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WHITE HOUSE STAFFING MEMORANDUM

DATE: 07/15/87 ACTION/CONCURRENCE/COMMENT DUE BY: NOON Friday July 17th

SUBJECT: TALKING POINTS -- THE PRESIDENT'S NOMINEE TO THE SUPREME COURT
ROBERT BORK

	ACTION FYI			ACTION FYI	
VICE PRESIDENT	<input type="checkbox"/>	<input type="checkbox"/>	FITZWATER	<input type="checkbox"/>	<input type="checkbox"/>
BAKER	<input type="checkbox"/>	<input checked="" type="checkbox"/>	GRISCOM	<input checked="" type="checkbox"/>	<input type="checkbox"/>
DUBERSTEIN	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	HENKEL	<input type="checkbox"/>	<input type="checkbox"/>
MILLER - OMB	<input type="checkbox"/>	<input type="checkbox"/>	HOBBS	<input type="checkbox"/>	<input type="checkbox"/>
BALL	<input checked="" type="checkbox"/>	<input type="checkbox"/>	KING	<input type="checkbox"/>	<input type="checkbox"/>
BAUER	<input checked="" type="checkbox"/>	<input type="checkbox"/>	MASENG	<input checked="" type="checkbox"/>	<input type="checkbox"/>
CARLUCCI	<input type="checkbox"/>	<input type="checkbox"/>	RISQUE	<input checked="" type="checkbox"/>	<input type="checkbox"/>
CRIBB	<input checked="" type="checkbox"/>	<input type="checkbox"/>	RYAN	<input type="checkbox"/>	<input type="checkbox"/>
CRIPPEN	<input type="checkbox"/>	<input type="checkbox"/>	SPRINKEL	<input type="checkbox"/>	<input type="checkbox"/>
CULVAHOUSE	<input checked="" type="checkbox"/>	<input type="checkbox"/>	TUTTLE	<input checked="" type="checkbox"/>	<input type="checkbox"/>
DAWSON	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<u>GIBSON</u>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
DONATELLI	<input checked="" type="checkbox"/>	<input type="checkbox"/>	_____	<input type="checkbox"/>	<input type="checkbox"/>

REMARKS:

Please provide any comments/recommendations to Tom Gibson by Noon on Friday, July 17th, with an info copy to my office. Thanks.

RESPONSE:

WHITE HOUSE TALKING POINTS

THE PRESIDENT'S NOMINEE TO THE SUPREME COURT ROBERT BORK

Overview

- o On July 1, the President nominated Judge Robert Bork to replace retiring Justice Lewis Powell on the Supreme Court. Judge Bork has served great distinction on the U.S. Court of Appeals of the District of Columbia since 1982, when he was rated by the American Bar Association as "exceptionally well qualified" and confirmed with unanimous approval of the Senate.

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.

New York Times editorial, 1981

- o There is a unanimous bi-partisan consensus that Judge Bork is an outstanding intellectual and legal scholar and a premier Constitutional authority. In 152 opinions from the D.C. Circuit, a Bork/majority opinion has never been overturned.
- o As demonstrated in his decisions on the D.C. Circuit, Judge Bork is a mainstream jurist. When Judge Bork took his seat on the D.C. Circuit, 8 of the 10 other Judges on the bench were Democrats. Nevertheless, in five years on that court, Judge Bork has written only 9 dissenting opinions.
- o Political views are not the issue here as already declared Democrats oponents have charged. The issue is whether the Judges and the Courts are called upon by the Constitution to rule upon laws passed by the Congress and the states -- the "Constructionist view" -- or whether judges and the courts should write orders and opinions that expand current laws or in effect write new laws -- the "Activist" view.
- o Judge Bork believes that the Constitution leaves law writing up to legislative bodies and rulings upon those laws up the Judiciary. Bork opponents attack this view as conservative. Ironically, some in the media call it liberal, because it would let stand laws passed by legislatures of the last several decades instead of turning them back under an "activist" banner ascribed to the "Conservative movement."
- o After 200 years of Constitutional precedent calling for an independant Judiciary, Democrats now insist that a political test is required for admission to the Supreme Court.
- o The Supreme Court should have its full nine-member complement when it begins its October term. Unwarrented delays in hearings and confirmation proceedings will not serve justice.

WHITE HOUSE TALKING POINTS

BORK 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 managed all of them. As The New York Times stated in 1981, "Mr. Bork is a legal scholar of distinction and principle."

- o 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.
- o Arguably the nation's foremost authority on antitrust law and constitutional law. Author of dozens of scholarly articles, including The Antitrust Paradox, the leading work on antitrust law.
- o Experienced practitioner and partner at Kirkland & Ellis.
- o Solicitor General of the United States, 1973-77, representing the United States before the Supreme Court in hundreds of cases.
- o 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.
- o No appellate judge in America has had a finer record on the bench: not one of his 152 majority opinions has been reversed by the Supreme Court.

WHITE HOUSE TALKING POINTS

BORK JUDICIAL PHILOSOPHY

"...only 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
San Diego Law Review, 1986

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

- o He is not a political judge: He has repeatedly criticized political, "result-oriented" jurisprudence of either conservative or liberal philosophies.
- o He has repeatedly rebuked academics and commentators who have urged conservative manipulation of the judicial process as a response to liberal judicial activism. He wants to get the courts out of the policy business -- not to make conservative policy.
- o He believes in neutral, text-based readings of the Constitution, statutes and cases. His expansive First Amendment and sex-discrimination jurisprudence and his opposition to jurisdiction-stripping legislation and to the Human Life Bill testify to his even-handedness and intellectual integrity.
- o He believes 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."

The Role of "Precedent" -- No Radical Shifts in Policy

- o 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. He was hissed at a meeting of the conservative Federalist Society recently for making this point.

WHITE HOUSE TALKING POINTS

- o Robert Bork is the best sort of judge for all Americans. Neither liberals nor conservatives ought rely on unelected branches of government to advance their agendas. Judge Bork believes that there is a presumption favoring democratic decision making, and he has demonstrated deference to liberal and conservative laws alike.

- o 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.

-- New York Times, 12/10/81

WHITE HOUSE TALKING POINTS

"BALANCE" OR POLITICAL LITMUS TEST?

In America's 200 year Constitutional history there is no historical or constitutional basis for measuring the political makeup of the Supreme Court. Franklin Roosevelt appointed 8 out of 9 Supreme Court Justices. Why now in June 1987, has a political standard been established by liberals, to which all future Courts must be held?

- o The Senate has always tried to look to the nominee's merits -- even when they have disagreed about them.
- o 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.
- o No nominee in modern times has ever been rejected for any reason other than perceived personal inadequacies like alleged financial misconduct or racism (Parker, Fortas, Haynesworth, Carswell).

A Political Test Ends the Independence of America's Judiciary

The Constitutional reason for this 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.

- o The Senate would have to interrogate any prospective nominee on his position regarding abortion, the death penalty, and dozens of other cases. This could completely politicize judicial selection.

Senator Kennedy has, at times, agreed:

"Supreme Court nominees...have properly refused to answer question 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."

If nominees are held hostage until they sign political promissory notes for future decisions, the nomination process will be paralyzed, and the Court and American justice will be crippled.

WHITE HOUSE TALKING POINTS

BORK AND 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. 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. Examples:

- o 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 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.

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. 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."

- o 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," one which bore a "presumption of unconstitutionality." Its decision to deny its space, Judge Bork said, was "an attempt at censorship," and he therefore struck it down.
- o 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.

Judge Bork has been criticized for once suggesting (in 1971) that the First Amendment is principally concerned with protecting political speech. Judge Bork made his position on this issue clear in a letter to the ABA Journal -- the underlying purpose of the First Amendment is to establish an open and robust public, political debate; but nonpolitical speech feeds that debate through the expression of moral, scientific and cultural values.

WHITE HOUSE TALKING POINTS

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"[Judge Bork is seen by some as]...the best that might have been expected of the Reagan administration on media law issues."

-- Jane Kirtley, Director
Reporters Committee for Freedom
of the Press

Bork Excerpts from Ollman v. Evans and Novak, 1984

"The law of the First Amendment must not try to make public dispute safe and comfortable for all the participants. That would only stifle the debate."

"This case...arouses concern that a freshening stream of libel actions, which often seems as much designed to punish writers and publications as to recover damages for real injuries, may threaten the public and constitutional interest in free, and frequently rough, discussion. Those who step into areas of public dispute, who choose the pleasures and distractions of controversy, must be willing to bear criticism, disparagement, and even wounding assessments..."

"Perhaps the framers did not envision libel actions as a major threat to that freedom [of political expression]... But if, over time, the libel action becomes a threat to the central meaning of the First Amendment, why should not judges adapt their doctrines."

"The American press is extraordinarily free and vigorous, as it should be. It should be, not because it is free of innaccuracy, oversimplification and bias, but because the alternative to that freedom is worse than those failings. Yet the area in which legal doctrine is currently least adequate to preserve press freedom is the area of defamation law..."

WHITE HOUSE TALKING POINTS

BORK AND CIVIL RIGHTS

As a member for five years of the United States Court of Appeals, Judge Bork voted to vindicate the rights of plaintiffs claiming race and sex discrimination, frequently reversing lower courts in order to do so. Examples:

- o In Ososky v. Wick, he voted to reverse the district court and held that the Equal Pay Act applies to the Foreign Service's merit system;
- o In Doe v. Weinberger, he voted to reverse the district court and held that an individual discharged from the National Security Agency for his homosexuality had been illegally denied a right to a hearing;
- o In Palmer v. Shultz, he voted to vacate the district court's grant of summary judgment to the government and held for a group of female foreign service officers alleging State Department discrimination in assignment and promotion;
- o 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";
- o 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 lawsuit must be dismissed; the lawsuit was thus reinstated.
- o In Laffey v. Northwest Airlines, Judge Bork affirmed a lower court decision which found that Northwest Airlines had discriminated against its female employees.

Affirmative Action

Judge Bork has never presided over 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 Bakke decision. Since then, however, the Supreme Court has issued many other decisions reaffirming the general constitutionality of affirmative action. That principle was not settled law in 1979; it is now, and Judge Bork has never indicated or suggested that he believes this line of cases should be overruled.

WHITE HOUSE TALKING POINTS

In 1963 Bork wrote an article in the New Republic criticizing a proposal to outlaw discrimination in public accommodations like restaurants or 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.

- o Ten years later, 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.

- o His article did not discuss legal issues or the Constitution -- it was purely abstract libertarian political philosophy and has no bearing on his views of the Civil Rights Act or the Constitution.
- o His article itself, like his subsequent career, makes clear his abhorrence of racism: "Of the ugliness of racial discrimination there need be no argument."
- o The article, well known during his confirmation proceedings in 1982, was not even raised during his unanimous confirmation to the D.C. Circuit.

WHITE HOUSE TALKING POINTS

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.

This reflects the heart of his judicial philosophy which is not to create Constitutional rights where none are enumerated, by judicial fiat.

- o Neither the President nor any other member of the Administration asked Judge Bork for his personal views on abortion or any other matter.
- o 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".
- o 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
- o 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."
- o The legal issue for a judge is whether it should be the court, or the people through their legislatures, that should decide our policy on abortion.
- o 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 legislatures.

WHITE HOUSE TALKING POINTS

BORK AND WATERGATE

During the Watergate proceedings, and in the incident where Archibald was Cox fired, Judge Bork displayed great personal courage and statesmanship and helped preserve the integrity of the on-going Watergate investigation.

- o At first, he informed Attorney General Elliott Richardson and Deputy Attorney General William Ruckelshaus that he intended to resign his position.
- o Richardson and Ruckelshaus persuaded him to stay. As Richardson has recently said, "There was no reason for him to resign." 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.
- o 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 Nixon White House was furious that he gave that instruction.
- o All this is why, in 1981, The New York Times described Judge Bork's decisions during Watergate as "principled."

WHITE HOUSE TALKING POINTS

SELECTED QUOTES ON ROBERT BORK AND JUDICIAL NOMINATIONS

Sen. Joseph Biden, Chairman, Senate Judiciary Committee

"[I]t has been understood since the founding of this republic that it is totally improper for a president to set pre-conditions before making a nomination. For the same reason, the 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 nominees."

Congressional Record
6/6/86

"The Constitution says the President obviously has a right to choose whomever he wishes; conversely, it also indicates that the United States Senate has equally as much right to insist upon ideological purity as the President does."

Face the Nation, 6/28/87

"Say the administration sends up Bork, and after our investigation he looks a lot like Scalia. I'd have to vote for him, and if the (pressure) groups tear me apart, that's the medicine I'll have to take. I'm not Teddy Kennedy. That kind of vote may turn out to be a liability for the presidential nomination process. . . ."

Philadelphia Inquirer
November 16, 1986

"If Judge Bork were to replace Judge Rehnquist or to replace Judge Scalia, I would have no problem replacing him; he's a brilliant man . . . ideologically somewhat rigid--but there is a need and a place for a Bork on the bench and a Scalia on the bench. But it does not mean that there should be six or seven or eight or even five Borks."

Face the Nation, 6/28/87

"I frankly do not know how we could approve any Members of the U.S. Senate, U.S. Congress, a member of any legislative body, or anyone who has ever served in a policy decision, who has taken a position on any issue, if the rationale for disqualifying you is that you have taken strong positions. That is certainly not proof of your inability to be objective and avoid being a policymaker on the bench. If we take that attitude, we fundamentally change the basis on which we consider the appointment of persons to the bench."

July 12, 1979

WHITE HOUSE TALKING POINTS

Sen. Edward Kennedy

"If strong political views were a disqualifying factor from serving on the Federal bench, then all of us here today -- and every man and woman who has ever served in either House of Congress, or held a political office -- would be disqualified... In my judgement, such a rule makes no sense at all."

Congressional Record, 9/25/79

Sen. Paul Simon

"The danger in applying a more ideological standard is that the Senate should not be the abuser of ideological rigidities any more than the president should be."

in "The Senate's role in
judicial appointments"
Judicature, June-July 1986

Sen. Max Baucus

"...I want to congratulate the president on his nomination of you (Judge Bork). I think there is no doubt that you are eminently qualified to serve in the position to which you have been nominated. There is no doubt in my mind that you will be confirmed, and I hope very quickly and expeditiously."

January 27, 1982

Sen. Howard Metzenbaum

"I am familiar with your (Judge 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."

January 27, 1982



Congress of the United States

Mark D. Siljander

Fourth District, Michigan

11084 Thrush Ridge Road

Reston, Virginia 22091



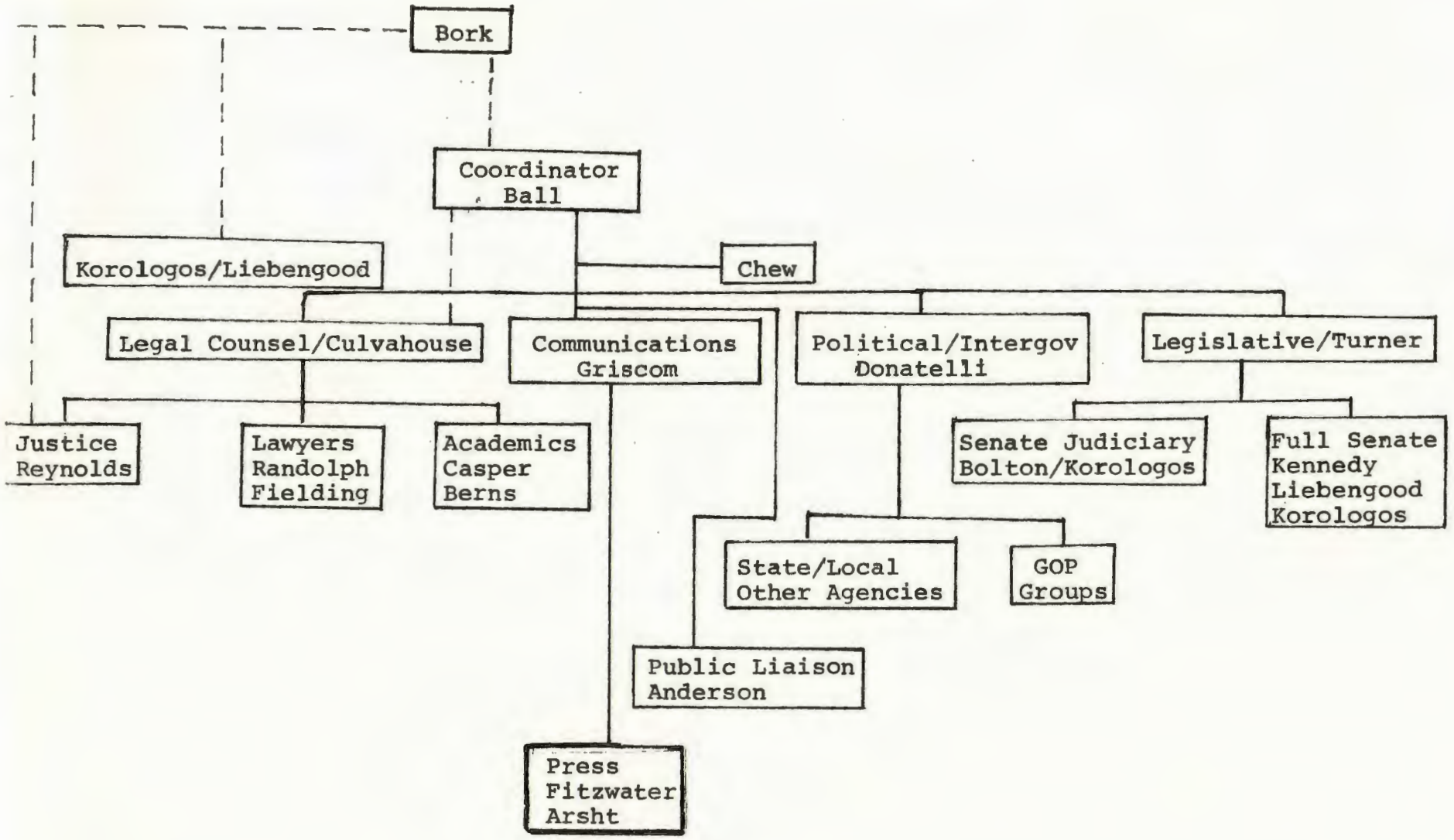
7/1/87

Dear Ken:

So good to bump into you today!
I wanted to clarify that my frustration,
reference to a position, was not directed
at you, rather a general expression
after nearly a year of effort.

Bob is a wonderful choice, and
if I can assist in any fashion, please
let me know.

Most Sincerely



THE WHITE HOUSE
WASHINGTON



July 15, 1987

MEMORANDUM FOR SENATOR BAKER

FROM: William L. Ball, III *WB*
RE: Proposed calls to Senators in support of Judge
Bork

I am attaching a list of phone calls I recommend you make in support of Judge Bork. These are Senators from the Democrat side who voted for Rehnquist plus five freshman from southern States.

Talking points are also attached. Message is "hear him out before you decide..."

cc: Ken Duberstein

Call List on Bork Nomination

John Stennis	(D-MS)
Lawton Chiles	(D-FL)
Bob Graham	(D-FL)
Alan Dixon	(D-IL)
Bennett Johnston	(D-LA)
John Breaux	(D-LA)
Sam Nunn	(D-GA)
Wyche Fowler	(D-GA)
David Pryor	(D-AR)
Terry Sanford	(D-NC)
Richard Shelby	(D-AL)