BORK NOMINATION

GENERAL OVERVIEW

- Judge Robert Bork is one of the most qualified individuals ever nominated to the Supreme Court. He is one of the preeminent legal scholars of our time; a practitioner who has argued and won numerous cases before the Supreme Court; and a judge who for five years has been writing opinions that faithfully apply law and precedent to the cases that come before him.

- As Lloyd Cutler, President Carter's Counsel, has recently said: "In my view, Judge Bork is neither an idealogue nor an extreme right-winger, either in his judicial philosophy or in his personal position on current social issues....The essence of [his] judicial philosophy is self-restraint." Mr. Cutler, one of the nation's most distinguished lawyers and a self-described "liberal democrat and...advocate of civil rights before the Supreme Court," compared Judge Bork to Justices Holmes, Brandeis, Frankfurter, Stewart, and Powell, as one of the few jurists who rigorously subordinate their personal views to neutral interpretation of the law.

- As a member of the Court of Appeals, Judge Bork has been solidly in the mainstream of American jurisprudence.

  - Not one of his more than 100 majority opinions has been reversed by the Supreme Court. No appellate judge in the United States has a finer record.

  - Indeed, the Supreme Court has never reversed any of the over 400 majority opinions in which Judge Bork has joined.

  - In his five years on the bench, during which Judge Bork heard hundreds of cases, he has written only 9 dissents and 7 partial dissents in those cases. This is despite the fact that when he took his seat on the bench, 7 of his 10 colleagues were Democratic appointees, as are 5 of the 10 now. He has been in the majority in 94 percent of the cases he has heard.

- Moreover, the reasoning of several of his dissents was adopted by the U.S. Supreme Court when it reversed opinions with which he had disagreed. Justice Powell, in particular, has agreed with Judge Bork in 9 of 10 relevant cases that went to the Supreme Court.

- Judge Bork has compiled a balanced record in all areas of the law, including the First Amendment, civil rights, labor law, and criminal law. Indeed, his views on freedom of the press prompted scathing criticism from his more conservative colleague, Judge Scalia.

- Some have expressed the fear that Judge Bork will seek to "roll back" many existing precedents. There is no basis for this view. As a law professor, he often criticized the reasoning of Supreme Court opinions; that is what law professors do. But as a judge, he has faithfully applied the legal precedents of both the Supreme Court and his own Circuit Court. That is why he is almost always in the majority on the Court of Appeals and why he has never been reversed by the Supreme Court. Judge Bork understands that in the American legal system, which places a premium on the orderly development of the law, the mere fact that one may disagree with a prior decision does not mean that that decision ought to be overruled.

- Judge Bork is the leading proponent of "judicial restraint." He believes, in essence, that judges should set aside the decisions of the democratically-elected branches of government only when there is warrant for doing so in the Constitution itself. He further believes that a judge has no authority to create new rights based upon his own personal philosophical views, but must instead rest his judgment solely on the principles set forth in the Constitution.

- His opinions on the Court of Appeals reflect a consistent application of this form of judicial restraint, and he has upheld and enforced "liberal" laws and agency decisions as often as "conservative" ones. What do his opponents in the Senate have to fear? That he will allow <u>them</u> to set policy for the country, and thereby place the responsibility to make political choices where it belongs?

- The rush to judgment against this nominee by several Senators and outside groups is unseemly and unfair. Though the nomination is supposedly so complex and important that hearings on it cannot be held for months, opponents of the nomination waited only days or, in some cases, hours before attacking it. Given

their performance, one of their major complaints is ironic: The nominee is said to lack "an open mind."

- At bottom, this opposition is grounded in nothing more than a fear that Judge Bork will not use his seat on the Court to advance specific policy agendas. Such a politicization of the confirmation process, in which Senators seek to determine how a nominee will vote in the specific cases they care about, detracts from the independence of our judiciary and weakens that central institution of our government.

- Why should this nominee be held to some standard other than the traditional one for evaluating judicial nominees--competence, integrity, and judicial temperment? When Judge Bork has had an opportunity to respond fully to the Senate's questions, we are confident he will demonstrate his overwhelming qualifications to be confirmed as an Associate Justice of the Supreme Court.

QUALIFICATIONS

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

- Professor at Yale Law School for 15 years; holder of two endowed chairs; graduate of the University of Chicago Law School, Phi Beta Kappa and managing editor of the Law Review.

- Arguably the nation's foremost authority on antitrust law and constitutional law. Author of dozens of scholarly works, including The Antitrust Paradox, the leading work on antitrust law.

- Experienced practitioner and partner at Kirkland & Ellis.

- Solicitor General of the United States, 1973-77, representing the United States before the Supreme Court in hundreds of cases.

- Unanimously confirmed for the D.C. Circuit in 1982, after receiving the ABA's highest rating--"exceptionally well qualified"--which is given to only a handful of judicial nominees each year.

- No appellate judge in America has had a finer record on the bench: not one of his more than 100 majority opinions has been reversed by the Supreme Court.

- Moreover, the reasoning of several of his dissents was adopted by the Supreme Court when it reversed opinions with which he had disagreed. For example, in Sims v. CIA, Judge Bork criticized a panel opinion which had impermissibly, in his view, narrowed the circumstances under which the identity of confidential intelligence sources could be protected by the government. When the case was appealed, all nine members of the Supreme Court agreed that the panel's definition of "confidential source" was too narrow and voted to reverse.

GENERAL JUDICIAL PHILOSOPHY

Judge Bork has spent more than a quarter of a century developing a powerful and cogent philosophy of law.

- His judicial philosophy begins with the simple proposition that judges must apply the Constitution, the statute, or controlling precedent--not their own moral, political, philosophical or economic preferences.

- He believes in neutral, text-based readings of the Constitution, statutes and cases. This has frequently led him to take positions at odds with those favored by political conservatives. For example, he testified before the Senate Subcommittee on Separation of Powers that he believed the Human Life Bill to be unconstitutional; he has opposed conservative efforts to enact legislation depriving the Supreme Court of jurisdiction over issues like abortion and school prayer; and he has publicly criticized conservatives who wish the courts to take an active role in invalidating economic regulation of business and industry.

- He is not a political judge: He has repeatedly criticized politicized, result-oriented jurisprudence of either the right or the left.

- He has repeatedly rebuked academics and commentators who have urged conservative manipulation of the judicial process as a response to liberal judicial activism.

- Judge Bork believes judges are duty-bound to protect vigorously those rights enshrined in the Constitution. He does not adhere to a rigid conception of "original intent" that would require courts to apply the Constitution only to those matters which the Framers specifically foresaw. To the contrary, he has written that it is the "task of the judge in this generation to discern how the framers' values, defined in the context of the world they knew, apply to the world we know." His opinions applying the First Amendment to modern broadcasting technology and to the changing nature of libel litigation testify to his adherence to this view of the role of the modern judge.

- He believes in abiding by precedent: he testified in 1982 regarding the role of precedent within the Supreme Court:

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

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

- Robert Bork is the best sort of judge for genuine liberals and conservatives. Neither liberals nor conservatives ought to be relying on the only unelected branch of government to advance their policy agendas. Judge Bork believes that there is a presumption favoring democratic decisionmaking, and he has demonstrated deference to liberal and conservative laws and agency decisions alike. Some of the opponents to this nomination show a disturbing mistrust of what the American people would do without an activist court to restrain them.

- As The New York Times said in endorsing his nomination to our most important appellate court in 1981:

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

NY Times, 12/10/81.

FIRST AMENDMENT

- During his five years on the bench, Judge Bork has been one of the judiciary's most vigorous defenders of First Amendment values.

- He has taken issue with his colleagues, and reversed lower courts, in order to defend aggressively the rights of free speech and a free press. For example:

  - In Ollman v. Evans and Novak, Judge Bork greatly expanded the constitutional protections courts had been according journalists facing libel suits for political commentary. Judge Bork expressed his concern that a recent and dramatic upsurge in high-dollar libel suits threatened to chill and intimidate the American press, and held that those considerations required an expansive view of First Amendment protection against such suits.

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

    Judge Bork's decision in this case was praised as "extraordinarily thoughtful" in a New York Times column authored by Anthony Lewis. Lewis further described the opinion as "too rich" to be adequately summarized in his column. Libel lawyer Bruce Sanford said, "There hasn't been an opinion more favorable to the press in a decade."

  - In McBride v. Merrell Dow and Pharmaceuticals Inc., Judge Bork stressed the responsibility of trial judges in libel proceedings to ensure that a lawsuit not become a "license to harass" and to take steps to "minimize, so far as practicable, the burden a possibly meritless claim is capable of imposing upon free and vigorous journalism." Judge Bork emphasized that even if a libel plaintiff is not ultimately successful, the burden of defending a libel suit may itself in many cases unconstitutionally constrain a free press. He wrote: "Libel suits, if not carefully handled, can

threaten journalistic independence. Even if many actions fail, the risks and high costs of litigation may lead to undesirable forms of self-censorship. We do not mean to suggest by any means that writers and publications should be free to defame at will, but rather that suits--particularly those bordering on the frivolous--should be controlled so as to minimize their adverse impact upon press freedom."

- In Lebron v. Washington Metropolitan Area Transit Authority, Judge Bork reversed a lower court and held that an individual protestor had been unconstitutionally denied the right to display a poster mocking President Reagan in the Washington subway system. Judge Bork characterized the government's action in this case as a "prior restraint" bearing a "presumption of unconstitutionality." Its decision to deny space to the protestor, Judge Bork said, was "an attempt at censorship," and he therefore struck it down.

- Judge Bork would be a powerful ally of First Amendment values on the Supreme Court. His conservative reputation and formidable powers of persuasion would provide critical support to the American tradition of a free press. Indeed, precisely because of that reputation, his championing of First Amendment values would carry special credibility with those who might not otherwise be sympathetic to vigorous defenses of the First Amendment.

- Judge Bork has been criticized for an article he wrote in 1971 suggesting that the First Amendment is principally concerned with protecting political speech. It has been suggested that this might mean that Bork would seek to protect only political speech. But Judge Bork has repeatedly made his position on this issue crystal clear: in a letter published in the ABA Journal in 1984, for example, he said that "I do not think...that First Amendment protection should apply only to speech that is explicitly political. Even in 1971, I stated that my views were tentative....As the result of the responses of scholars to my article, I have long since concluded that many other forms of discourse, such as moral and scientific debate, are central to democratic government and deserve protection." He also testified before Congress to this effect in 1982. He has made unmistakably clear his view that the First Amendment itself, as well as Supreme Court precedent, requires vigorous protection of non-political speech.

- On the appellate court, Judge Bork has repeatedly issued broad opinions extending First Amendment

protection to non-political speech, such as commercial speech (FTC v. Brown and Williamson Tobacco Corp.), scientific speech (McBride v. Merrell Dow and Pharmaceuticals, Inc.) and cable television programming involving many forms of speech (Quincy Cable Television v. FCC).

CIVIL RIGHTS

- As Solicitor General, Judge Bork was responsible for the government arguing on behalf of the most far-reaching civil rights cases in the Nation's history, sometimes arguing for more expansive interpretations of the law than those ultimately accepted by the Court.

- Among Bork's most important arguments to advance the civil rights of minorities were:

  - Beer v. United States -- Solicitor General Bork urged a broad interpretation of the Voting Rights Act to strike down an electoral plan he believed would dilute black voting strength, but the Court disagreed 5-3.

  - General Electric Co. v. Gilbert -- Bork's amicus brief argued that discrimination on the basis of pregnancy was illegal sex discrimination, but six justices, including Justice Powell, rejected this argument. Congress later changed the law to reflect Bork's view.

  - Washington v. Davis -- The Supreme Court, including Justice Powell, rejected Bork's argument that an employment test with a discriminatory "effect" was unlawful under Title VII.

  - Teamsters v. United States -- The Supreme Court, including Justice Powell, ruled against Bork's argument that even a wholly race-neutral senority system violated Title VII if it perpetuated the effects of prior discrimination.

  - Runyon v. McCrary -- Following Bork's argument, the Court ruled that civil rights laws applied to racially discriminatory private contracts.

  - United Jewish Organization v. Carey -- The Court agreed with Bork that race-conscious redistricting of voting lines to enhance black voting strength was constitutionally permissible.

- Lau v. Nichols -- This case established that a civil rights law prohibited actions that were not intentionally discriminatory, so long as they disproportionately harmed minorities. The Court later overturned this case and narrowed the law to reach only acts motivated by a discriminatory intent.

- As a member for five years of the United States Court of Appeals for the D.C. Circuit, Judge Bork has compiled a balanced and moderate record in the area of civil rights.

- He has often voted to vindicate the rights of civil rights plaintiffs, frequently reversing lower courts in order to do so. For example:

  - In Palmer v. Shultz, he voted to vacate the district court's grant of summary judgment to the government and hold for a group of female foreign service officers alleging State Department discrimination in assignment and promotion.

  - In Ososky v. Wick, he voted to reverse the district court and hold that the Equal Pay Act applies to the Foreign Service's merit system.

  - In Doe v. Weinberger, he voted to reverse the district court and hold that an individual discharged from the National Security Agency for his homosexuality had been illegally denied a right to a hearing.

  - In County Council of Sumter County, South Carolina v. United States, Judge Bork rejected a South Carolina county's claim that its switch to an "at-large" election system did not require preclearance from the Attorney General under the Voting Rights Act. He later held that the County had failed to prove that its new system had "neither the purpose nor effect of denying or abridging the right of black South Carolinians to vote."

  - In Norris v. District of Columbia, Judge Bork voted to reverse a district court in a jail inmate's Section 1983 suit against four guards who allegedly had assaulted him. Judge Bork rejected the district court's reasoning that absent permanent injuries the case must be dismissed; the lawsuit was thus reinstated.

  - In Laffey v. Northwest Airlines, Judge Bork affirmed a lower court decision which found that Northwest

Airlines had discriminated against its female employees.

- In Emory v. Secretary of the Navy, Judge Bork reversed a district court's decision to dismiss a claim of racial discrimination against the United States Navy. The District Court had held that the Navy's decisions on promotion were immune from judicial review. In rejecting the district court's theory, Judge Bork held: "Where it is alleged, as it is here, that the armed forces have trenched upon constitutionally guaranteed rights through the promotion and selection process, the courts are not powerless to act. The military has not been exempted from constitutional provisions that protect the rights of individuals. It is precisely the role of the courts to determine whether those rights have been violated."

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

  - In Paralyzed Veterans of America v. Civil Aeronautics Board, Judge Bork criticized a panel decision which had held that all the activities of commercial airlines were to be considered federal programs and therefore subject to a statute prohibiting discrimination against the handicapped in federal programs. Judge Bork characterized this position as flatly inconsistent with Supreme Court precedent. On appeal, the Supreme Court adopted Judge Bork's position and reversed the panel in a 6-3 decision authored by Justice Powell.

  - In Vinson v. Taylor, Judge Bork criticized a panel decision in a sexual harassment case, both because of evidentiary rulings with which he disagreed and because the panel had taken the position that employers were automatically liable for an employee's sexual harassment, even if the employer had not known about the incident at issue. The Supreme Court on review adopted positions similar to those of Judge Bork both on the evidentiary issues and on the issue of liability.

  - In Dronenberg v. Zech, Judge Bork rejected a constitutional claim by a cryptographer who was discharged from the Navy because of his homosexuality. Judge Bork held that the Constitution did not confer a right to engage in homosexual acts, and that the court therefore did not have the authority to set aside the Navy's

decision. He wrote: "If the revolution in sexual mores that appellant proclaims is in fact ever to arrive, we think it must arrive through the moral choices of the people and their elected representatives, not through the ukase of this court." The case was never appealed, but last year the Supreme Court adopted this same position in Bowers v. Hardwick--a decision in which Justice Powell concurred.

- In Hohri v. United States, Judge Bork criticized a panel opinion reinstating a claim by Americans of Japanese descent for compensation arising out of their World War II internment. Judge Bork denounced the internment, but pointed out that in his view the Court of Appeals did not have statutory authority to hear the case. He characterized the panel opinion as one in which "compassion displaces law." In a unanimous opinion authored by Justice Powell, the Supreme Court adopted Judge Bork's position and reversed the panel on appeal.

- Judge Bork has never sat on a case involving an affirmative action plan. While a law professor, he wrote an op-ed piece in 1979 for The Wall Street Journal in which he criticized the recently issued Bakke decision. Since then, however, the Supreme Court has issued many other decisions affecting this issue, and Judge Bork has never in any way suggested that he believes this line of cases should be overruled.

- In 1963 Bork wrote an article in the New Republic criticizing proposed public accommodations provisions that eventually became part of the Civil Rights Act as undesirable legislative interference with private business behavior.

  - But ten years later, at his confirmation hearings for the position of Solicitor General, Bork acknowledged that his position had been wrong:

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

  - The article was not even raised during his unanimous confirmation to the D.C. Circuit ten years later, in 1982.

- His article itself, like his subsequent career, makes clear his abhorrence of racism: "Of the ugliness of racial discrimination there need be no argument."

LABOR

- Judge Bork's approach to labor cases illustrates his deep commitment to principled decisionmaking. His faithful interpretation of the statutes at issue has resulted in a balanced record on labor issues that defies characterization as either "pro-labor" or "pro-management."

- He has often voted to vindicate the rights of labor unions and individual employees both against private employers and the federal government.

  - In an opinion he authored for the court in United Mine Workers of America v. Mine Safety Health Administration, Judge Bork held on behalf of the union that the Mine Safety and Health Administration could not excuse individual mining companies from compliance with a mandatory safety standard, even on an interim basis, without following particular procedures and ensuring that the miners were made as safe or safer by the exemption from compliance.

  - In concurring with an opinion authored by Judge Wright in Amalgamated Clothing and Textile Workers v. National Labor Relations Board, Judge Bork held that despite evidence that the union, at least in a limited manner, might have engaged in coercion in a very close election that the union won, the National Labor Relations Board's decision to certify the union should not be overturned nor a new election ordered.

  - In Musey v. Federal Mine Safety and Health Review Commission, Judge Bork ruled that under the Federal Coal Mine and Health and Safety Act the union and its attorneys were entitled to costs and attorney fees for representing union members.

  - In Amalgamated Transit Union v. Brock, Judge Bork, writing for the majority, held in favor of the union that the Secretary of Labor had exceeded his statutory authority in certifying in federal assistance applications that "fair and equitable arrangements" had been made to protect the collective bargaining rights of employees before

labor and management had actually agreed to a dispute resolution mechanism.

- In United Scenic Artists v. National Labor Relations Board, Judge Bork joined an opinion which reversed the Board's determination that a secondary boycott by a union was an unfair labor practice, holding that such a boycott occurs only if the union acts purposefully to involve neutral parties in its dispute with the primary employer.

- Similar solicitude for the rights of employees is demonstrated by Northwest Airlines v. Airline Pilots International, where Bork joined a Judge Edwards' opinion upholding an arbitrator's decision that an airline pilot's alcoholism was a "disease" which did not constitute good cause for dismissal.

- Another opinion joined by Judge Bork, NAACP v. Donovan, struck down amended Labor Department regulations regarding the minimum "piece rates" employers were obliged to pay to foreign migrant workers as arbitrary and irrational.

- A similar decision against the government was rendered in National Treasury Employees Union v. Devine, which held that an appropriations measure barred the Office of Personnel Management and other agencies from implementing regulations that changed federal personnel practices to stress individual performance rather than seniority.

- In Oil Chemical Atomic Workers International v. National Labor Relations Board, Judge Bork joined another Edwards' opinion reversing NLRB's determination that a dispute over replacing "strikers" who stopped work to protest safety conditions could be settled through a private agreement between some of the "strikers" and the company because of the public interest in ensuring substantial remedies for unfair labor practices.

- In Donovan v. Carolina Stalite Co., Judge Bork reversed the Federal Mine Safety and Health Review Commission, holding that a state gravel processing facility was a "mine" within the meaning of the Act and thus subject to civil penalties.

- Black v. Interstate Commerce Commission, a per curiam opinion joined by Judge Bork, held that the ICC had acted arbitrarily and capriciously in allowing a railroad to abandon some of its tracks in a manner that caused the displacement of employees of another railroad.

- Where the statute, legitimate agency regulation, or collective bargaining agreement so dictated, however, he has not hesitated to rule in favor of the government or private employer.

  - In National Treasury Employees Union v. U.S. Merit Systems, Judge Bork held that seasonal government employees laid off in accordance with the conditions of their employment were not entitled to the procedural protections that must be provided to permanent employees against whom the government wishes to take "adverse action."

  - In Prill v. National Labor Relations Board, Judge Bork dissented from the panel to support the National Labor Relations Board decision that an employee's lone refusal to drive an allegedly unsafe vehicle was not protected by the "concerted activities" section of the National Labor Relations Act. Judge Bork concluded that the Board's definition of "concerted activities," which required that an employee's conduct must be engaged in with or on the authority of other employees and not solely by and on behalf of the employee himself, was compelled by the statute.

  - In International Brotherhood of Electrical Workers v. National Labor Relations Board, Judge Bork wrote an opinion for the court upholding a National Labor Relations Board decision against the union which held that an employer had not committed an unfair labor practice by declining to bargain over its failure to provide its employees with a Christmas bonus. The court found that the company's longstanding practice to provide bonuses had been superseded by a new collective bargaining agreement which represented by its terms that it formed the sole basis of the employer's obligations to its employees and did not specify a Christmas bonus.

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

CRIMINAL LAW

- As Solicitor General, Robert Bork argued and won several major death penalty cases before the United

States Supreme Court. He has expressed the view that the death penalty is constitutionally permissible, provided that proper procedures are followed. This is the position of all but two of the current members of the Supreme Court.

- Judge Bork is a tough but fairminded judge on criminal law issues.

- He has opposed expansive interpretations of procedural rights that would enable apparently culpable individuals to evade justice.

  - In United States v. Mount, for example, he concurred in a panel decision affirming a defendant's conviction for making a false statement in a passport application. He wrote a separate concurrence to emphasize that the court had no power to exclude evidence obtained from a search conducted in England by British police officers, and that even assuming that it did, it would be inappropriate for the court to apply a "shock the conscience" test.

  - In U.S. v. Singleton, he overruled a district court order that had suppressed evidence in a defendant's retrial for robbery which had been deemed reliable in a previous court of appeals review of the first trial.

- On the other hand, however, Judge Bork has not hesitated to overturn convictions when constitutional or evidentiary considerations require such a result.

  - In U.S. v. Brown, Judge Bork joined in a panel decision overturning the convictions of members of the "Black Hebrews" sect, on the ground that the trial court, by erroneously dismissing a certain juror who had questioned the sufficiency of the government's evidence, had violated the defendants' constitutional right to a unanimous jury. Judge Bork's decision to void nearly 400 separate verdicts in what is believed to be the longest and most expensive trial ever held in a D.C. district court highlights his devotion to vindicating the constitutional rights even of criminal defendants.

ABORTION

- Judge Bork's personal views on abortion are irrelevant to his responsibility as a judge to decide fairly the cases which come before him, as are his personal views

on any subject. This reflects the heart of his judicial philosophy.

- Neither the President nor any other member of the Administration has ever asked Judge Bork for his personal or legal views on abortion.

- In 1981, Judge Bork testified before Congress in opposition to the proposed Human Life Bill, which sought to reverse Roe v. Wade by declaring that human life begins at conception. Judge Bork called the Human Life Bill "unconstitutional".

- Judge Bork has in the past questioned only whether there is a right to abortion in the Constitution.

- This view is shared by some of the most notable, mainstream and respected scholars of constitutional law in America:

  - Harvard Law Professors Archibald Cox and Paul Freund.

  - Stanford Law School Dean John Hart Ely.

  - Columbia Law Professor Henry Monaghan.

- Stanford law professor Gerald Gunther, the editor of the leading law school casebook on constitutional law, offered the following comments on Griswold v. Connecticut, the precursor to Roe v. Wade: "It marked the return of the Court to the discredited notion of substantive due process. The theory was repudiated in 1937 in the economic sphere. I don't find a very persuasive difference in reviving it for the personal sphere. I'm a card-carrying liberal Democrat, but this strikes me as a double standard."

- Judge Ruth Bader Ginsburg, one of Judge Bork's most liberal colleagues on the D.C. Circuit, has written that Roe v. Wade "sparked public opposition and academic criticism...because the Court ventured too far in the change it ordered and presented an incomplete justification for its action."

- The legal issue for a judge is whether it should be the court, or the people through their elected representatives, that should decide our policy on abortion.

- If the Supreme Court were to decide that the Constitution does not contain a right to abortion, that would not render abortion illegal. It would simply mean that the issue would be decided in the same way as

virtually all other issues of public policy--by the people through their legislatures.

- We do not know whether Judge Bork would vote to overrule Roe v. Wade. Some have suggested, however, that Judge Bork ought not to be confirmed unless he commits in advance not to vote to overrule Roe v. Wade. No judicial nominee has ever pledged his vote in a case in order to secure confirmation, and it would be the height of irresponsibility to do so. Indeed, any judicial nominee who did so would properly be accused not only of lacking integrity, but of lacking an open mind.

WATERGATE

- During the course of the Cox firing, Judge Bork displayed great personal courage and statesmanship. He helped save the Watergate investigation and prevent massive disruption of the Justice Department. As Lloyd Cutler has recently written, "[I]t was inevitable that the President would eventually find someone in the Justice Department to fire Mr. Cox, and, if all three top officers resigned, the department's morale and the pursuit of the Watergate investigation might have been irreparably crippled." Elliott Richardson has confirmed this as well.

- At first, Bork informed Attorney General Elliott Richardson and Deputy Attorney General William Ruckelshaus that he intended to resign his position. Richardson and Ruckelshaus persuaded him to stay. As Richardson has recently said, "There was no good reason for him to resign, and some good reason for him not to." Unlike Bork they had made a personal commitment not to discharge Archibald Cox. Richardson and Ruckelshaus felt that it was important for someone of Bork's integrity and stature to stay on the job in order to avoid mass resignations that would have crippled the Justice Department.

- After carrying out the President's instruction to discharge Cox, Bork acted immediately to safeguard the Watergate investigation and its independence. He promptly established a new Special Prosecutor's office, giving it authority to pursue the investigation without interference. He expressly told the Special

Prosecutor's office that they had complete independence and that they should subpoena the tapes if they saw fit--the very assertion that led to Cox's discharge.

- Judge Bork framed the legal theory under which the indictment of Spiro Agnew was allowed to go forward. Agnew had taken the position that a sitting vice president was immune from criminal indictment, a position which President Nixon initially endorsed. Bork wrote and filed the legal brief arguing the opposite position, i.e. that Agnew was subject to indictment. Agnew resigned shortly thereafter.

- All this is why, in 1981, The New York Times described Judge Bork's decisions during Watergate as "principled."

BALANCE ON THE SUPREME COURT

- It is simply wrong to suggest that Judge Bork's appointment would change the balance of the Court. His opinions on the Court of Appeals--of which, as previously noted, not one has been reversed--are thoroughly in the mainstream. His case-by-case approach is the same as Justice Powell's. Sometimes the civil rights plaintiffs win, and sometimes they do not. Sometimes the labor union wins, and sometimes it does not. In every instance, Judge Bork's decisions are based on his reading of the statutes, constitutional provisions, and case law before him. A Justice who brings that approach to the Supreme Court will not alter the present balance in any way.

- Moreover, the unpredictability of Supreme Court appointees is characteristic. Justice Scalia, a more conservative judge than Bork, has been criticized by some conservatives for his unpredictability in his very first term on the Court. Justice O'Connor has also defied expectations, as Professor Lawrence Tribe noted: "Defying the desire of Court watchers to stuff Justices once and for all into pigeonholes of 'right' or 'left,' [her] story...is fairly typical: when one Justice is replaced with another, the impact on the Court is likely to be progressive on some issues, conservative on others."

- There is no historical or constitutional basis for making the Supreme Court as it existed in June 1987 the ideal standard to which all future Courts must be held.

- No such standard has ever been used by anyone, conservative or liberal, in evaluating nominees to the Court. The Senate has always tried to look to the nominee's individual merits--even when they have disagreed about them.

- No such standards were used to evaluate FDR's eight nominations to the Court in six years or LBJ's nominees to the Warren Court, even though, as Professor Tribe has written, Justice Black's appointment in 1937 "took a delicately balanced Court...and turned it into a Court willing to give solid support to F.D.R.'s initiatives. So, too, Arthur Goldberg's appointment to the Court in 1962 shifted a tenuous balance on matters of personal liberty toward a consistent libertarianism...."

INDEPENDENCE OF THE JUDICIARY

The confirmation process is not, and constitutionally cannot be, a contest between the Executive and the Legislature in which all weapons, including case-specific or political litmus tests, are fair game. It is proper neither for the President nor for Congress to use such litmus tests, and as a result neither the President nor any member of the Administration has asked such questions of Judge Bork. The avoidance of such tests in the nomination process is essential to preserve the independence of the judiciary. It is the constitutional role and independence of the judiciary, not that of Congress or the President, that is at risk. There will be no winners as between the Executive and the Senate in such a contest, but there could be a loser--the Court.

- The constitutional reason for rejecting "balance" litmus tests is clear: If the Senate tried to preserve the narrow balances of the present Court on, e.g., the death penalty or abortion, it would destroy the constitutionally-guaranteed independence of the Supreme Court.

- The Senate would have to interrogate any prospective nominee on his position regarding abortion, the death penalty, and dozens of other cases. To preserve all these competing balances would subject the Senate to paralyzing competing demands.

- This politicization would plague the confirmation process far beyond this Presidency: It would legitimate blatant vote trading whenever cases arouse strong political interests.

- Moreover, it would be as improper for nominees to answer these questions as it would be for the Senate to ask them. To force nominees to trade their votes on future cases in exchange for Senators' votes on confirmation would diminish the prestige of the Court and politicize judicial decisionmaking, allowing legislators to reach into the Court to control the disposition of cases and controversies.

  - Nominees did not testify at all before the appointment of Justice Brandeis in 1916 and did not do so regularly until considerably later. When such testimony became more common, the necessity of insulating the Court from political manipulation gave rise to the universally-recognized privilege against comments on issues or cases likely to come before the Court.

- As Senator Kennedy has said, "Supreme Court nominees...have properly refused to answer questions put to them by the Senate which would require the nominee prematurely to state his opinion on a specific case likely to come before him on the bench." And Justice Harlan said during his hearings that for him, as a nominee, to comment on cases or issues that might come before him "would seem to me to constitute the gravest kind of question as to whether I was qualified to sit on that great Court."

July 22, 1987

Document No. DC

WHITE HOUSE STAFFING MEMORANDUM

DATE: 7/23/87 ACTION/CONCURRENCE/COMMENT DUE BY: 7/24/87

SUBJECT: UPDATED DRAFT TALKING POINTS ON BORK NOMINATION

	ACTION	FYI		ACTION	FYI
VICE PRESIDENT	☐	☐	FITZWATER	☐	☑
BAKER	☐	☑	GRISCOM	☑	☐
DUBERSTEIN	☐	☑	HENKEL	☐	☐
MILLER - OMB	☐	☐	HOBBS	☐	☐
BALL	☑	☐	KING	☐	☐
BAUER	☑	☐	MASENG	☐	☐
CARLUCCI	☐	☐	RISQUE	☑	☐
CRIBB	☑	☐	RYAN	☐	☐
CRIPPEN	☑	☐	SPRINKEL	☐	☐
CULVAHOUSE	☑	☐	TUTTLE	☐	☐
DAWSON	☐P	☑SS	GIBSON	☐	☑
DONATELLI	☐	☐	_____	☐	☐

REMARKS: Please provide any comments directly to Joe Rodota (x7170) by close of business Friday, July 24th, with an info copy to my office.

The attached materials, which supercede previously circulated packages on the Bork nomination, will be sent to Administration spokespeople and mailed to editorial writers, columnists, and regional editors.

RESPONSE:

Rhett Dawson
Ext. 2702

THE WHITE HOUSE

WASHINGTON

July 23, 1987

MEMORANDUM FOR RHETT DAWSON

FROM: TOM GIBSON

SUBJECT: Updated Draft Talking Points on Bork Nomination

Attached for staffing are updated talking points on the nomination of Judge Bork.

When cleared, these materials will be sent to Administration spokesmen. These materials will also be mailed to editorial writers, columnists and regional editors.

If you have questions concerning these materials, please call Joe Rodota at x7170. I would appreciate a comment deadline of C.O.B. Friday, July 24.

Thanks very much.

JUDGE ROBERT H. BORK

THE PRESIDENT'S NOMINEE TO THE SUPREME COURT

Overview

- On July 1, the President nominated Judge Robert Bork to replace retiring Justice Lewis Powell on the Supreme Court. Judge Bork has served with great distinction on the U.S. Court of Appeals for the District of Columbia since 1982, when the Senate unanimously confirmed his appointment.

- Judge Bork is superbly well qualified to join the Supreme Court. The American Bar Association gave him their highest possible rating in 1981 -- "Exceptionally Well Qualified." Observers from across the political spectrum agree he is an outstanding intellectual, an impressive legal scholar and a premier Constitutional authority.

- Judge Bork is a mainstream jurist. Since 1982, he dissented in only 6 percent of cases heard by the D.C. Court of Appeals. At no time have Reagan appointees been in the majority on the D.C. Circuit.

- The American people demand an effective, efficient government and they deserve prompt action on this nomination. Unwarranted delays in hearings and confirmation proceedings do a grave disservice to the Court and the Nation. The Supreme Court should have its full nine-member complement when it begins its October term. Justice delayed is justice denied.

- Ideology has no role in the Senate's decision. The issue is whether the Judges and the Courts are called upon by the Constitution to interpret the laws passed by the Congress and the states -- the "constructionist view" -- or whether judges and the courts should write orders and opinions which are, in effect, new laws -- the "activist" view.

- Judge Bork believes that the Constitution requires law writing be left to legislative bodies and interpretations of those laws to the Judiciary.

- Judge Bork deserves a fair hearing, and the Senate should ensure that he receives one.

JUDGE BORK IS SUPERBLY QUALIFIED

- Judge Robert Bork is superbly well qualified to serve on the United States Supreme Court. His legal career to date has been impressive. Taken individually, his achievements in private practice, teaching, in the executive branch and the judiciary would have been the high point of a brilliant career; he managed all of them.

- No appellate judge in America has a finer record on the bench. In more than 100 opinions from the D.C. Circuit, no majority opinion written by Judge Bork has been overturned by the Supreme Court.

- Moreover, the reasoning of several of his dissents was adopted by the Supreme Court when it reversed opinions with which he had disagreed.

- Highlights of Judge Bork's legal career:

  -- Professor at Yale Law School for 15 years; holder of two endowed chairs; Phi Beta Kappa; honors graduate of the University of Chicago Law School and managing editor of its law review.

  -- One of the Nation's foremost authorities on antitrust law and constitutional law. Author of dozens of scholarly works, including The Antitrust Paradox, perhaps the definitive textbook on antitrust law.

  -- Experienced practitioner and partner at Kirkland & Ellis.

  -- Solicitor General of the United States, 1973-77, representing the United States before the Supreme Court in hundreds of cases.

  -- Unanimously confirmed for the D.C. Circuit in 1982, after receiving the ABA's highest rating -- "Exceptionally Well Qualified" -- given to only a handful of judicial nominees each year.

  Mr. Bork...is a legal scholar of distinction and principle. . . . Differences of philosophy are what the 1980 election was about; Robert Bork is, given President Reagan's philosophy, a natural choice for an important judicial vacancy.

  --- Editorial
  New York Times, 1981

BORK'S JUDICIAL PHILOSOPHY

> ...[O]nly by limiting themselves to the historic intentions underlying each clause of the Constitution can judges avoid becoming legislators, avoid enforcing their own moral predilections, and ensure that the Constitution is law.
>
> --- Robert Bork, 1986

> "I have long been opposed to judges who write their own views into law rather than what they think, on the basis of principled interpretation, the law is."
>
> --- Robert Bork, 1982

- Judge Bork has spent more than a quarter of a century developing a powerful and cogent philosophy of law.

- Because he believes in adhering to the Constitution, Judge Bork is the best judge for all Americans. Neither liberals nor conservatives ought to rely on unelected branches of government to advance their agendas. Judge Bork believes in democratic decision making, and he has enforced both "liberal" and "conservative" laws alike.

- During his 1982 confirmation hearings to be a U.S. Circuit Court judge, Robert Bork was asked about the term "judicial activism."

> "I think what we are driving at is something that I prefer to call judicial imperialism. . . . I think a court should be active in protecting those rights which the Constitution spells out. Judicial imperialism is really activism that has gone to far and has lost its roots in the Constitution or in the statutes being interpreted. When a court becomes that active or that imperialistic, then I think that it engages in judicial legislation, and that seems to me inconsistent with the democratic form of Government we have...."

- He is not a political judge: He has repeatedly criticized political, "result-oriented" jurisprudence of both conservative and liberal philosophies.

- He has also rebuked conservative academics and commentators who have urged manipulation of the judicial process as a response to liberal judicial activism. He wants to get the courts out of the legislation business.

Bork on the Role of "Precedent" -- No Radical Shifts in Policy

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

--- Robert Bork, 1982

"...[T]o be a good judge is to be obedient to precedent as it stands."

--- Robert Bork, 1982

JUSTICE DELAYED IS JUSTICE DENIED

- When he nominated Judge Bork to the Supreme Court on July 1, the President took note of Justice Powell's belief that the courts should not be hampered by operating at less than full strength. The President urged the Senate "to expedite its consideration of Judge Bork so the Court will have nine Justices when its October term begins."

- The American people want and deserve a government that is fair, efficient and effective in carrying out the duties only government can perform.

- As Justice Powell put it, when the Court was not at full strength due to his previous absences, it "created problems for the court and for litigants."

- Since January 1987, the Senate Judiciary Committee has failed to give judicial nominees timely hearings.

  -- Between 1985 and 1986, the Judiciary Committee took an average of only 3 weeks to begin confirmation hearings after the President announced his nomination.

  -- Thus far in 1987, it is taking the Senate Judiciary Committee an average of 9 weeks to arrange confirmation hearings on judicial nominees.

- In the past quarter century, it has taken the Senate Judiciary Committee only 18 days, on average, to begin hearings on Supreme Court nominations. In the case of Judge Bork, the Democrat leadership of the Senate Judiciary Committee intends to delay hearings for approximately 10 weeks from the time President Reagan sent the nomination to the Senate, before it will begin hearings. This is the longest delay in history for a confirmation hearing for a Supreme Court justice.

- The efficiency of the entire judicial process has been undermined by excessive, needless, and openly partisan delaying tactics. As of March 31, 1987, more than 243,000 cases had been filed in the Nation's Federal District courts but had not yet been decided.

NO IDEOLOGICAL TESTS SHOULD APPLY

- Ideology has no role in the Senate's decision on whether to confirm Judge Bork. The application of ideological tests would end the independence of the judiciary.

- The Senate would have to interrogate any prospective nominee on his position on dozens of issues. Attempts to preserve all these competing balances would subject the Senate to paralyzing competing demands. The judicial selection process would become completely politicized.

- If the static "balance" test had been applied to previous nominations, the ideologies of Dred Scott and Plessy v. Ferguson would have been frozen in time -- denying us major civil rights decisions such as Brown v. Board of Education.

> "...[H]istory should be enough caution to those of us on the floor who are willing, for our own political needs and/or because we think we know, to stop predicting what she is going to be and to underscore the need for us to have more objective criteria to determine whether or not someone should or should not be on the Supreme Court of the United States -- that is, their intellectual capacity, their background and training, their normal character, and their judicial temperament. We cannot be asked to effectively do much beyond that; for, if it were our task to apply a philosophic litmus test beyond that -- which is not the constitutional responsibility of this body, in my opinion -- it would be a task at which we would consistently fail, because there is no good way in which we can know."
>
> --- Sen. Joseph Biden
> Congressional Record, 9/21/81
> (Sandra Day O'Connor nomination)

> "...[T]he Senate must not apply litmus tests of its own. No party to the process of naming federal judges has any business attempting to foreclose upon the future decisions of the nominee."
>
> --- Sen. Joseph Biden
> Congressional Record, 6/6/86

"Single-issue politics has no place in the solemn responsiblity to advise and consent to appointments to the Supreme Court or any other Federal Court."

--- Sen. Edward M. Kennedy
Congressional Record, 9/21/81

"I believe there is something basically un-American about saying that a person should or should not be confirmed for the Supreme Court...based on somebody's view that they are wrong on one issue."

--- Sen. Howard Metzenbaum
Congressional Record, 9/21/81

"I am familiar with your [Bork's] views with respect to antitrust legislation, antitrust enforcement, and you and I are totally in disagreement on that subject. However, as I said at the time Justice [Sandra Day] O'Connor was up for confirmation, the fact that my views might differ from hers on any one of a number of different issues would not in any way affect my judgment as pertains to confirmation or failure to confirm a member of the judiciary."

--- Sen. Howard Metzenbaum
Congressional Record, 1/27/82

- No nominee has ever been denied confirmation by the Senate for any reason other than perceived personal inadequacies -- such as alleged financial misconduct, mental instability, or racism.

BORK AND THE FIRST AMENDMENT

- Judge Bork would be a powerful ally of First Amendment values on the Supreme Court.

- Because of his reputation and formidable powers of persuasion, his championing of First Amendment values would carry special credibility with those who might not otherwise be sympathetic to vigorous defenses of the First Amendment.

- During his five years on the bench, Judge Bork has been one of the judiciary's most vigorous defenders of First Amendment values. For example:

  -- In Ollman v. Evans and Novak, Judge Bork greatly expanded the constitutional protections accorded journalists facing libel suits for political commentary. Judge Bork expressed his concern that a recent and dramatic upsurge in high-dollar libel suits threatened to chill and intimidate the American press, and held that those considerations required an expansive view of First Amendment protection against such suits.

     Judge Bork's decision provoked a sharp dissent from Judge Scalia and was praised as "extraordinarily thoughtful" in a New York Times column authored by Anthony Lewis. Libel lawyer Bruce Sanford said: "There hasn't been an opinion more favorable to the press in a decade."

  -- In Lebron v. Washington Metropolitan Area Transit Authority, Judge Bork held that an individual protestor had been unconstitutionally denied the right to display in the Washington, D.C. subway system a poster mocking President Reagan. The decision to deny display of the poster, Bork said, was "an attempt at censorship."

BORK ON CIVIL RIGHTS

- In his arguments before the Supreme Court as Solicitor General, and as a member of the Court of Appeals, Bork has never advocated or rendered a judicial decision that was less sympathetic to minority or female plaintiffs than the position eventually taken by the Supreme Court or by Justice Powell.

- In addition, in a significant number of cases, Bork has advocated a broader interpretation of civil rights laws than either Justice Powell or the Supreme Court was willing to accept. (This does not include cases challenging the constitutionality or permissability of federal statutes or policies, where the Solicitor General is obliged to advocate the interests of the United States as a defendant.)

Record as Solicitor General

- As Solicitor General, Robert Bork was responsible for the government arguing on behalf of the most far-reaching civil rights cases in the Nation's history, sometimes arguing more expansive interpretations of the law than those ultimately accepted by the Court.

- Among Bork's most important arguments to advance civil rights:

  -- Bork urged a broad interpretation of the Voting Rights Act to strike down an electoral plan he believed would dilute black voting strength. The Court disagreed 5-3 (Beer v. United States).

  -- The Court also agreed with Bork that race-conscious redistricting of voting lines to enhance black voting strength was constitutionally permissable (United Jewish Organization v. Casey).

  -- Bork argued in an amicus brief that discrimination on the basis of pregnancy was illegal sex discrimination. Six justices, including Justice Powell, rejected this argument. Congress later changed the law to reflect Bork's view (General Electric Co. v. Gilbert).

  -- Bork argued that even a wholly race-neutral seniority system violated Title VII if it perpetuated the effects of prior discrimination. The Supreme Court, including Justice Powell, ruled against Bork's argument (Teamsters v. United States).

-- Following Bork's argument, the Court ruled that civil rights laws applied to racially discriminatory private contracts (Runyon v. McCrary).

On the Court of Appeals

o As a member of the United States Court of Appeals since 1982, Judge Bork consistently upheld the rights of plaintiffs claiming race and sex discrimination, frequently reversing lower courts to do so. For example:

-- Bork rejected a South Carolina county's claim that its switch to an "at-large" election system did not require preclearance from the Attorney General under the Voting Rights Act (County Council of Sumter County, South Carolina v. United States). He later held that the county had failed to prove that its new system had "neither the purpose nor effect of denying or abridging the right of black South Carolinians to vote."

-- Bork voted to reverse the district court and hold that the Equal Pay Act applies to the Foreign Service's merit system (Ososky v. Wick).

-- Bork reversed a district court's decision to dismiss a claim of racial discrimination against the U.S. Navy (Emory v. Secretary of the Navy). The district court had held that the Navy's promotion decisions were immune from judicial review. In rejecting the district court's theory, Bork held:

> "Where it is alleged, as it is here, that the armed forces have trenched upon constitutionally guaranteed rights through the promotion and selection process, the courts are not powerless to act. The military has not been exempted from constitutional provisions that protect the rights of individuals. It is the role precisely of the courts to determine whether those rights have been violated."

Quotas in College Admissions

o While a law professor, Bork wrote an Op-Ed piece for the Wall Street Journal in 1979 in which he criticized the Bakke decision. Since then, however, the Supreme Court has issued many other decisions affecting this issue and Judge Bork has never indicated or suggested that he believes this line of cases should be overruled.

Public Accommodations

- In 1963, Bork wrote an article in the New Republic criticizing a proposal to outlaw discrimination in public accommodations such restaurants and hotels. (This proposal eventually became part of the Civil Rights Act.) He claimed at the time that there was a significant distinction between discrimination imposed by law and discrimination practiced by private individuals.

- This 25-year old article cannot fairly be used to criticize Bork's nomination. At his confirmation hearings for the position of Solicitor General, Bork repudiated the article:

> "I should say that I no longer agree with that article. . . . It seems to me I was on the wrong track altogether. It was my first attempt to write in that field. It seems to me the statute has worked very well and I do not see any problem with the statute, and were that to be proposed today, I would support it."
> --- Robert Bork, 1982

- His article itself, like his subsequent career, makes clear his abhorrence of racism: "Of the ugliness of racial discrimination," Bork said, "there need be no argument."

- The article, well known at the time of his confirmation hearings in 1982, was not even raised during his unanimous confirmation to the D.C. Circuit.

CRIMINAL JUSTICE

- As Solicitor General, Bork argued and won several major death penalty cases before the Supreme Court. He has expressed the view that the death penalty is constitutionally permissable, provided that proper procedures are followed. This is the position of all but two of the current members of the Supreme Court.

- Judge Bork is a tough but fairminded judge on criminal law issues.

- He has opposed expansive interpretations of procedural rights that would enable apparently culpable individuals to evade justice.

- In one case, a criminal defendant claimed that evidence against him obtained by British police officers in a search of his British residence should not be used against him in an American criminal proceeding. The defendant had argued that using such evidence "shocked the conscience." Judge Bork wrote:

> "Where no deterrence of unconstitutional police behavior is possible, a decision to exclude probitive evidence with the result that a criminal goes free should shock the judicial conscience even more than omitting the evidence."
>
> --- U.S. v. Mount

- On the other hand, Judge Bork has not hesitated to overturn convictions when constitutional or evidentiary considerations require such a result.

BORK AND THE ABORTION ISSUE

- Judge Bork's personal views on abortion are irrelevant to his responsibility as a judge to decide fairly the cases which come before him.

- Judge Bork has in the past questioned only whether there is a right to abortion in the Constitution.

- Neither the President nor any other member of the Administration asked Judge Bork for his personal views on abortion or any other matter.

- In 1981, Judge Bork testified before Congress in opposition to the proposed Human Life Bill, which sought to reverse Roe v. Wade by declaring that human life begins at conception. Judge Bork called the proposed Human Life Bill "unconstitutional".

- This view is shared by some of the most notable, mainstream and respected scholars of constitutional law in America, including:

  -- Harvard Law Professors Archibald Cox and Paul Freund;

  -- Stanford Law School Dean John Hart Ely; and

  -- Columbia Law Professor Henry Monaghan.

- Judge Ruth Bader Ginsburg, one of Judge Bork's most liberal colleagues on the D.C. Circuit, has written that Roe v. Wade "sparked public opposition and academic criticism...because the Court ventured too far in the change it ordered and presented an incomplete justification for its action."

- If the Supreme Court were to decide that the Constitution does not contain a right to abortion, that would not render abortion legal -- or illegal. It would simply mean that the issue would be decided in the same way as virtually all other issues of public policy -- by the State legislatures.

BORK AND WATERGATE

- During the so-called "Saturday Night Massacre" when Special Prosecutor Archibald Cox was fired, Robert Bork displayed great personal courage and statesmanship. His conduct throughout the Watergate era helped preserve the integrity of the ongoing investigation.

  -- First, he informed Attorney General Elliott Richardson and Deputy Attorney General William Ruckelshaus that he intended to resign his position.

  -- Richardson and Ruckelshaus persuaded him to stay. Unlike Bork, they had made a personal commitment not to discharge Archibald Cox, and felt that it was important for someone of Bork's integrity and stature to stay on the job.

  -- Judge Bork's decision to stay on helped prevent mass resignations that would have crippled the Justice Department and the subsequent investigation.

- Immediately after carrying out the President's instruction to discharge Cox, Bork acted to safeguard the Watergate investigation and its independence.

- He promptly established a new Special Prosecutor's office, giving it authority to pursue the investigation without interference. He expressly ensured the Special Prosecutor's office complete independence, as well as his right to subpoena the tapes if he saw fit. The Nixon White House was furious that he gave that instruction.

- Robert Bork framed the legal theory under which the indictment of Spiro Agnew was allowed to go forward. Agnew had taken the position that a sitting vice president was immune from critical indictment, a position which President Nixon initially endorsed. Bork wrote and filed the legal brief arguing the opposite position, that Agnew was subject to indictment. Agnew resigned shortly thereafter.

THE WHITE HOUSE

WASHINGTON

July 24, 1987

7/27/87
talked to Joe — he said once Leslie Arsht did. Finished below
PR

MEMORANDUM FOR DAVID CHEW

FROM: JOE RODOTA

SUBJECT: Tracking of Bork Editorials and Reports

Per our discussion yesterday, I have met with Bruce Wilmot of the White House News Summary and discussed our needs, as follows:

1. Consolidation of Bork Clip Files

Our immediate need is to create a central Bork file, using the clips collected to date by News Summary, WH Public Affairs, WH Media Relations, Diana Holland, DOJ, RNC, etc. Bruce thought the News Summary could appropriately do this.

2. Daily Distribution

Each morning, a special edition of the WH News Summary could be sent to a list of about 12-15 WH employees (and DOJ personnel, subject to WH Counsel's approval). Again, Bruce thought the News Summary could handle this.

3. Catalogue

As you suggested, a simple tracking system which will greatly enhance our ability to follow the story and initiate responses. I recommend reports be logged by date and source, and identified as follows:

-- Editorial/favorable
-- Editorial/unfavorable
-- Column/favorable
-- Column/unfavorable
-- Letter/favorable
-- Letter/unfavorable
-- Print news report
-- Television news report (transcript)
-- Radio news report (transcript)

Bruce will raise this with Leslye Arsht. The tracking function may need to be a cooperative effort between News Summary and WH Administration. Leslye or Bruce will be contacting you soon.

Please call me at x7170 if you have questions.

cc: Peter Keisler
Bruce Wilmot

THE WHITE HOUSE
WASHINGTON

[redacted]

DATE: July 27, 1987

TO: Tom Gibson

FROM: WILL BALL

SUBJECT: Bork

[redacted]

FYI.

cc: David Chew

[redacted]

THE WHITE HOUSE
WASHINGTON

Date: 7/27/87

TO: WILL BALL

FROM: CARL A. ANDERSON
Special Assistant to the President
for Public Liaison
Room 197 OEOB, Ext. 2164

The attached is for your:

- [x] Information
- [ ] Review & Comment
- [ ] Direct Response
- [ ] Appropriate Action
- [ ] Draft Letter
- [ ] Signature
- [ ] File
- [ ] Other
- [ ] Please Return By _____

Comments:

FOOD INDUSTRIES OF ALABAMA, INC.

2100 Data Park One
Suite 207 · Riverchase
Birmingham, Alabama 35244
Telephone (205) 988-9880

July 16, 1987

The Honorable Howell Heflin
United States Senate
728 Hart Senate Office Building
2nd and C Street, N.E.
Washington, D.C. 20510

Dear Senator Heflin:

It is my pleasure to serve as Executive Director for The Food Distributors of Alabama Association and The Alabama Meat Packers and Processors Association, in the Great State of Alabama.

These trade Associations met jointly for the first time at the New Perdido Beach Hilton in Gulf Shores, Alabama this past week, and it was at this joint meeting that the attached petition was generated.

I and the membership of the Associations would respectfully ask that you, as a member of the Judiciary Committee of the United States Senate vote to confirm the appointment of Judge Bork to the United States Supreme Court. It is the Strong feeling of the Associations's membership that Judge Bork be confirmed prior to the Court convening in October 1987, and certainly with your help this will be reality.

We are "private Enterprise" - hard working business people - pledged to uphold the Constitution of the United States - proud to be a part of "The Land of the Free" and humble that God has given us the privilege of living in a land where we are able to communicate with those we have elected to represent us in our Government and know that our viewpoints are noted.

You are to be commended as a statesman and for your ideals for a great America. I pray that the Good Lord will continue to bless you and yours.

Sincerely,

Stewart P. McLaurin

THE WHITE HOUSE

WASHINGTON

July 28, 1987

MEMORANDUM FOR SENIOR WHITE HOUSE STAFF

FROM: TOM GIBSON

SUBJECT: Issue Briefs and Talking Points in Support of Judge Bork

Attached, are two sets of materials that differ only in the header at the top of the page. Please use and circulate these materials through your networks as is customary and appropriate. The "Talking Points" header is for use for individuals and groups of Administration spokesmen. The "Issue Brief" header is intended for individuals and groups outside the Administration.

Also attached are selected editorials and columns which you may find useful.

Thanks very much.

JUDGE ROBERT H. BORK

THE PRESIDENT'S NOMINEE TO THE SUPREME COURT

Overview

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- Judge Bork is a mainstream jurist. He has been in the majority in 94 percent of the cases he has heard. Furthermore, none of his opinions has ever been reversed by the Supreme Court.

- The American people demand an effective, efficient government and they deserve prompt action on this nomination. Unwarranted delays in hearings and confirmation proceedings do a grave disservice to the Court and the Nation. The Supreme Court should have its full nine-member complement when it begins its October term. Justice delayed is justice denied.

- Ideology should have no role in the Senate's decision. The issue is whether the judges and the courts are called upon by the Constitution to interpret the laws passed by the Congress and the states -- the "judicial restraint view" -- or whether judges and the courts should write orders and opinions which are, in effect, new laws -- the "activist" view.

- Judge Bork believes that the Constitution requires law writing be left to legislative bodies. It is the role of the judiciary, in contrast, to interpret the laws which are enacted.

- Judge Bork deserves a fair hearing, and the Senate should ensure that he receives one.

JUDGE BORK IS SUPERBLY QUALIFIED

- Judge Robert Bork is superbly well qualified to serve on the United States Supreme Court. His legal career to date has been impressive. Taken individually, his achievements in private practice, education, the executive branch and the judiciary would have been the high point of a brilliant career; he managed all of them.

- No appellate judge in America has a finer record on the bench. In more than 100 opinions from the D.C. Circuit, no majority opinion written by Judge Bork has been overturned by the Supreme Court.

- Moreover, the reasoning of several of his dissents was adopted by the Supreme Court when it reversed opinions with which he had disagreed.

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  -- Phi Beta Kappa; honors graduate of the University of Chicago Law School and managing editor of its law review.

  -- Experienced practitioner and partner at Kirkland & Ellis.

  -- Solicitor General of the United States, 1973-77, representing the United States before the Supreme Court in hundreds of cases.

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- Because he believes in adhering to the Constitution, Judge Bork is the best judge for all Americans. Neither liberals nor conservatives ought to rely on unelected branches of government to advance their agendas. Judge Bork believes in democratic decision making, and he has enforced both "liberal" and "conservative" laws alike.

- During his 1982 confirmation hearings to be a U.S. Circuit Court judge, Robert Bork was asked about the term "judicial activism."

  > "I think what we are driving at is something that I prefer to call judicial imperialism. . . . I think a court should be active in protecting those rights which the Constitution spells out. Judicial imperialism is really activism that has gone to far and has lost its roots in the Constitution or in the statutes being interpreted. When a court becomes that active or that imperialistic, then I think that it engages in judicial legislation, and that seems to me inconsistent with the democratic form of Government we have...."

- He is not a political judge: He has repeatedly criticized political, "result-oriented" jurisprudence of both conservative and liberal philosophies.

- He has also rebuked conservative academics and commentators who have urged manipulation of the judicial process as a response to liberal judicial activism. He wants to get the courts out of the business of making policy.

Bork on the Role of "Precedent" -- No Radical Shifts in Policy

> "I think the value of precedent and of certainty and of continuity in the law is so high that I think a judge ought not to overturn prior decisions unless he thinks it is absolutely clear that the prior decision was wrong and perhaps pernicious."
>
> --- Robert Bork, 1982

> "...[T]o be a good judge is to be obedient to precedent as it stands."
>
> --- Robert Bork, 1982

Bork Praised by Justice Stevens

- Supreme Court Justice John Paul Stevens, appointed to the Court by President Gerald Ford in 1975, told a group of lawyers and judges meeting in Colorado Springs, Colorado, this month:

> "I think Judge Bork is very well qualified. He will be a welcome addition to the Court."
>
> --- Justice John Paul Stevens
> Omaha World Herald, 7/18/87

JUSTICE DELAYED IS JUSTICE DENIED

- When he nominated Judge Bork to the Supreme Court on July 1, the President took note of Justice Powell's belief that the courts should not be hampered by operating at less than full strength. The President urged the Senate "to expedite its consideration of Judge Bork so the Court will have nine Justices when its October term begins."

- The American people want and deserve a government that is fair, efficient and effective in carrying out the duties only government can perform.

- As Justice Powell put it, when the Court was not at full strength due to his previous absences, it "created problems for the court and for litigants."

- Since January 1987, the Senate Judiciary Committee has failed to give judicial nominees timely hearings.

  -- Between 1985 and 1986, the Judiciary Committee took an average of only 3 weeks to begin confirmation hearings after the President announced his nomination.

  -- Thus far in 1987, it is taking the Senate Judiciary Committee an average of 9 weeks to arrange confirmation hearings on judicial nominees.

- In the past quarter century, it has taken the Senate Judiciary Committee only 18 days, on average, to begin hearings on Supreme Court nominations. In the case of Judge Bork, the Democrat leadership of the Senate Judiciary Committee intends to delay hearings for approximately 10 weeks from the time President Reagan sent the nomination to the Senate. This is the longest delay in 25 years for a confirmation hearing for a Supreme Court justice.

- The efficiency of the entire judicial process has been undermined by excessive, needless, and openly partisan delaying tactics. As of March 31, 1987, more than 243,000 cases had been filed in the Nation's Federal District courts but had not yet been decided.

NO IDEOLOGICAL TESTS SHOULD APPLY

- Ideology should have no role in the Senate's decision on whether to confirm Judge Bork. The application of ideological tests would end the independence of the judiciary.

- The Senate would have to interrogate any prospective nominee on his position on dozens of issues. Attempts to preserve all these competing balances would subject the Senate to paralyzing competing demands. The judicial selection process would become completely politicized.

> "...[H]istory should be enough caution to those of us on the floor who are willing, for our own political needs and/or because we think we know, to stop predicting what she is going to be and to underscore the need for us to have more objective criteria to determine whether or not someone should or should not be on the Supreme Court of the United States -- that is, their intellectual capacity, their background and training, their normal character, and their judicial temperament. We cannot be asked to effectively do much beyond that; for, if it were our task to apply a philosophic litmus test beyond that -- which is not the constitutional responsibility of this body, in my opinion -- it would be a task at which we would consistently fail, because there is no good way in which we can know."
>
> --- Sen. Joseph Biden
> Congressional Record, 9/21/81
> (Sandra Day O'Connor nomination)

> "...[T]he Senate must not apply litmus tests of its own. No party to the process of naming federal judges has any business attempting to foreclose upon the future decisions of the nominee."
>
> --- Sen. Joseph Biden
> Congressional Record, 6/6/86

"...[T]his hearing is not to be a referendum on any single issue or the significant opposition that comes from a specific quarter.... [A]s long as I am chairing this hearing, that will not be the relevant issue. The real issue is your competence as a judge and not whether you voted right or wrongly on a particular issue.... If we take that attitude, we fundamentally change the basis on which we consider the appointment of persons to the bench."

--- Sen. Joseph Biden, Hearing on Nomination of Abner Mikva to D.C. Circuit at 394, 396

"Single-issue politics has no place in the solemn responsiblity to advise and consent to appointments to the Supreme Court or any other Federal Court."

--- Sen. Edward M. Kennedy
Congressional Record, 9/21/81

"I believe there is something basically un-American about saying that a person should or should not be confirmed for the Supreme Court...based on somebody's view that they are wrong on one issue."

--- Sen. Howard Metzenbaum
Congressional Record, 9/21/81

"I am familiar with your [Bork's] views with respect to antitrust legislation, antitrust enforcement, and you and I are totally in disagreement on that subject. However, as I said at the time Justice [Sandra Day] O'Connor was up for confirmation, the fact that my views might differ from hers on any one of a number of different issues would not in any way affect my judgment as it pertains to confirmation or failure to confirm a member of the judiciary."

--- Sen. Howard Metzenbaum
Congressional Record, 1/27/82

BORK AND THE FIRST AMENDMENT

- Judge Bork would be a powerful ally of First Amendment values on the Supreme Court.

- Because of his reputation and formidable powers of persuasion, his championing of First Amendment values would carry special credibility with those who might not otherwise be sympathetic to vigorous defenses of the First Amendment.

- During his five years on the bench, Judge Bork has been one of the judiciary's most vigorous defenders of First Amendment values. For example:

  -- In Ollman v. Evans and Novak, Judge Bork greatly expanded the constitutional protections accorded journalists facing libel suits for political commentary. Judge Bork expressed his concern that a recent and dramatic upsurge in high-dollar libel suits threatened to chill and intimidate the American press, and held that those considerations required an expansive view of First Amendment protection against such suits.

     Judge Bork's decision provoked a sharp dissent from Judge Scalia and was praised as "extraordinarily thoughtful" in a New York Times column authored by Anthony Lewis. Libel lawyer Bruce Sanford said: "There hasn't been an opinion more favorable to the press in a decade."

  -- In Lebron v. Washington Metropolitan Area Transit Authority, Judge Bork held that an individual protester had been unconstitutionally denied the right to display in the Washington, D.C. subway system a poster mocking President Reagan. The decision to deny display of the poster, Bork said, was "an attempt at censorship."

BORK ON CIVIL RIGHTS

- In his arguments before the Supreme Court as Solicitor General, and as a member of the Court of Appeals, Bork has never advocated or rendered a judicial decision that was less sympathetic to minority or female plaintiffs than the position eventually taken by the Supreme Court or by Justice Powell. (This does not include cases challenging the constitutionality or permissibility of federal statutes or policies, where the Solicitor General is obliged to advocate the interests of the United States as a defendant.)

- In addition, in a significant number of cases, Bork has advocated a broader interpretation of civil rights laws than either Justice Powell or the Supreme Court was willing to accept.

Record as Solicitor General

- As Solicitor General, Robert Bork was responsible for the government arguing on behalf of some of the most far-reaching civil rights cases in the Nation's history, sometimes arguing more expansive interpretations of the law than those ultimately accepted by the Court.

- Among Bork's most important arguments to advance civil rights:

  -- Bork urged a broad interpretation of the Voting Rights Act to strike down an electoral plan he believed would dilute black voting strength. The Court disagreed 5-3 (Beer v. United States).

  -- The Court agreed with Bork that race-conscious redistricting of voting lines to enhance black voting strength was constitutionally permissible (United Jewish Organization v. Casey).

  -- Bork argued in an amicus brief that discrimination on the basis of pregnancy was illegal sex discrimination. Six justices, including Justice Powell, rejected this argument. Congress later changed the law to reflect Bork's view (General Electric Co. v. Gilbert).

  -- Bork argued that even a wholly race-neutral seniority system violated Title VII if it perpetuated the effects of prior discrimination. The Supreme Court, including Justice Powell, ruled against Bork's argument (Teamsters v. United States).

-- Following Bork's argument, the Court ruled that civil rights laws applied to racially discriminatory private contracts (Runyon v. McCrary).

On the Court of Appeals

o As a member of the United States Court of Appeals since 1982, Judge Bork consistently upheld the rights of civil rights plaintiffs who had been victims of race and sex discrimination, frequently reversing lower courts to do so. For example:

-- Bork rejected a South Carolina county's claim that its switch to an "at-large" election system did not require preclearance from the Attorney General under the Voting Rights Act (County Council of Sumter County, South Carolina v. United States). He later held that the county had failed to prove that its new system had "neither the purpose nor effect of denying or abridging the right of black South Carolinians to vote."

-- Bork voted to reverse the district court and hold that the Equal Pay Act applies to the Foreign Service's merit system (Ososky v. Wick).

-- Bork reversed a district court's decision to dismiss a claim of racial discrimination against the U.S. Navy (Emory v. Secretary of the Navy). The district court had held that the Navy's promotion decisions were immune from judicial review. In rejecting the district court's theory, Bork held:

> "Where it is alleged, as it is here, that the armed forces have trenched upon constitutionally guaranteed rights through the promotion and selection process, the courts are not powerless to act. The military has not been exempted from constitutional provisions that protect the rights of individuals. It is the role precisely of the courts to determine whether those rights have been violated."

Quotas in College Admissions

o While a law professor, Bork wrote an Op-Ed piece for the Wall Street Journal in 1979 in which he criticized the Bakke decision. Since then, however, the Supreme Court has issued many other decisions affecting this issue and Judge Bork has never indicated or suggested that he believes this line of cases should be overruled.

Public Accommodations

- In 1963, Bork wrote an article in the New Republic criticizing a proposal to outlaw discrimination in public accommodations such as restaurants and hotels. (This proposal eventually became part of the Civil Rights Act.) He claimed at the time that there was a significant distinction between discrimination imposed by law and discrimination practiced by private individuals.

- This 25-year-old article cannot fairly be used to criticize Bork's nomination. At his confirmation hearings for the position of Solicitor General, Bork repudiated the article:

> "I should say that I no longer agree with that article. . . . It seems to me I was on the wrong track altogether. It was my first attempt to write in that field. It seems to me the statute has worked very well and I do not see any problem with the statute, and were that to be proposed today, I would support it."
> --- Robert Bork, 1973

- His article itself, like his subsequent career, makes clear his abhorrence of racism: "Of the ugliness of racial discrimination," Bork said, "there need be no argument."

- The article, well known at the time of his confirmation hearings in 1982, was not even raised during his unanimous confirmation to the D.C. Circuit.

CRIMINAL JUSTICE

- As Solicitor General, Bork argued and won several major death penalty cases before the Supreme Court. He has expressed the view that the death penalty is constitutionally permissible, provided that proper procedures are followed. This is the position of all but two of the current members of the Supreme Court.

- Judge Bork is a tough but fair-minded judge on criminal law issues.

- He has opposed expansive interpretations of procedural rights that would enable apparently culpable individuals to evade justice.

- In one case, a criminal defendant claimed that evidence against him obtained by British police officers in a search of his British residence should not be used against him in an American criminal proceeding. The defendant had argued that using such evidence "shocked the conscience." Judge Bork wrote:

> "Where no deterrence of unconstitutional police behavior is possible, a decision to exclude probative evidence with the result that a criminal goes free should shock the judicial conscience even more than admitting the evidence."
>
> --- U.S. v. Mount

- On the other hand, Judge Bork has not hesitated to overturn convictions when constitutional or evidentiary considerations required such a result.

BORK AND THE ABORTION ISSUE

- Judge Bork's personal views on abortion are irrelevant to his responsibility as a judge to decide fairly the cases which come before him.

- Neither the President nor any other member of the Administration asked Judge Bork for his personal views on abortion or any other matter.

- In 1981, Judge Bork testified before Congress in opposition to the proposed Human Life Bill, which sought to reverse Roe v. Wade by declaring that human life begins at conception. Judge Bork called the proposed Human Life Bill "unconstitutional".

- Judge Bork has in the past questioned only whether there is a right to abortion in the Constitution.

- This view is shared by some of the most notable, mainstream and respected scholars of constitutional law in America, including:

  -- Harvard Law Professors Archibald Cox and Paul Freund;

  -- Stanford Law School Dean John Hart Ely; and

  -- Columbia Law Professor Henry Monaghan.

- Judge Ruth Bader Ginsburg, one of Judge Bork's most liberal colleagues on the D.C. Circuit, has written that Roe v. Wade "sparked public opposition and academic criticism...because the Court ventured too far in the change it ordered and presented an incomplete justification for its action."

- If the Supreme Court were to decide that the Constitution does not contain a right to abortion, that would not render abortion legal -- or illegal. It would simply mean that the issue would be decided in the same way as virtually all other issues of public policy -- by the State legislatures.

BORK AND WATERGATE

- During the so-called "Saturday Night Massacre" when Special Prosecutor Archibald Cox was fired, Robert Bork displayed great personal courage and statesmanship. His conduct throughout the Watergate era helped preserve the integrity of the ongoing investigation.

  -- First, he informed Attorney General Elliott Richardson and Deputy Attorney General William Ruckelshaus that he intended to resign his position.

  -- Richardson and Ruckelshaus persuaded him to stay. Unlike Bork, they had made a personal commitment not to discharge Archibald Cox, and felt that it was important for someone of Bork's integrity and stature to stay on the job.

  -- Judge Bork's decision to stay on helped prevent mass resignations that would have crippled the Justice Department and the subsequent investigation.

- Immediately after carrying out the President's instruction to discharge Cox, Bork acted to safeguard the Watergate investigation and its independence.

- He promptly established a new Special Prosecutor's office, giving it authority to pursue the investigation without interference. He expressly ensured the Special Prosecutor's office complete independence, as well as his right to subpoena the tapes if he saw fit.

- Robert Bork framed the legal theory under which the indictment of Spiro Agnew was allowed to go forward. Agnew had taken the position that a sitting vice president was immune from criminal indictment, a position which President Nixon initially endorsed. Bork wrote and filed the legal brief arguing the opposite position, that Agnew was subject to indictment. Agnew resigned shortly thereafter.

THE WHITE HOUSE

WASHINGTON

July 28, 1987

MEMORANDUM FOR A.B. CULVAHOUSE

FROM: WILLIAM L. BALL, III

Subject: Bork Editorial

The attached favorable editorial on the Bork nomination appeared in today's edition of the New York Daily News.

The President clipped it from the paper, and he has asked that we include it in our file of editorials.

cc: Tom Gibson
David Chew
Leslye Arsht

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Bork's nomination: An appalling delay

PRESIDENT REAGAN'S NOMINATION OF Robert H. Bork to the Supreme Court has become a dangerous power struggle. Opponents have raised more than $2 million for a campaign to block Senate confirmation. Supporters are raising a like sum. The implication is somewhere between vulgar and obscene. And that's not the worst.

What is? Two offenses rise high:

1. The nomination and confirmation process is being politicized by both sides into a contest of power that already has sorely damaged the confirmation process.

2. Fought with blind ideological bluster, the debate thus far has little if anything to do with Bork's personal or professional competence or credentials.

The most dramatic illustration of Point 1 was Sen. Edward Kennedy's swift diatribe: "Robert Bork's America is one in which women would be forced into back-alley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens' doors in midnight raids, school children could not be taught about evolution," etc.

THAT LEFT CHICKEN LITTLE sounding Solomonic. Much of it is clearly rebutted by Bork's record. But that merely dramatizes the greater offense.

Joseph Biden (D-Del.) is chairman of the Senate Judiciary Committee. Throwing even the pretense of fairness or professionalism into the Potomac, he has declared himself as a forefront opponent of Bork. Then he postponed the confirmation hearing until Sept. 15, *10 weeks* after Reagan submitted the name.

Opposition to Bork is not all political opportunism. Many feminists, blacks, Hispanics and others are rallying against him. He is conservative—as should be expected of any Reagan appointee. He is firm in his opposition to social policies of importance to major segments of the American population. But it is his deep commitment to judicial restraint, his opposition to legislation by judicial interpretation, that underlies the most vehement opposition.

How his social or judicial philosophy may affect his performance is fit material for examination. That is what confirmation hearings are *for*. Then, if opposition to Bork carries the day, so be it. But not before.

IT IS NOT PROPER FOR LEGISLATORS or anyone else to demand that judicial candidates make ideological commitments on future rulings. It should be equally unacceptable to reject candidates on presumed ideological grounds without questions or answers.

However it may serve his presidential ambitions, Biden has thrown away any credibility he might have had as chair of the Judiciary Committee in the Bork matter. *And* the date he has set is irresponsibly delayed.

He should give up that chair for the purpose of the confirmation hearing. And his colleagues should reschedule the hearings and pledge to complete it before considering leaving on a summer recess.