MEMORANDUM FOR GARY L. BAUER  
FROM: DINESH D'SOUZA  
SUBJECT: Life After Bork

With the Bork nomination apparently finished, it is time for the Administration to think not only about possible new nominees, but also the broad political and intellectual approach that should underlie the selection and marketing of future judicial appointments.

The lesson of the Bork nomination is that it is entirely unrealistic to expect that a nominee's ideology--or more precisely the contents of his judicial philosophy--can escape scrutiny by the Senate. We learned from the Bork case that the laborious edifice constructed by the White House over months was brought down five minutes after the congressional hearings began. Therefore, much as we may feel that it is historically appropriate that "advise and consent" be narrowly construed by the Senate, this isn't going to happen. Our solace here lies in two facts: first, it is entirely consistent with original intent jurisprudence that important decisions rest with legislative bodies; and second, no future liberal Democrat is going to be able to sail through the way that Thurgood Marshall, Abner Mikva and Ruth Ginsberg did.

Howard Baker has been quoted saying that the Bork case illustrates that only a bland homogenous candidate may be confirmable to the Court. It is true that Bork's vulnerability was a series of wild intellectual swings that the public found hard to comprehend--from socialist to libertarian to traditionalist. Yet, it is also true that the White House was helpless against its critics precisely because it tried to present Bork as a bland homogenous person, "another Lewis Powell."

We have to remember that bland homogeneity is precisely what the political left wants. They would much rather have milquetoast than conservatism of any stripe. Thus, it does not alarm them when we accuse them of destroying the integrity of the judicial selection process and only
making it possible for political eunuchs to be confirmed. What these people want is for conservative Presidents to nominate moderates, and liberal Presidents to nominate liberals. Thus is the Court's continual progressive direction ensured.

For the President to appoint a moderate would be to reward the kind of lynch mob that has strangled the Bork nomination. Even worse, it would be a powerful and haunting statement of acknowledgment that the President's agenda is no longer saleable to the American people. The Bork case, viewed in retrospect, would become a political liability—Democratic candidates could say, "Look at the maniac those people almost put on the Court." And by changing gears so sharply, we would have validated that charge.

So where do we go from here? It seems evident that we need two different things in the next nominee. First, we want a judicial conservative who, like the President, believes that law derives from the Constitution and not from the personal whims of the judiciary. Second, we want a qualified scholar who is within the mainstream.

The White House treated the Bork nomination as though these two requirements were contradictory. It reasoned that since Bork does not seem to be in the mainstream, it therefore makes sense to camouflage his judicial conservatism so it goes over with the Senate and the people. But this was a faulty assumption and, it turned out, unrewarding as well.

Of course, Bork or anyone who thinks like him will not be in the legal mainstream, defined by the predominant point of view in the law schools. On the other hand, judicial conservatives, even if a numerical minority, remain a respectable school of thought. Further, President Reagan's numerous sound appointments to the bench have ensured equilibrium between practitioners of judicial activism and judicial restraint on the Court, so the liberal mainstream is less evident there.

In a political environment, however, the most important mainstream is not the legal mainstream but the mainstream of public values. Here we must be confident that we can get the American people to identify with our conservative principles. After all, this is exactly what Ronald Reagan did in 1980 and 1984. Heartland values are what we cherish and what the special interests opposing us fear and detest. We must be able to demonstrate this.
Some suggestions for the hearings:

First, the nominee should take his case directly to the American people. Bork totally missed this opportunity. When Senators asked him whether he felt crime was a blight on this country, instead of giving examples of serial murderers set free on technicalities, Bork said that criminal law was not his specialty. When Senators harangued Bork about state laws requiring forced sterilization and other such atrocities, Bork should have replied, "Senator Kennedy, your question presumes a profound lack of faith in the American people. Do you imagine that the American people lack the good sense to pass laws under which they can live? In which state do you expect forced sterilization laws to pass? I am sure that Senator DeConcini can assure you that his constituents in Arizona would not pass such a law. I trust Senator Heflin will tell you the same thing about native Alabamans. In short, Senator, I am not too afraid of the horrible prospects you mention because I have faith in democracy and I have faith in America." Instead, Bork responded to politically-charged innuendo with legal esoterica. Our next candidate should remember that he is not speaking before a jurists' convention but before the American public. And Senators aren't voting as lawyers, but as representatives of the people.

Second, the nominee should not go into the detail that Bork did about how he would rule. Stating positions about to what degree the 14th Amendment applies to women and where the line between speech and pornography should be drawn, are only invitations to Senators to second-guess the nominee. Our next appointment should say that he believes that rights upheld must be constitutionally warranted and that he will respect precedent. Where exactly the nominee will allow precedent to enshrine even constitutionally-unwarranted rights should in no case be specified. Senators have never in the past been told this and they do not have a right to know. Leaving this ambiguous helps the nominee politically because it does not give people a reason to vote against him.

In conclusion, the next nomination should be aimed at invigorating not only the Court, but also this presidency. We need to demonstrate that a competent man who believes the things President Reagan believes about the Court can prevail over the special interests mobilized against him. We need to do so not through sugary talk about "working with the Democrats." The Democrats are happy to work with us, but only to destroy our agenda and promote theirs.
Previously when this President has found himself beleaguered, he has hung tough and taken his case to the American people. We should stop lamenting the democratization of the judicial process. This is now a populist argument whether we like it or not. We should emphasize our issues—violent crime, pornography, school prayer, busing, quotas—and not let the opposition set the agenda. All of this will not only get our man on the Court, it will also be good practice for 1988.