News from Senator

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FOR IMMEDIATE RELEASE
THURSDAY, JULY 23, 1987

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STATEMENT OF SENATOR BOB DOLE ON THE NOMINATION OF ROBERT BORK

THE TRUE ROLE OF THE SENATE

MR. PRESIDENT:

AS I HAVE WATCHED THE PUBLIC DEBATE OVER THE BORK NOMINATION EVOLVE OVER THE LAST FEW WEEKS IN THIS BODY AND IN THE PRESS, I AM STRUCK BY THE AMOUNT OF HAND-WRINGING BY JUDGE BORK'S OPPONENTS OVER WHETHER A NOMINEE'S SO-CALLED IDEOLOGY MAY BE CONSIDERED BY THE SENATE AS PART OF ITS CONSTITUTIONAL OBLIGATION TO OFFER ITS "ADVICE AND CONSENT" TO THE PRESIDENT. MUCH OF THIS DEBATE, I MUST SAY, HAS BEEN QUITE EDIFYING IN THE CONTEXT OF OUR CONSTITUTIONAL BICENTENNIAL, EXPLORING AS IT DOES THE VARIOUS HISTORICAL PRECEDENTS.

IDEOLOGY OFF LIMITS

BUT LET'S BE HONEST. IN THE CASE OF THE BORK NOMINATION, THE ISSUE IS NOT WHETHER A NOMINEE'S "IDEOLOGY" CAN EVER BE CONSIDERED BY THE SENATE. I AM CERTAIN THAT WE COULD ALL CONJURE UP AN IMAGINARY NOMINEE WHOSE IDEOLOGY WAS SO BIZARRE, WHOSE THOUGHT PROCESSES WERE SO ALIEN, THAT WE WOULD FEEL OBLIGED TO VOTE AGAINST HIM OR HER.

I AM ALSO CERTAIN, HOWEVER, THAT SUCH AN IMAGINARY CANDIDATE WOULD NEVER HAVE SERVED AS SOLICITOR GENERAL OF THE UNITED STATES, HAVING ATTAINED A PARTNERSHIP AT A PROMINENT LAW FIRM, AND DISTINGUISHED HIMSELF AS A PROFESSOR AT THE YALE LAW SCHOOL, AND WOULD MOST CERTAINLY NEVER BE CONFIRMED BY THIS BODY TO SERVE ON THE EXTRAORDINARILY IMPORTANT UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

BORK -- IN THE MAINSTREAM

THE STARK -- AND TO HIS OPPONENTS, DISCONCERTING -- FACT IS THAT JUDGE BORK'S VIEWS ARE WELL WITHIN THE ACCEPTABLE RANGE OF LEGAL DEBATE AND, IF PRESIDENTIAL ELECTIONS MEAN ANYTHING AT ALL, IS PROBABLY MUCH CLOSER TO THE MAINSTREAM OF AMERICAN THOUGHT THAN THAT OF MOST OF HIS POLITICAL CRITICS. IN THIS REGARD, IT IS IMPORTANT TO NOTE THAT NOT ONE OF THE 100 MAJORITY OPINIONS WRITTEN BY JUDGE BORK, OR EVEN ONE OF THE 300 OR SO DECISIONS WHERE HE HAS JOINED THE MAJORITY, HAS BEEN OVERTURNED ON APPEAL.

JUDGE BORK HAS IN LARGE PART MADE HIS FORMIDABLE REPUTATION BY ARGUING FOR A NEUTRAL, NONPOLITICAL AND NONPERSONAL KIND OF JUDGING, FOR A REAFFIRMATION OF THE GREAT PRINCIPLE OF JUDICIAL RESTRAINT. HIS OPPONENTS FEAR ONLY THAT THE APPLICATION OF THAT TRADITIONAL PRINCIPLE WILL NOT RESULT IN JUDICIAL DECISIONS THAT WILL ADVANCE THEIR OWN POLITICAL AND SOCIAL AGENDAS.

THE REAL ISSUE, THEN, IS WHETHER OUR DUTY TO ADVISE AND CONSENT TO THE NOMINATION SHOULD INCLUDE OUR CONSIDERATION OF A NOMINEE'S VIEWS ON SPECIFIC POLITICAL AND SOCIAL ISSUES, AS OPPOSED TO HIS FITNESS AND MERIT.

SUCH AN APPROACH, I SUGGEST, WOULD OFFEND COMMON SENSE, WOULD BE CONTRARY TO THE INTENT OF THE FRAMERS, AND WOULD, IN THE END, BE HORRIBLY SHORTSIGHTED.

NO CHECK LISTS

IT IS UNIVERSALLY ACKNOWLEDGED THAT JUDICIAL NOMINEES SHOULD NOT BE ASKED TO COMMIT THEMSELVES ON PARTICULAR POINTS OF LAW IN ORDER TO SATISFY A SENATOR AS TO HOW HE OR SHE WILL DECIDE AN ISSUE THAT MIGHT COME BEFORE THE COURT. YET THERE IS LITTLE DISCERNIBLE DIFFERENCE BETWEEN A SENATOR DEMANDING SUCH AN EXPLICIT QUID PRO QUO DURING THE CONFIRMATION PROCESS AND ONE WHO DECIDES BEFOREHAND THAT HE WILL ONLY SUPPORT NOMINEES THAT SATISFY A "CHECK LIST" CONCERNING SPECIFIC ISSUES OR CASES.

AS PROFESSOR RICHARD FRIEDMAN HAS PUT IT, "EXTENDED DEBATES, BOTH WITHIN AND WITHOUT THE SENATE, CONCERNING THE POLITICAL PHILOSOPHY OF A NOMINEE CANNOT HELP BUT DIMINISH THE COURT'S REPUTATION AS AN INDEPENDENT INSTITUTION AND IMPRESS UPON THE PUBLIC -- AND, INDEED, THE COURT ITSELF -- A POLITICAL PERCEPTION OF ITS ROLE." IN SHORT, THE INDEPENDENT JUDICIARY SHOULD NOT BE CAUGHT UP IN "CAMPAIGN PROMISES" DESIGNED TO CURRY FAVOR WITH POLITICIANS AND THEIR CONSTITUENT GROUPS.

FOUNDING FATHERS ON THE MARK

SIMILARLY, HAD THE FRAMERS INTENDED THAT THE SENATE SHOULD CONSIDER VIEWS ON POLITICAL OR SOCIAL ISSUES AS A CRITERION FOR CONFIRMATION, THE CONSTITUTIONAL CONVENTION WOULD HAVE ADOPTED A PROPOSAL THAT WOULD HAVE EXCLUSIVELY LODGED THE APPOINTMENT

POWER IN EITHER THE SENATE OR THE ENTIRE CONGRESS. THE FRAMERS, HOWEVER, EXPRESSLY REJECTED GIVING THE SENATE SUCH A ROLE, PRIMARILY OUT OF FEAR THAT CRONYISM WOULD PREVAIL OR THAT THE PROCESS WOULD BE TAINTED BY "[I]NTRIGUE, PARTIALITY AND CONCEALMENT."

RATHER, AS ALEXANDER HAMILTON EXPLAINED IN FEDERALIST NO. 76, THE PRESIDENT WAS TO BE "THE PRINCIPAL AGENT" IN THE JUDICIAL PROCESS. THE SENATE'S ROLE IN THE CONFIRMATION PROCESS WAS LIMITED TO WEIGHING THE QUALIFICATIONS, RATHER THAN THE POLITICS, OF EACH CANDIDATE. ACCORDING TO HAMILTON, THE SENATE'S SCRUTINY "WOULD BE AN EXCELLENT CHECK UPON A SPIRIT OF FAVORITISM . . . AND WOULD TEND GREATLY TO PREVENT THE APPOINTMENT OF UNFIT CHARACTERS FROM STATE PREJUDICE, FROM FAMILY CONNECTION, FROM PERSONAL ATTACHMENT, OR FROM A VIEW TO POPULARITY."

HAVING REJECTED CONGRESSIONAL SELECTION OF JUDGES BECAUSE OF CONCERNS ABOUT "[I]NTRIGUE, PARTIALITY AND CONCEALMENT, "THE FRAMERS COULD HARDLY HAVE ENVISIONED THAT THE SENATE WOULD POLITICIZE THE COURT THROUGH THE EXERCISE OF ITS ADVICE AND CONSENT FUNCTIONS.

BIDEN, KENNEDY AGREE: NO LITMUS TEST

FRAMED IN THIS MANNER, THE ISSUES FOR DEBATE ARE MORE LIMITED. AS MY DISTINGUISHED COLLEAGUE THE SENATOR FROM DELAWARE (MR. BIDEN) PUT IT SOME YEARS BACK,

> "THIS HEARING IS NOT TO BE A REFERENDUM ON ANY SINGLE ISSUE OR THE SIGNIFICANT OPPOSITION THAT COMES FROM A SPECIFIC QUARTER . . . AS LONG AS I AM CHAIRING THIS HEARING, THAT WILL NOT BE THE RELEVANT ISSUE. THE REAL ISSUE IS YOUR COMPETENCE AS A JUDGE AND NOT WHETHER YOU VOTED RIGHTLY OR WRONGLY ON A PARTICULAR ISSUE . . . . IF WE TAKE THAT ATTITUDE, WE FUNDAMENTALLY CHANGE THE BASIS ON WHICH WE CONSIDER THE APPOINTMENT OF PERSONS TO THE BENCH."

AND THE DISTINGUISHED SENATOR FROM MASSACHUSETTS (MR. KENNEDY) HAS ALSO EXPRESSED WHAT I BELIEVE TO BE THE TRADITIONAL UNDERSTANDING OF THE SENATE'S ROLE IN THE CONFIRMATION PROCESS:

> "I BELIEVE THAT IT IS RECOGNIZED BY MOST SENATORS THAT WE ARE NOT CHARGED WITH THE RESPONSIBILITY OF APPROVING A MAN TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT ONLY IF HIS VIEWS COINCIDE WITH OUR OWN. WE ARE NOT SEEKING A NOMINEE FOR THE SUPREME COURT WHO WILL ALWAYS EXPRESS THE MAJORITY VIEWS OF THE SENATE ON EVERY GIVEN ISSUE OF FUNDAMENTAL IMPORTANCE. WE ARE INTERESTED REALLY IN KNOWING WHETHER THE NOMINEE HAS THE BACKGROUND, EXPERIENCE, QUALIFICATIONS, TEMPERAMENT AND INTEGRITY TO HANDLE THIS MOST SENSITIVE, IMPORTANT, RESPONSIBLE JOB."

STAYING WITH THE CONSTITUTION

IN MY VIEW, OUR INQUIRY SHOULD FOCUS ON THE NOMINEE'S ABILITY AND INTEGRITY, AND UPON WHETHER THE NOMINEE WOULD FAITHFULLY AND NEUTRALLY APPLY THE CONSTITUTION IN A MANNER THAT UPHOLDS THE PREROGATIVES OF THE THREE COORDINATE BRANCHES. IF WE GO BEYOND THIS AND REQUIRE THAT JUDICIAL CANDIDATES PLEDGE ALLEGIANCE TO THE POLITICAL AND IDEOLOGICAL VIEWS OF PARTICULAR SENATORS OR INTEREST GROUPS, WE WILL DO GRAVE AND IRREPARABLE VIOLENCE TO BASIC SEPARATION OF POWERS PRINCIPLES THAT ACT AS THE ULTIMATE SAFEGUARD AGAINST THE TYRANNY OF THE MAJORITY. WE WOULD THREATEN ALL THREE BRANCHES OF GOVERNMENT. WE WOULD UNDERMINE THE PRESIDENT'S CONSTITUTIONALLY-MANDATED POWER OF APPOINTMENT BY PARALYZING THE SENATE IN A GRIDLOCK OF COMPETING INTERESTS GROUPS, EACH HAWKING ITS OWN AGENDA -- AND I'M AFRAID THAT THE EXTREMELY LONG, ALMOST UNPRECEDENTED DELAY IN HEARINGS ON THIS NOMINATION IS ONLY A FORETASTE OF WHAT WE CAN EXPECT IF WE POLITICIZE THIS PROCESS. AND, MORE IMPORTANT, WE WILL DENY THE COURT THAT INSULATION FROM THE POLITICAL PROCESS WHICH THE CONSTITUTION SO WISELY ATTEMPTED TO INSURE.

FOR THESE REASONS, I URGE MY COLLEAGUES TO JOIN ME IN CONSIDERING THE APPROPRIATE ROLE OF THE SENATE IN REVIEWING JUDICIAL NOMINEES AND THE CONFIRMATION PROCESS.