thinks it is absolutely clear that that prior decision was wrong and perhaps pernicious." ("Confirmation of Federal Judges," Hearings Before the Judiciary Committee, 1982, at 14)

68. The Biden Report fails to take into account that Judge Bork has articulated a two part method of determining when a given precedent should be overturned. The Biden Report merely recites (in an incomplete quote on p.70) the second and ultimate determination that Judge Bork has repeatedly stated must be made before a prior constitutional decision is overturned:

> "There are some constitutional decisions around which so many other institutions and people have built that they have become part of the structure of the nation. They ought not be overturned, even if thought wrong" ("A Talk with Judge Robert H. Bork," District Lawyer 29 at 32. See also "Bork on Judicial Restraint," Manhattan Report 14 at 15) (Emphasis added.)

The remainder of the Biden Report ignores this second test in its highly speculative analysis of cases that Bork might some day overturn.

69. The Biden Report does not cite to a single instance where Judge Bork has stated that any prior Supreme Court decision should be overturned in support of its allegation that "The Record Strongly Suggests That Judge Bork, If Confirmed, Would Vote To Overturn A Substantial Number Of Supreme Court Decisions." (Biden Report, p. 68). Instead, the report relies upon circumstantial conclusions drawn from flawed legal reasoning.

70. The Biden Report is misleading when it states that "On several occasions, Judge Bork has expressed a clear willingness to overturn precedent." The Report then quotes out of context to say that "an originalist judge would have no problem whatever in overruling a non-orginalist precedent" (Remarks, First Annual Lawyers Convention of the Federalist Society, cited at p.66 of the Biden Report). What the Biden Report fails to indicate is that this remark was part of Judge Bork's explanation that a judge must first determine that the precedent was wrong. As part of the same remarks Judge Bork then goes on to explain that in some instances a judge should not overturn clearly incorrect precedent, because it is too damaging to social and economical institutional arrangements that have grown up as a result of the decision.

71. The Biden Report fails to note that Judge Bork was booed at the Federalist Society conference for stating that he would not overturn the commerce clause precedents. (Washington Post). This indicates that Bork is well within the mainstream of legal thought since some members of the legal profession believe his position on stare decisis is too deferential to prior decisions.

72. The Biden Report also creates a misleading impression that Bork is not in the mainstream of legal thought when he states that courts can overturn constitutional precedent more easily that common law or statutory precedent (Biden Report at p. 67). This position has long been commonly accepted by most constitutional scholars. It was first stated by Justice Brandeis:

> "Stare Decisis is usually the wise policy....This is true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action practically impossible, this Court has often overruled its earlier decisions." Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405-408 (1932).

This error is all the more surprising since one of the reviewers of the Biden Report, Professor Laurence Tribe, has noted this rationale:

> "For most of us, the proper role of precedent in constitutional adjudication will be found at the end of a middle road. The nation needs and deserves to have a steady hand

at the Constitution's wheel, but the Supreme Court occasionally must overrule its earlier cases because legislative correction of a constitutional decision is all but impossible." (Tribe, L., God Save This Honorable Court at p. 102 (1985)) (Emphasis in the original.)

73. The Biden Report attacks Judge Bork because he may consider overturning Roe v. Wade and the right of privacy cases. This attack is inconsistent with even liberal judicial philosophy, again as expressed by Laurence Tribe, one of the reviewers of the report:

> "On the other hand, those candidates [for the Supreme Court] who would, for example, refuse even to consider modifying, say, Roe v. Wade, ...simply because they are established precedents, are equally unsuited for a seat on the Supreme Court, and should be voted down by any Senator who views constitutional principles as subject to re-examination when circumstances so require." (Id.) (Emphasis in the original.)

74. By quoting out of context from Judge Bork's interview with Philip Lacovara in the District Lawyer, the Biden Report creates the false impression that Judge Bork's views on all constitutional issues have not and will not change when he is on the bench. The Biden Report highlights Judge Bork's general answer (that "[M]y views have remained about what they were....So when you become a judge, I don't think your viewpoint is likely to change greatly." Biden Report at p. 65) without indicating that the answer was made to a very specific and limited question:

> "Q. Before you ascended to the bench, and indeed in lectures and writings even since that time, you have been among the people who have challenged the role of what you and they have called the "imperial judiciary." Has your view of the possible usurpation of political functions by courts changed since you ascended to the bench? Either become stronger or perhaps more diffuse?" (District Lawyer Interview at p. 31)

75. The Biden Report incorrectly uses a statement by Judge Bork in the District Lawyer Interview regarding a candidate's published record as evidence that the White House is disingenuous in suggesting that there is a distinction between a candidate's judicial opinions and his writings as an academic. (Biden Report at p. 65) Judge Bork was not involved in selecting the criteria used by the White House or the Justice Department in selecting him as the nominee, and his prior description of the process sheds no light on what distinctions were made by the Executive Branch.

76. Additionally, the Biden Report quotes Judge Bork out of context to imply that a candidate's academic writings are on an

equal footing with his prior judicial decisions. Judge Bork was responding to a question that implied that appellate court judges are under stress because they know that their decisions are reviewed by the Department of Justice in selecting Supreme Court nominees. He responded that he had not observed anything which would corroborate such a concern. In the passage cited in the Biden Report Judge Bork merely stated that there should not be any concern about reviewing opinions. In fact, Judge Bork believes that it is very difficult to determine how a future Supreme Court Justice will vote, "predictions of what new judges will do being so perilous." ("Judicial Review and Democracy," Society, Nov/Dec. 1986, at p. 6) (The authors of the Biden Report must certainly have been aware of this fact, since they quote from the same paragraph in the Society article. See, No. 75 below).

77. The Biden Report's discussion of Judge Bork's views on the appointment power fails to substantiate the report's claim that they indicate "That He Would Overturn Many Landmark Supreme Court Decisions." (Biden Report at p.66) The report misquotes from Judge Bork's review of a biography of Felix Frankfurter. The quote is part of a discussion of Frankfurter's rejection in the 1920's of proposals to eliminate judicial supremacy. The unedited quote reveals this:

> "Perhaps Frankfurter was right about the inadvisability of formal mechanisms for checking the Court, though; since none have been tried, that is hard to say. But his hopes for legal education after fifty years certainly seem misplaced. Today, in fact, it is probably true that most professors of constitutional law teach and write from an activist perspective. What the solution should be is no more clear now than it was in 1921. If it is not to be a new constitutional mechanism, 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 110.) (Emphasis to show the edited quote in the Biden Report at p.66)

A full and careful reading of the passage makes it clear that Judge Bork was not discussing overruling prior cases at all. Rather, he was discussing the appointment power as the only way of affecting the Court's style of judicial reasoning and rejecting (in the immediately preceding paragraphs) such proposals as the use of the Exceptions Clause to strip the Supreme Court of jurisdiction over controversial constitutional issues.

78. The insertion of the phrase "to 'judicial excesses'," which the Biden Report claims to be quoting from the previous page

indicates that the report attempted to use the quote from the Frankfurter book review to distort Judge Bork's position. The phrase is taken from a theoretical discussion of constitutionally provided checks on the Supreme Court's power:

> Amending the Constitution is not a general solution to judicial expansionism; there are too many serious judicial excesses to make amendment a feasible tool of correction." (Id. at p. 109) (Emphasis to show the edited quote in the Biden Report at p.66)

Indeed, Judge Bork then goes on to say: "The only safeguard we have at the moment is the self-discipline and capacity for self-denial of our judges." (Id.)

79. The other quotes cited in the Biden Report also conceal that Judge Bork's comments about the appointment of judges are all in the context of theoretical discussions of what checks there are in the Constitution on judicial power. An examination of the full context of the quote from Judge Bork's testimony before the Senate reveals this fact. After a series of questions about Judge Bork's opposition to proposals to strip the Supreme Court of jurisdiction to hear a Federal constitutional question, Senator Baucus continued to question him:

> "Senator Baucus: Could you tell me your view of whether the constitutional amendment process as outlined in Article V of the Constitution is sufficient to enable the country and the Congress to respond to what it regards as improper Supreme Court decisions?
>
> Mr. Bork: I think there is a real dilemma, Senator. I think in a variety of areas the Court over a period of years has reached results that were not intended by the framers of the Constitution or by the framers of various amendments. I think to that degree the Court has stepped into areas that do not belong to it. It is that form of judicial activism or judicial imperialism that the chairman asked me about.
>
> I do not think there is an adequate way of checking the Court provided in the Constitution, and I think the reason for that is that the framers never anticipated judicial review could become the enormous power that it has become. There was no court at the time that had any power resembling that.
>
> The only cure for a Court which oversteps its bound that I know of is the appointment power, and in addition to that the power of debate, political rebuke, and I hope one day a better understanding by the profession and by the judges of what the limits of judicial power are." ("Confirmation of Federal Judges," Hearings Before the Judiciary Committee, 1982, at 7.) (Emphasis to show the edited quote in the Biden Report at p.66)

80. Similarly, the Biden Report quotes out of context from Judge Bork's writings on structural restraints in the Constitution on judicial power:

> "Moreover, jurisdiction removal does not vindicate democratic governance, for it merely shifts ultimate power to different groups of judges. Democratic responses to judicial excesses probably must come through the replacement of judges who die or retire with new judges of different views. But this is a slow and uncertain process, the accidents of mortality being what they are and prediction of what new judges will do being so perilous. ("Judicial Review and Democracy," Society, Nov/Dec. 1986, at p. 6) (Emphasis to show the edited quote in the Biden Report at p.66)

81. The Biden Report misquotes Judge Bork's discussion of the evolution of constitutional law in this century to imply that he would overturn a substantial number of Supreme Court decisions reached over the last thirty years. Compare the Biden Report excerpt:

> "'[T]he Court...began in the mid-1950's 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.'" (Biden Report at p. 68 quoting from "Judicial Review and Democracy," Encyclopedia of the American Constitution, Vol. 2, at 1062 (1986).) (Emphasis added in the Biden Report.)

with a full review of the comment in its proper context, which reveals that Judge Bork was not discussing stare decisis at all:

> "Nevertheless, if the Court stopped defending economic liberties without constitutional justification in the mid-1930's, it began in the mid-1950's to make other decisions for which it offered little or no constitutional argument. It had been generally assumed that constitutional questions were to be answered on ground of historical intent, but the Court began to make decisions that could hardly be, and were not, justified on that basis. Existing constitutional protections were expanded and new ones created. Sizable minorities on the Court indicated a willingness to go still further. The widespread perception that the judiciary was recreating the Constitution brought the tension between democracy and judicial review once more to a state of intellectual and political crisis.
>
> Much of the new judicial power claimed cannot be derived from the text, structure, or history of the

Constitution. Perhaps because of the increasing obviousness of this fact, legal scholars began to erect new theories of the judicial role. These constructs, which appear to be accepted by a majority of those who write about constitutional theory, go by the general name of the noninterpretivism...." ("Judicial Review and Democracy," Encyclopedia of the American Constitution, Vol. 2, at 1062 (1986).)

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PRO-BORK LEADERS CALL BIDEN PERFORMANCE "FAIR AND BALANCED"

(WASHINGTON) In a surprising retraction of earlier predictions, Daniel L. Casey, executive director of the American Conservative Union, and Patrick McGuigan, legal affairs analyst for the Coalitions for America, today announced they considered Senate Judiciary Committee Chairman Joe Biden's performance "fair and balanced" over the last five days of the Bork confirmation hearings.

Noting that much more testimony remains, however, McGuigan expressed the fear that pressure from Bork's most agressive opponents may skewer the remaining two weeks of the hearings.

"We have received multiple reports from allies in the pro-Bork coalition, including some law enforcement official, that they still have no idea when they are to tesify..."

"I fear we may see a parade of leftists every morning -- in plenty of time to make the evening news and beat the deadlines of busy print journalists -- followed in the late afternoon by Bork's supporters. You don't have to be a genious to realize that if this is the pattern in the testimony, the strong support Judge Bork has among various categories of Americans will not be adequately represented," McGuigan noted.

Casey remarked that Judge Bork's testimony was a "grand-slam", putting to rest all of the outrageous charges made through selective use of his record.

"Judge Bork has weathered the distortions and attempted character assassinations with aplomb and brilliance. No other man in America could have answered the range of questions with such clarity and forthrightness."

Casey contuinued, "I am confident the Bork nomination will move to the floor with excellent prospects for victory."

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FOR IMMEDIATE RELEASE September 19, 1987

STATEMENT OF Patrick B. McGuigan
Legal Affairs Analyst
Coalitions for America

Fair is fair. A few weeks ago Dan Casey and I demanded that Senator Joseph Biden of Delaware step aside as Chairman of the Senate Judiciary Committee for the duration of the confirmation hearings for Judge Robert Bork. We did this because his conduct in the days immediately following Bork's nomination convinced us it was impossible for him, apparently driven by his presidential ambitions, to be fair to the nominee.

However, I believe his conduct in the chair has largely been fair. Although the hearings went on several days too long, in my own view Biden gave Judge Bork every opportunity to respond to the attacks of his enemies.

The question is whether Senator Biden will conduct the remainder of the hearings in such an even-handed manner. Specifically, Dan and I have received multiple reports from allies in the pro-Bork coalition, including some law enforcement officials, that they still have no idea when they are to testify. Assuming the Democrat majority does allow Bork's supporters to testify, the question then is whether or not they will get fair "positioning" in the hearings. By this I am referring to something that reporters and Hill people will understand immediately, but which might be obscure to casual observers of the Senate. I fear we may see a parade of leftists every morning -- in plenty of time to make the evening news and beat the deadlines of busy print journalists -- followed in the late afternoon by Bork's supporters. You don't have to be a genius to realize that if this is the pattern in the testimony, the strong support Judge Bork has among various categories of Americans will not be adequately represented.

Judge Bork's many supporters are enthusiastic and delighted with his performance under the intense scrutiny and unfair attacks of the last several days, especially his handling of the assaults from Senators Kennedy, Leahy and Metzenbaum. As Dan Casey and I indicated yesterday, "There can be no legitimate basis for the baldly ideological opposition this man has faced. His views on a variety of legal issues demonstrate that his nomination evokes the best in traditional American legal thought."