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1	MEMO	WILLIAM LYTTON TO PETER KEISLER RE: ARLEN SPECTER (P. 2, PARTIAL)	1	8/21/1987	B6

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THE WHITE HOUSE

WASHINGTON

July 31, 1987

MEMORANDUM FOR T. KENNETH CRIBB, JR.
ASSISTANT TO THE PRESIDENT
FOR DOMESTIC AFFAIRS

FROM: PETER D. KEISLER POK
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Bork Nomination

Yesterday you asked me whether Judge Bork had ever commented on the issue of racially restrictive covenants. In Shelly v. Kraemer, 334 U.S. 1 (1948), the Court held that the fourteenth amendment forbids state court enforcement of a private, racially restrictive covenant. In "Neutral Principles and Some First Amendment Problems", 47 Indiana Law Journal 1 (1971), Judge Bork criticized that holding. I have attached a brief summary and analysis of that criticism.

cc: Arthur B. Culvahouse, Jr.
Jay B. Stephens
C. Christopher Cox
Patricia M. Bryan
Ben Cohen

Shelly v. Kraemer

In the Neutral Principles article, Bork found himself in substantial agreement with Professor Wechsler's criticism that the Court's decision in Shelly v. Kraemer, 334 U.S. 1 (1948), is not supported by neutral principles. Shelly held that the fourteenth amendment forbids state court enforcement of a private, racially restrictive covenant. First, Bork criticized the Court for its failure to rest the decision on a neutral principle: "The decision was, of course, not neutral in that the court was most clearly not prepared to apply the principle to cases it could not honestly distinguish." For example, taken to its logical conclusion the principle would require courts to enjoin state officials from enforcing trespass laws against trespassers who can show content discrimination by landowners seeking to have them removed. Second, even if the Court had been prepared to apply neutrally the rule that all state enforcement of a private person's discriminatory choice constitutes violates equal protection, Bork's view was that the Constitution could not be fairly interpreted to yield such a rule: "It converts an amendment whose text and history clearly show it to be aimed only at governmental discrimination into a sweeping prohibition of private discrimination. There is no warrant anywhere for that conversion."

In accordance with the criticisms raised by Professors Wechsler and Bork, the Supreme Court refused to extend Shelly in Evans v. Abney, 396 U.S. 435 (1970). After a prior case held that land conveyed to a city in trust for the use of whites only could not be operated on a racially discriminatory basis, the state court ruled that the trust had failed and that the trust property reverted by operation of Georgia law to the heirs of the donor. The Evans Court ruled 5-2 that this ruling did not constitute state discrimination under the fourteenth amendment. Justice Black's opinion for the Court credited the state court's finding that the donor would have rather had the whole trust fail than have the park integrated. According to the Court, "any harshness that may have resulted from the state court's decision can be attributed solely to its intention to effectuate as nearly as possible the explicit terms of [the donor's] will." Justice Brennan's dissent would have applied Shelly, stating that "there is state action whenever a State enters into an arrangement which creates a private right to compel or enforce the reversion of a public facility. Whether the right is a possibility of reverter, a right of entry, an executory interest, or a contractual right, it can be created only with the consent of a public body or official."

Thus, although Shelly served a valuable social purpose (no longer necessary since the 1968 enactment of the Fair Housing Act), to invalidate the enforcement of racially restrictive covenants, the Court's subsequent cases clearly establish that Shelly is now, for all practical purposes, limited to its facts. See Lugar v. Edmondson, 457 U.S. 922 (1982); Flagg Bros. v.

Brooks, 436 U.S. 149 (1978); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972). As Justice Powell's opinion for the Court stated just last Term in San Fransisco Arts & Athletics v. United States Olympic Committee, 55 U.S.L.W. 5061 (June 25, 1987), the government "can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the government."

THE WHITE HOUSE

WASHINGTON

July 31, 1987

MEMORANDUM FOR T. KENNETH CRIBB, JR.
ASSISTANT TO THE PRESIDENT
FOR DOMESTIC AFFAIRS

FROM: PETER D. KEISLER *PDK*
ASSOCIATE COUNSEL TO THE PRESIDENT

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THE WHITE HOUSE

WASHINGTON

July 31, 1987

MEMORANDUM FOR MAX GREEN
ASSOCIATE DIRECTOR
OFFICE OF PUBLIC LIAISON

FROM: PETER D. KEISLER PDK
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Bork Nomination

As we discussed, I have attached two Letters to the Editor which were mailed this week to the Washington Post. As you know, the Post reported on Tuesday that Judge Bork had participated in a panel discussion at the Brookings Institution in 1985 and had made remarks which appeared to be insensitive to religious minorities. The Post account was thoroughly inaccurate, as these letters attest. (Warren Cikins was the Brookings staffer who arranged the event; Rabbi Haberman was an attendee.)

cc: Arthur B. Culvahouse, Jr.
Jay B. Stephens
C. Christopher Cox
Patricia M. Bryan
Ben Cohen
Leslye Arsht

The Brookings Institution

1775 MASSACHUSETTS AVENUE N.W. / WASHINGTON D.C. 20036 / CABLES: BROOKINST / TELEPHONE: (202) 797-6000

Center for Public Policy Education

July 28, 1987

To the Editor
The Washington Post

Dear Madame:

I am quite concerned about the article of Al Kamen on Thursday, July 28 which made reference to a Brookings Seminar for Religious Leaders which Judge Robert H. Bork addressed on Thursday, September 12, 1985. When Mr. Kamen asked me about the Seminar, I replied that it was my understanding as the Chairman of that meeting that the meeting was off-the-record. Since other attendees have elected to report their recollections of the meeting, I thought, in fairness, that I should also respond to their comments.

Whatever one's views are about Judge Bork's qualifications to serve on the Supreme Court, he certainly is entitled to a thorough and accurate review of his opinions. In examining my notes of that meeting, I find no reference to any specific Supreme Court decision, but only the expression of broad concepts and principles. I find no opinion expressed by the Judge on the issue of school prayer, but only the comment that the current turmoil in constitutional law may force some revisions.

One must remember that the context of this session at Brookings was the airing of a wide range of views on matters of Church and State, in an aura of reconciliation not confrontation. While Judge Bork was challenged frequently by members of the Seminar, he responded with grace and an inquiring mind, and willingly extended the discussion period well beyond its adjournment time.

Let the debate on Judge Bork's confirmation go forward on its merits, in this same aura of the tenacious but gracious pursuit of the truth!

Sincerely,

Warren I. Cikins
Senior Staff Member

bcc: Robert H. Bork ✓
Barbara Littell
Bruce K. MacLaury

WASHINGTON HEBREW CONGREGATION
Massachusetts Avenue and Macomb Street, N.W.
WASHINGTON, D.C. 20016 • (202) 362-7100

JOSHUA O. HABERMAN, D.H.L.
Rabbi Emeritus

July 29, 1987

The Editor
Washington Post
1150 - 15th Street, N.W.
Washington, D.C. 20071

Dear Sir:

It is a good thing I was there when Judge Bork met with a group of Clergy at a Brookings Institution dinner for religious leaders in September, 1985 because, if I had nothing but your account (July 28, 1987) of that evening's discussion, I would draw entirely wrong conclusions about Judge Bork's view on Church and State issues.

Your reporter was not present at the meeting. I was. As a Rabbi with a strong commitment to the separation of Church and State, I would have been greatly alarmed if Judge Bork had expressed any tendency to move away from our Constitutional guarantee of religious freedom and equality. I heard nothing of the sort.

The Judge, indeed, showed great sensitivity for the ambiguities and dilemmas of the First Amendment which, on the one hand, says "Congress shall make no law respecting an establishment of religion," but, on the other hand, protects "the free exercise" of religion. During an extraordinarily long exchange with the assembled clergy, I found the Judge to be cautious yet candid and very open-minded. He threw back at us as many questions as he answered. Obviously, he was interested in how the clergy would cope with some of these problems and listened most attentively to opinions to which he often responded with still another question rather than a rebuttal, -- a socratic approach I found most stimulating.

I do not recall the Judge ever stating how he would vote on matters such as prayer in the public schools. Two points stand out clearly in my recollection of Judge Bork's chief concern expressed by him in the course of that evening's discussion:

1. The nation's growing polarization on the Church and State issue which, apparently, prompted him to grope for a way of pulling back from collision course which would be highly divisive and damaging to the nation as well as to the various religious bodies.

2. The need to give some public recognition to the role of religion in our history and national life, short of teaching, promoting, or favoring one or the other religious dogma or ritual under state auspices -- a policy which is now advocated even by the staunchly liberal People for the American Way.

I gained the impression that Judge Bork favored a pragmatic approach to some of the most controversial Church and State issues with all sides developing more flexibility.

Sincerely,

Joshua O. Haberman

Rabbi Joshua O. Haberman

JOH:bg

THE WHITE HOUSE

WASHINGTON

August 3, 1987

MEMORANDUM FOR DONALD A. DANNER
SPECIAL ASSISTANT TO THE PRESIDENT FOR PUBLIC LIAISON AND DIRECTOR ECONOMIC DIVISION

FROM: PATRICIA MACK BRYAN PMB
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Proposed Editorial Supporting Bork Appointment

Attached as you requested is a proposed editorial supporting Robert Bork's appointment to the Supreme Court from a businessman's perspective.

Attachment

cc: Arthur B. Culvahouse, Jr.
Jay B. Stephens
T. Kenneth Cribb, Jr.
C. Christopher Cox
Peter D. Keisler
Benedict Cohen

Over the last month, the press has carried stories about and editorials by special interest groups opposing Judge Robert H. Bork's appointment to the United States Supreme Court. The crux of their opposition appears to be a fear that Judge Bork is not committed to the same political vision that they are and, consequently, cannot be counted on to rule in their favor in every instance.

As a businessman I believe--and I think anyone who thinks about the issue seriously will agree--that the health of American business is crucial to the health of the entire American economy and therefore in the long run is more critical to the quality of life of all Americans than are these very important and emotionally-charged social issues. Unlike these special interest groups for particular social issues, however, I do not want judges deciding cases on the basis of any policy agenda--mine or anyone else's. I, therefore, join the long list of Robert Bork supporters--a list that contains notables of all political persuasions including Supreme Court Justice John Paul Stevens, and President Carter's Counsel, Lloyd Cutler. In my view, Judge Bork would make a superb Supreme Court Justice precisely because no special interest group can count on him; he has proven himself to be a fair, openminded and impartial judge who decides cases free from partisan preferences or political influence.

As a businessman and as a citizen, it is of tremendous importance to me that our courts do in practice what they were designed to

do in theory: impartially decide cases on the basis of preexisting law. I make all kinds of business and social arrangements every day--how to school my children, whom to hire for a particular job, what contracts to enter into, etc. In conducting my affairs, I, like all Americans, need to have confidence first that not every action I take will result in a court case and second, that should a controversy wind up in court, it will be settled on the basis of preexisting law of which all parties were or should have been aware.

Legal uncertainty, more than any particular judicial outcome, is capable of disrupting the efficient operation of the American economy. As Judge Bork himself has so eloquently stated, such uncertainty is a boon only to lawyers; "It makes their practices lucrative and their clients' lives wretched."

Judge Bork's enduring commitment to the rule of law ensures the vital predictability that is sought by those of us who are not lawyers and necessary to a flourishing economy. Relatedly, Judge Bork is adept at resolving any ambiguities in the law that do cause uncertainty in a logical and forthright manner that provides the direction necessary for us to order our affairs within the law. His ability to craft opinions that are both extremely thoughtful and easily understandable to even nonlawyers is a feat that in my view far too few of his colleagues on the federal bench have been able to emulate.

It is for these reasons that I strongly support Judge Bork's appointment to the Supreme Court, and not because he can be counted on to decide all cases in my favor or in favor of business in general. In fact, he cannot be counted as a safe vote for either business or economic freedom--and rightly so. Rather, he is an advocate of judicial restraint. As such, Judge Bork has argued that judicial policymaking is illegitimate whenever the exercise of judicial power is not fairly tied to the Constitution, regardless of whether it happens to favor economic rights, on the one hand, or personal privacy rights, on the other. In rejecting as illegitimate attempts to invalidate economic regulation under a general notion of laissez-faire economic philosophy, he wrote in one article:

> Viewed from the standpoint of economic philosophy, and individual freedom, the idea has many attractions. But viewed from the standpoint of constitutional structures, the idea works a massive shift away from democracy and toward judicial rule.

Judge Bork relies on this same neutral approach in interpreting statutes, agency regulations, and contracts as well. For every one of his rulings that can be labelled a business victory, there seems to be another that can be labelled a business defeat. What each of Judge Bork's decisions has in common is its basis in preexisting law, rather than in his political, economic or philosophical preferences. And that is as it should be.

Take, for example, two of Judge Bork's labor cases. In International Brotherhood of Electrical Workers, Judge Bork did not hesitate to uphold a company's decision not to bargain with the union over a Christmas bonus that was not one of the benefits agreed to in the collective bargaining agreement. The victor in this case--the company--won because the terms of its preexisting agreement with the union required that it win. On the other hand, in United Mine Workers of America v. Mine Safety and Health Administration, Judge Bork followed the clear mandate of the relevant statute to hold 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 insuring that the miners were made as safe or safer by the exemption from compliance.

Consequently, while I applaud Judge Bork's fairminded approach to judging, I--like the special interest groups that oppose him--find that I cannot count on him to rule in my favor in every instance. Viewed outside the emotionally-laden context of highly charged social issues such as abortion, busing, and school prayer, however, I think the illegitimacy of supporting or opposing a candidate simply because he can or cannot be counted on always to decide a case for one's interest is as obvious as the sheer impossibility of finding a candidate who can meet that test for even a small fraction of all Americans.

At the risk of sounding politically naive, I believe that the vast majority of Americans join me in neither needing nor wanting a court tilted in their favor. What we do both need and want are judges who will impartially and faithfully apply the laws of this country without regard to their own personal or policy preferences. Robert Bork is the epitome of such a judge. In the words of Justice Stevens, he would be "a very welcome addition to the Supreme Court."

THE WHITE HOUSE

WASHINGTON

August 3, 1987

MEMORANDUM FOR DONALD A. DANNER
SPECIAL ASSISTANT TO THE PRESIDENT FOR PUBLIC LIAISON AND DIRECTOR ECONOMIC DIVISION

FROM: PETER D. KEISLER PDK
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Bork Talking Points

Attached as you requested are the talking points for business groups on the Bork nomination.

Attachment

cc: Arthur B. Culvahouse, Jr.
Jay B. Stephens
T. Kenneth Cribb, Jr.
C. Christopher Cox
Patricia Mack Bryan
Benedict Cohen

In an op-ed piece published in The New York Times on July 13, 1987, ("His Judicial Restraint is a Myth"), Ralph Nader attacked the Bork nomination in the following terms:

> "President Reagan has praised his Supreme Court nominee, Judge Robert H. Bork, as a 'powerful advocate of judicial restraint' who believes that 'judges' personal preferences and values' should not affect how they decide cases. Judge Bork's judicial record, however, demonstrates that he has little trouble taking 'activist' positions to accomplish results that he prefers in specific cases. In fact, while Judge Bork scrupulously follows the rules of restraint when civic groups seek judicial review, he abandons them when corporate interests are in jeopardy....Since January alone, Judge Bork has written at least six opinions in cases where a business challenged an agency decision and, in five of them, he reversed the agency in whole or in part."

This criticism is unfounded. Judge Bork's record on the Court of Appeals reflects a genuine deference to decisions made by the political branches of government, and a reluctance to set them aside in the absence of clear warrant in the law to do so. In some instances, Judge Bork has voted in favor of challenges to administrative and regulatory agencies, but on each such occasion his vote reflected a faithful interpretation of the governing law. For example, Nader criticizes a panel opinion authored by Judge Bork in which the court held that the Environmental Protection Agency was legally permitted to consider the cost to the industry in setting certain emission standards under the Clean Air Act. In a subsequent decision in the same case, however, that holding was supported by all eleven members of the Court of Appeals for the District of Columbia Circuit. In another decision opposed by Nader in his article, Judge Bork simply held (on behalf of a majority of the full court) that an electric utility company which claimed that the rates set by the Federal Energy Regulatory Commission would place it into bankruptcy was entitled to a hearing before the agency at which it could plead its case. This is hardly "judicial activism."

The business community does not need or desire a "pro-business" judge, i.e., a judge who automatically votes on the side of business interests. What businessmen most need are predictable legal rules, rules that allow them to plan their affairs with some confidence that they will not be subjected to unexpected legal liability. Judge Bork has shown an appreciation for the degree to which legal uncertainty, more than any particular judicial outcome, is capable of disrupting the efficient operation of the American economy:

> "The inconsistency both of doctrine and of application is well known to antitrust lawyers. It makes their practices lucrative and their clients' lives wretched. The lawyer must repeatedly tell clients planning a course of business conduct that some decided cases read against it but it is not clear the government will bring an action or, if it should, whether the court will apply the precedent in that fashion. This is ordinarily followed, to the client's chagrin, by an impressionistic statement of the odds for and against, capped by the buck-passing observation that now the decision whether to proceed has become a question of business rather than legal judgment."

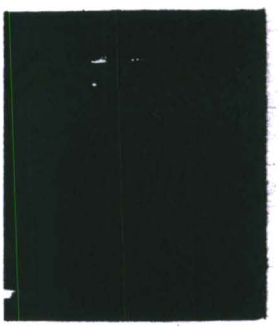
(The Antitrust Paradox, p. 420.) When judges feel free to set aside the policies that have been enacted into law through the political process, and substitute instead their own notions of good policy, this unpredictability is especially strong. That is why the doctrine of "judicial restraint"--of upholding and enforcing, in a principled and consistent manner, the policy choices made by the elected branches of government--is the jurisprudence best suited to creating an atmosphere in which business can flourish.

THE WHITE HOUSE
WASHINGTON

August 14, 1987

MEMORANDUM FOR WILLIAM L. BALL, III
JAY B. STEPHENS
LESLYE ARSHT
TOM KOROLOGOS
C. CHRISTOPHER COX
PETER KEISLER
PATRICIA BRYAN
BENEDICT COHEN

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



THE WHITE HOUSE
WASHINGTON

Date: 8/5

TO: A. B. Culvahouse

FROM: **FRANK J. DONATELLI**
Assistant to the President for
Political and Intergovernmental Affairs

SUBJECT:

The attached is for:

☐	Information	☐	Review & Comment
☐	Direct Response	☐	Appropriate Action
☐	Draft Reply	☑	Per Request
☐	File	☐	Signature

Comments:

Dear Editor:

Since his nomination by the President as Associate Justice, Robert Bork has been undergoing intensive scrutiny by the media, politicians and civic groups. This examination of the record of someone who has been nominated to hold one of the most important offices in our nation is appropriate.

I would like to offer my own observations of someone I have known for more than 15 years, both as a U.S. Attorney during his tenure as Solicitor General and as a friend for the past decade and a half.

I also offer this view as a Governor of a major state, as someone who is not affected by the so-called "Beltway Syndrome," and as a solid supporter of Judge Bork's nomination.

I hope you will take the opportunity to run this piece on your opinion-editorial page at your earliest convenience during the discussion of Judge Bork's qualifications to be a Supreme Court Justice.

Sincerely,

James R. Thompson
GOVERNOR

JRT:ct

Howard - As I promised. It's going to 93 major papers. We'll see who uses it. Let me know I can help further. I've been lobbying Dixon, as, he said, you know.

Regards,
Jim

Two centuries of experience has proven, time and again, that the promise of our Constitution is only as meaningful as the conscience and intelligence of those who interpret it as members of the United States Supreme Court. Insulated from winds of political change and beholden only to their individual senses of justice and propriety, nine citizens are called upon to sit in judgment as our Court of last resort and breathe life into the paper guarantees of the Constitution. For this reason, the President has an awesome responsibility to nominate people of extraordinary integrity, intellect and equanimity to the Court; and the Senate has an equally important obligation to assure that the nominee meets the towering criteria of the office.

President Reagan has discharged his responsibility with preeminence in the nomination of Judge Robert H. Bork as an Associate Justice. As the Senate begins its solemn constitutional duty of advice and consent, it is important to focus on precisely what the confirmation process should -- and should not -- entail.

The principal inquiry at this fall's Senate proceeding should concentrate on the qualifications and credentials of Judge Bork to serve on the Court. On the surface, that should be an easy task. He has had a distinguished career as a lawyer, an academician, an officer of the executive branch and as a judge on the United States Court of Appeals for the District of Columbia Circuit. His legal scholarship has engendered fresh thought in the academic community; his forceful advocacy as Solicitor General--the government's lawyer before the Supreme Court--has had a meaningful impact on the Court's deliberation; his judicial opinions have been delivered with such creative force that they have greatly influenced the development of the law.

Beneath the surface of a scholar beats the heart of a lawyer. From the august post of Solicitor General, Judge Bork did not insulate himself from the daily activities of government lawyers pursuing the fight against crime. He spent many hours communicating with young Assistant United States Attorneys refining legal positions, crafting arguments and developing strategies. The influence of his enormous legal talent and masterful teaching ability was felt throughout the nation.

He is a man of uncommon fortitude as evidenced by his ultimate decision to act in the national interest instead of his personal interest to discharge Watergate special prosecutor Archibald Cox. In what became known as the "Saturday Night Massacre," President Nixon ordered Attorney General Elliot Richardson to discharge Cox. Richardson refused and resigned as did his Chief Assistant William Ruckelshaus. As third in line, Judge Bork's initial reaction was to resign as well; but he was persuaded, through Richardson's advice, that a massive departure by key Justice Department officials would weaken the presidency in the eyes of the world and give our government the appearance of a banana republic insurgency. Although he knew that his action could be misunderstood as blind loyalty and his career jeopardized, he acted to protect the <u>presidential office</u>, as opposed to the incumbent President, and permitted the law to take its course. His Watergate role was a display of rare courage and devout patriotism.

Judge Bork's career demonstrates that he is an open-minded public servant given to the rule of the law. The 1969 trial of the "Chicago Conspiracy Seven," held at the height of the Viet Nam War, had been a confrontational proceeding that became a symbol of national divisiveness. At the trial's conclusion, the judge imposed contempt sanctions against the defendants and their lawyers for outrageous courtroom misconduct. Four years later, after the contempt convictions were reversed on appeal and remanded for a new trial, some at the Justice Department wanted to drop the prosecution in order to avoid opening old wounds on the body politic. Although inclined to heed the Department's recommendation, Judge Bork, then acting Attorney General, was persuaded that the contempt case should proceed in order to convey the message that no one, regardless of their ideology or station in life, should be allowed to thwart the orderly process of our judicial system. The ensuing contempt convictions were hailed by the media as a "victory for the law." In so doing, Judge Bork demonstrated a capacity absolutely vital to the Court--the ability to <u>listen</u> with an <u>open mind</u> before deciding.

When it considers the nomination of Judge Bork, the Senate will have before it a distinguished scholar, a consummate lawyer, a worthy judge, a man of patriotism, openmindedness, personal fortitude and reverence for the rule of law. However, there is more to Judge Bork than intellectual capacity and literary eloquence. As was said of Learned Hand, "Those who know him well regard him as the most delightful of companions. Men of the arts and sciences, philosophers and statesmen are among this friends . . . Contrary to the notion that intellectual interests should be entirely serious, he is the

sort of boon comrade who would have been at home in the revels at the Mermaid Tavern or at the Inns of Court." That is also Bob Bork, and in style, as well as substance, he fits the mold of the great judges in our nation's history.

Given his impeccable credentials, the controversial question that the Senate must consider is whether Judge Bork's ideology is a factor to be considered in the confirmation process. There is respectable weight to the contention that philosophical views should not be injected into the process of reviewing an otherwise highly qualified nominee. It is unseemly to require judicial candidates to take an oath of allegiance on a particular litmus test issue.

However, in a democracy, substantial importance should be attached to the constitutional philosophy of a judicial nominee. Extremism on either side of the political spectrum has no place on a Court that must resolve the most profound legal issues confronting the nation. This is particularly true of the Justice who will assume the seat of Lewis Powell, a sensitive and compassionate independent who cast the swing vote in many important decisions.

To the extent that it conducts a vigorous review of Bob Bork's ideology, the Senate will come away with the impression of a fairminded jurist whose profound intellect seeks to interpret the law with deference to the principles upon which this nation was founded. His constitutional philosophy is tempered by an abiding sense of caution and pragmatism; and his record as a judge on the second highest court in the land underscores his egalitarianism.

Those who claim that he is an ultraconservative extremist who will tilt the Court's philosophical bent suffer the tyranny of labels and warp the record of achievement. He is too much of a lawyer, too much of a scholar and too much of a realist to retrench from the important strides that the Court has made in protecting individual liberties and human rights. He will be a faithful guardian of the Constitution.

The temptation to use the Bork confirmation hearings as a campaign platform for the forthcoming presidential election or a forum in which to voice the demands of competing interest groups should be avoided. The task at hand is to determine whether the nation will be well served by the appointment of Judge Robert H. Bork to the Supreme Court. When his distinguished record is reviewed in detail, that conclusion will be inescapable.

Those who have left their imprint on American public law as members of the Supreme Court have had the faculties of scholars, sages, humanitarians and philosophers. In nominating Judge Bork to the Court, the President has identified an individual who possesses those extraordinary characteristics. To assure that we are selecting the best among us to sit in judgment upon us, a speedy confirmation by the Senate is in order.

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THE WHITE HOUSE

WASHINGTON

August 17, 1987

MEMORANDUM FOR GWENDOLYN S. KING
DEPUTY ASSISTANT TO THE PRESIDENT AND
DIRECTOR OF THE OFFICE OF INTERGOVERNMENTAL
AFFAIRS

FROM: C. CHRISTOPHER COX
SENIOR ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Talking Points for Telephone Contacts to State and Local Government Officials on Bork Nomination

This memorandum is to follow up on my conversations with you and Frank Donatelli. It sets forth, as you requested, the essential objectives concerning the Bork nomination that should be communicated to state and local government officials, their staff members, or other contacts that Intergovernmental Affairs maintains throughout the country. As we discussed, this information will be provided by telephone; in addition, only persons who can be expected to be supportive will be contacted.

There are three objectives to be accomplished by our state and local contacts:

- o Identify and activate influential members of the local legal community.
- o Identify and activate influential members of the local academic community.
- o Contact local Senators during the August recess.

Identifying and activating influential members of the legal community:

This should include state, county and city bar presidents and other officers; lawyers who are well-known in the community; partners with well-known firms; and officials of legal services or law-related public-interest organizations. Particular emphasis should be placed upon persons who will hold sway with their Senators. Our contacts should be encouraged to enlist as many of such persons as possible who will be supportive of the Bork nomination. These persons should be encouraged to write or, if possible, visit with their Senators about the nomination; phone and write other lawyers who can be enlisted in the effort; and publish op/ed pieces and letters to the editor. In addition, all should be asked to authorize inclusion of their names in public lists of persons supportive of the nomination.

Identifying and activating influential members of the academic community:

This should include deans of law schools in the area; professors at these law schools; professors of political science, government and related disciplines at local universities and colleges; and well-known legal authors and scholars. Particular emphasis should be placed upon persons who will hold sway with their Senators. Our contacts should be encouraged to enlist as many of such persons as possible who will be supportive of the Bork nomination. Their efforts in behalf of Judge Bork should include: writing or, if possible, visiting with their Senators about the nomination; phoning and writing other academics who can be enlisted in the effort; publishing op/ed pieces and letters to the editor; and authorizing inclusion of their names in public lists of persons supportive of the nomination.

Contacting Senators in their home states during the August recess:

Our principal contacts should themselves meet with their Senators and bring to their attention the support of the various lawyers, representatives of the organized bar, and academics identified in the above-described outreach efforts.

An important aspect of these efforts is that our contacts in the various states should be self-directing. Indeed, they in turn should encourage others to recruit other volunteers to the task. Our principal contacts should collate reports of the progress that their own contacts have made, and send the reports to:

A. Ray Randolph, Esq.
Pepper, Hamilton & Sheetz
1777 F Street, N.W.
Washington, D.C. 20006
Telephone: 202/842-8291

Mr. Randolph is heading up the nationwide effort to enlist support from the organized bar and academics. He, in turn, is keeping the White House apprised of the progress of these efforts.

Attached are the basic written materials on Judge Bork that may be provided to each of our principal contacts. These principal contacts may, in turn, obtain additional written materials on Judge Bork via Mr. Randolph.

I understand that your office has already taken significant steps toward these objectives. This work will, I am sure, be of great value in ensuring Judge Bork's confirmation. Please let me know if I can be of further assistance to you in these efforts.

Attachment

cc: A. Ray Randolph, Esq. (w/o enc.)

BORK NOMINATION

GENERAL OVERVIEW

- Judge Robert Bork is one of the most qualified individuals ever nominated to the Supreme Court. He is a preeminent legal scholar; 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.

  - 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, Judge Bork has heard hundreds of cases. In all of those cases he has written only 9 dissents and 7 partial dissents. 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.

  - The Supreme Court adopted the reasoning of several of his dissents when it reversed opinions with which he had disagreed. Justice Powell, in particular,

has agreed with Judge Bork in 9 of 10 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. In fact, 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 judicial precedents. There is no basis for this view in Judge Bork's record. 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. Consequently, he is almost always in the majority on the Court of Appeals and 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 that judges should overturn 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 the judge's personal philosophical views, but must instead rely solely on the principles set forth in the Constitution.

- Justice Stevens, in a speech before the Eighth Circuit Judicial Conference, stated his view that Judge Bork was "very well qualified" to be a Supreme Court Justice. Judge Bork, Justice Stevens explained, would be "a welcome addition to the Court."

QUALIFICATIONS

Any one of Judge Robert Bork's four positions in private practice, academia, the Executive Branch or 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.

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

- An 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 by the Senate 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.

- As an appellate judge, he has an outstanding record: not one of his more than 100 majority opinions has been reversed by the Supreme Court.

- The Supreme Court adopted the reasoning of several of his dissents 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 refining a careful 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.

- 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.

- 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.

- As The New York Times said in a December 12, 1981, editorial 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.

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's record indicates he would be a powerful ally of First Amendment values on the Supreme Court. His conservative reputation and formidable powers of persuasion provide strong support to the American tradition of a free press. Indeed, precisely because of that reputation, his championing of First Amendment values carries special credibility with those who might not otherwise be sympathetic to vigorous defenses of the First Amendment.

- In 1971 Judge Bork wrote an article 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 civil rights in some 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 impressive record in the area of civil rights.

- He 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."

- Judge Bork has rejected, however, 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 had occasion to issue a ruling in an affirmative action case. 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 Senate confirmation to the D.C. Circuit ten years later, in 1982.

- His article, as does 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.

- 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 has never stated whether he 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. Traditionally, judicial nominees do not pledge their votes in future cases in order to secure confirmation. This has long been regarded as clearly improper. Indeed, any judicial nominee who did so would properly be accused not only of lacking integrity, but of lacking an open mind.

- 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 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.

WATERGATE

- During the course of the Cox firing, Judge Bork displayed great personal courage and statesmanship. He helped save the Watergate investigation and prevent 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."

- 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." 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 action that led to Cox's discharge.

- Judge Bork framed the legal theory under which the indictment of Spiro Agnew went 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.

- In 1981, The New York Times described Judge Bork's decisions during Watergate as "principled."

BALANCE ON THE SUPREME COURT

- Judge Bork's appointment would not change the balance of the Supreme Court. His opinions on the Court of Appeals--of which, as previously noted, not one has been reversed--are thoroughly in the mainstream. 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.

- 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 in evaluating nominees to the Court. The record indicates that the Senate has always tried to look to the nominee's individual merits--even when they have disagreed about them.

  - The issue of "balance" did not arise with respect to 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... shifted a tenuous balance on matters of personal liberty toward a consistent libertarianism...."

July 29, 1987

Bork meeting - 8/18

I have attempted below to describe the principal areas in which our efforts will be concentrated over the next two months. I have omitted any discussion of direct lobbying on the Hill, since our office has not been involved in that.

1. Outreach

In this category I include all efforts to generate support among the general public, constituency groups and the media. Thus far, there have been useful meetings arranged with certain religious groups and law enforcement groups, and it is my understanding that a meeting with business groups is being planned. Many academics have indicated their support, and members of the D.C. bar who favor the nomination have contacted acquaintances of theirs in key states. Public Affairs has been generating letters to the editor and op-ed pieces. The President has discussed the nomination in several well-publicized speeches.

Our office has been involved in outreach through providing relevant information to outside groups, drafting op-ed pieces, preparing background material for Administration supporters, reviewing and editing the material prepared by Public Affairs, and, in general, monitoring the efforts of outside groups and providing assistance where appropriate.

While a great deal of productive work has been done, the mobilization is not nearly at the level it ought to be. Efforts to win support or neutrality from some of the key groups, such as Hispanics, have not been visible. The President and Senator Baker appear to be the only members of the Administration speaking out on the nomination; no Cabinet Secretary has yet joined them. While many academics have been contacted, there are also many whose positions are not known. (For example, I do not know whether the Dean of the University of Alabama law school has been contacted.) And our original idea of organizing local members of the bar in key states seems never to have been attempted. Those who are "organizing states" appear to be simply calling their friends.

Our office is not equipped to organize or execute an outreach effort of the necessary magnitude. Other offices in the White House are. The Office of Public Liaison should be directed to develop a written strategy for winning the support of each of the sets of organizations with which it deals. These strategies should in each case describe where things currently stand and should lay out a timetable for meetings and other events which need to take place. Public Liaison should then be directed to implement its strategies. The Office of Intergovernmental

Affairs has contacts throughout the country. Those contacts should be asked to identify prominent attorneys, academics, and others of stature in key states who are likely to support the nomination. The Office of Cabinet Affairs should be pressing members of the Cabinet to speak publicly on the matter. The members of the D.C. bar who have been supporting the nomination should be encouraged to contact leaders of state and local bar associations in key states.

As we get closer to the confirmation hearings, it will become increasingly difficult for this office to provide as much support for outreach as we have up to now -- particularly if the effort grows, as it should. This responsibility should, therefore, be delegated as broadly as possible.

2. Presidential Events

We have discussed three possible Presidential events on the nomination that we would like to see take place prior to September 15:

o A Presidential luncheon or meeting with most of the living former Attorneys General, as a means of demonstrating the broad-based establishment support for Judge Bork.

o A similar event with the past ABA Presidents who are supporting Judge Bork.

o A meeting between the President and the heads of the major law enforcement groups, such as the police groups and the national prosecutors associations. The Department of Justice has lists of these organizations, and is in regular contact with their leadership. These groups could announce their support for Judge Bork at the meeting with the President.

We have also considered the possibility of a meeting involving the leading academic supporters of the nomination.

Scheduling has indicated that the President will participate in a Bork event for 15 minutes on August 28. We have not yet been given any other time.

A great deal of work will need to be done in order to stage these events. We will need to get on the President's schedule. We will need to line up the necessary support from the participants. (In the case of the former AGs, this will mean nailing down support from Katzenbach and, if possible, Civiletti. In the case of the law enforcement groups, it will mean identifying and contacting them, and ensuring that they officially support the nomination and will say so.) We will need to script the public statements at the event, and we will need to work with the Press Office to guarantee proper coverage. Since the first event is eleven days away, this is going to require quick action.

3. Confirmation Hearings

The hearings begin in less than one month.

a. Bork's Preparation -- Justice is taking the lead in gathering materials together for Judge Bork to study. He has taken several notebooks with him to Vermont. He needs to do essentially two things. First, he needs to think about what sorts of answers he wishes to give to the predictable questions. Second, he needs to become very familiar with his own 25-year record of public statements. He is working on that now, and will be meeting with people on this when he returns from Vermont. I am working closely with Justice on it.

b. Witness List -- Justice is not going to be working on the witness list at all anymore; the task falls to our office. Thus far, we have identified several panels and individuals whose testimony we desire, and Judge Bork has begun calling the potential witnesses. In the upcoming weeks, we will need to talk to these people at length so that we know what they are going to say; work with them on their testimony; assist Legislative Affairs in its discussions with the Committee staff on format; and do all the things necessary to keep the witnesses happy and the testimony coordinated. The task is similar in many respects to running a trial. It will require somebody's full-time attention.

c. Responding to Allegations -- Up to now, the debate has been over judicial philosophy. Soon, I believe, there will be a flurry of factual allegations of the sort Rehnquist faced with respect to the deeds on his homes, his brother-in-law's trust, his medical condition, his activities with voters in 1962, and so on. Bork's opponents are already, for example, telephone-polling his former students. We need to have people in place ready to do the quick investigative work that will be necessary to speedily rebut any accusations that are made. This may require getting on the phone and flying in witnesses. It will necessitate fast responses, since any unrebutted accusations will appear on the evening news on the day they are first made.

d. Document Request -- The Committee has made an extensive document request focused mostly, but not entirely, on Watergate material. Most of this is being handled at Justice, although I am dealing with Central Records here in the few instances in which we might possess relevant records. When the documents are gathered, there will certainly need to be some White House-Justice discussions on what it is proper to turn over. Additionally, there is no guarantee that we will not receive additional requests as new issues arise; indeed, I expect we will. Any delay on our part in responding will be used as a justification for delay in the Senate. We need to be able to conduct these searches and make quick decisions on release.

Our office is not presently equipped to accomplish effectively even the most essential tasks outlined above, i.e., those relating to the confirmation hearings. We are certainly not equipped to handle everything else on the list as well. We need more people, and we need to get them soon or it will be too late to bring them up to speed in time. We need to focus over the next couple of days on how to do this -- i.e., through detailees, through assigning more of the regular office staff to this effort, or through some other means. I have talked, for example, with Steve Gilles, a former Bork and O'Connor clerk who is now practicing in Chicago. He has agreed to move into the Washington branch office of his firm beginning 8/24 to work full-time on the confirmation hearings. We need to find additional ways to augment the effort.

THE WHITE HOUSE

WASHINGTON

Chris —

August 21, 1987

Can Political Affairs do this?

MEMORANDUM FOR PETER KEISLER

FROM: WILLIAM B. LYTTON III

SUBJECT: JUDGE BORK AND SENATOR ARLEN SPECTER (R-PA.)

As I mentioned to you, I spoke with a friend of mine, Gordon Woodrow, on August 20, 1987. Gordon runs Specter's Philadelphia office. He previously was his AA and Campaign Manager.

I asked Gordon what I could do to help convince Arlen to vote for Bork's nomination. His advice was that for right now, the best thing for the White House to do was leave Arlen alone. However, he suggested several other ways of proceeding.

Arlen's son, Shanin, who is a lawyer in Philadelphia, and Gordon, who is not a lawyer, have been lobbying Arlen to vote for Bork. However, Neal Manney (sp. ?), Arlen's AA in Washington, is a very liberal lawyer who used to work in New York for David Garth, and Gordon believes Manney is anti-Bork. There may be others on Arlen's D.C. staff of a similar mind.

Apparently, a lot of liberal anti-Bork groups are planning to visit Arlen in September. Gordon suggests two things. (1) First, we should gather a list of liberal groups that supported Bob Edgar in his campaign against Specter, and cross reference that list with the list of those groups opposed to Bork. This can be used at some point to remind Arlen of who's who. (2) Second, we should arrange for some conservatives to visit Arlen to discuss the legal, policy, constitutional, precedental, and political reasons for supporting Bork. He suggested the Business Round Table and major corporations with a heavy Pennsylvania presence, such as U.S. Steel. He believes that arguments on the merits rather than on the political issues will be the more successful. It will also help neutralize the appearance that a majority of people oppose Bork because a majority of the people who have spoken to Specter oppose him.

Chris — ~~Thanks~~ Looks like

Can Public Liaison Do this?

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1	MEMO WILLIAM LYTTON TO PETER KEISLER RE: ARLEN SPECTER (P. 2, PARTIAL)	1	8/21/1987	B6

Freedom of Information Act - [5 U.S.C. 552(b)]

B-1 National security classified information [(b)(1) of the FOIA]
B-2 Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
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B-9 Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

Obviously, more Lloyd Cutler type endorsements,and their contacts with Arlen, will be helpful.

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He'll keep me informed if he thinks of any other steps we might take.

As of right now, I'd put Arlen in the undecided but leaning towards pro Bork column.

I also spoke with Philadelphia D.A. Ron Castille and urged him to let Arlen know of his support and the support of the Pennsylvania D.A.'s association. He pointed out that Bork was born in Pennsylvania. He will follow up with Arlen.

cc: Jay Stephens
Chris Cox
Alan Raul