

38

News from Senator

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FOR IMMEDIATE RELEASE
FRIDAY, AUGUST 7, 1987

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STATEMENT OF SENATOR BOB DOLE
BRINGING THE BORK NOMINATION TO A VOTE

I WAS PLEASED TO HEAR YESTERDAY THAT SENATOR BIDEN HAS NO INTENTION OF BOTTLING THE BORK NOMINATION UP IN COMMITTEE. BUT THE DELAY THAT HAS ALREADY OCCURRED WILL CAUSE PROBLEMS.

I WILL NOT DWELL ON THE POINT RAISED BY OTHERS--THAT THE BORK NOMINATION WILL HAVE BEEN DELAYED IN COMMITTEE LONGER THAN ANY OTHER IN THE PAST TWENTY-FIVE YEARS--BUT I WILL POINT OUT THAT THE SCHEDULE PROPOSED BY SENATOR BIDEN SEEMS ALMOST CERTAIN TO CAUSE THE SUPREME COURT TO OPEN ITS TERM ON OCTOBER 5 ONE JUSTICE SHORT.

UNDER EVEN THE BEST OF CIRCUMSTANCES, AN EIGHT-PERSON COURT CREATES THE POTENTIAL FOR GREAT CONFUSION IN THE LAW. A TIE VOTE ON A MATTER OF ENOUGH IMPORTANCE TO MERIT THE SUPREME COURT'S ATTENTION IS NEVER SATISFACTORY.

MORE SIGNIFICANTLY, HOWEVER, THE DELAY HERE WILL FORCE THE COURT TO PROCEED SHORT-HANDED AT PERHAPS THE MOST CRITICAL POINT IN ITS TERM. ON THE FIRST MONDAY IN OCTOBER, THE COURT ANNOUNCES ITS DECISIONS, REACHED THE WEEK BEFORE, ON HUNDREDS OF CASES THAT RIPENED OVER THE SUMMER. LAST YEAR, FOR EXAMPLE, THE COURT OPENED ITS TERM ON OCTOBER 6 BY DISPOSING OF 941 SEPARATE CASES. MOST OF THESE DECISIONS INVOLVED THE CRUCIAL QUESTION OF WHETHER THE COURT WAS GOING TO HEAR THE CASES AT ALL.

IN ADDITION, THE COURT WILL IMMEDIATELY BEGIN TO HEAR ARGUMENT AND DECIDE SOME OF THE TERM'S MOST IMPORTANT CASES. AMONG THE ISSUES THE COURT WILL FACE DURING THE FIRST TWO WEEKS OF ITS TERM ARE THE CONSTITUTIONALITY OF NEW JERSEY'S "MOMENT OF SILENCE," THE APPLICABILITY OF THE FIRST AMENDMENT TO SCHOOL NEWSPAPERS, THE SCOPE OF THE "GOVERNMENT CONTRACTOR'S" DEFENSE TO TORT LIABILITY, AND THE PERMISSIBILITY OF DENYING ENTRY VISAS TO MEMBERS OF THE COMMUNIST PARTY.

UNDER EVEN THE MOST OPTIMISTIC PROJECTIONS, THE SUPREME COURT WILL NOW HAVE TO CONFRONT THOSE ISSUES SHORT-HANDED.

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-2-

ADDING TO THIS PROBLEM IS, OF COURSE, THE PROSPECT OF A FILIBUSTER. I HAVE HEARD SOME TALK THAT JUDGE BORK'S OPPONENTS WILL TRY TO POSTPONE AN UP OR DOWN VOTE ON THE NOMINATION INDEFINITELY. I CERTAINLY HOPE THAT TALK IS WRONG.

SINCE THE ADOPTION OF THE CLOTURE RULE IN 1917 THERE HAS BEEN ONLY ONE SUCCESSFUL FILIBUSTER OF A SUPREME COURT NOMINEE. THAT, OF COURSE WAS THE NOMINATION OF ABE FORTAS TO BE CHIEF JUSTICE IN 1968, A PRECEDENT THAT HAS BEEN THROWN UP FREQUENTLY BY JUDGE BORK'S OPPONENTS AS JUSTIFYING, IN THEIR MINDS, JUST ABOUT ANYTHING.

THE FORTAS FILIBUSTER DID NOT, HOWEVER, LEAVE THE COURT SHORT-HANDED. CHIEF JUSTICE EARL WARREN SUBMITTED HIS RESIGNATION TO PRESIDENT JOHNSON "EFFECTIVE AT YOUR PLEASURE," AND REMAINED ON THE COURT THROUGHOUT THE DEBATE OVER JUSTICE FORTAS' ELEVATION. INDEED, CHIEF JUSTICE WARREN DID NOT ACTUALLY RETIRE FROM THE COURT UNTIL JUNE 23, 1969, WELL INTO THE NIXON ADMINISTRATION.

HERE, UNLIKE THE FORTAS CASE, WE ARE FACED WITH THE PROSPECT OF AN EIGHT-JUSTICE COURT UNLESS AND UNTIL THIS BODY DECIDES UPON THE BORK NOMINATION. THIS SHOULD BE REASON ALONE TO COMPLETE DEBATE PROMPTLY AND TO VOTE YEA OR NAY ON THE NOMINATION ITSELF.

IN THE PERIOD BEFORE THIS BODY HAD A CLOTURE RULE, THERE WERE CASES WHERE THE SENATE SIMPLY REFUSED TO ACT ON A SUPREME COURT NOMINATION. DURING THE PRESIDENCY OF JOHN TYLER, FIVE NOMINATIONS WERE SUBMITTED TO THIS BODY BETWEEN JANUARY 1844 AND FEBRUARY 1845; ONE WAS REJECTED, ONE WAS POSTPONED, TWO WERE WITHDRAWN, AND ONE WAS SIMPLY NOT ACTED UPON.

PRESIDENT MILLARD FILLMORE HAD A SIMILAR EXPERIENCE IN 1852-53 WHEN ONE NOMINATION WAS POSTPONED AND TWO WERE NOT ACTED UPON.

THE SENATE REFUSED TO ACT ON ONE NOMINATION OF PRESIDENT ANDREW JOHNSON, IT REJECTED ONE OF PRESIDENT GRANT'S AND HE WITHDREW TWO OTHERS. PRESIDENT RUTHERFORD B. HAYES HAD ONE NOMINATION THAT WAS NOT ACTED UPON.

WHAT THE COUNTRY EXPECTS, HOWEVER, IS NOT THAT THE SENATE WILL EMULATE THESE SORRY NINETEENTH CENTURY SQUABBLES, BUT RATHER THAT WE WILL LIVE UP TO OUR RESPONSIBILITY UNDER THE CONSTITUTION TO CONSIDER AND VOTE UPON THE PRESIDENT'S NOMINATION TO BRING THE SUPREME COURT UP TO FULL STRENGTH.

I PROPOSE THAT WE PREPARE OURSELVES TO DO THIS WITH DISPATCH ONCE THE NOMINATION EMERGES FROM SENATOR BIDEN'S COMMITTEE. IN MY OPINION, THE AMERICAN PEOPLE WILL NOT TOLERATE A FILIBUSTER THAT LEAVES THE COURT SHORT-HANDED AND JUSTICE ILL-SERVED.

-30-