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The Honorable Joseph R. Biden, Jr.  
Chairman  
Committee on the Judiciary  
United States Senate  
Washington, DC 20510-6275

Dear Senator Biden:

The following is in response to your question of December 18 concerning the Supreme Court nomination of Judge Anthony Kennedy.

My review of Judge Kennedy's judicial opinions and of his speeches suggests to me that he has an entirely appropriate view of the role of stare decisis, presenting none of the peculiar difficulties posed by Judge Bork's apparent views on that subject. The Committee will recall that, in the case of Judge Bork, numerous pronouncements, some of them made after his appointment as a circuit court judge, strongly suggested not only that he recognized a judicial obligation to reconsider clearly erroneous constitutional rulings -- an obligation virtually all Supreme Court Justices have acknowledged -- but also that he felt no hesitation to overturn decisions that departed from his quite rigid notions of "original intent." On numerous occasions, in fact, Judge Bork had suggested that, unless entire industries or institutions had been constructed in reliance on a long line of well-settled rulings, a Supreme Court Justice committed to following the Framers' original intent should have no reluctance at all to overrule a Supreme Court precedent of a non-originalist sort. The upshot was that Judge Bork came to the Committee as a jurist with a program that seemed to portend constitutional revolution rather than continuous evolution of constitutional doctrine.

Judge Kennedy, in sharp contrast, has both expressed in his speeches, and exemplified in his judicial work, a commitment to gradual evolution of doctrine and precedent, within the context of a principled exposition of constitutional text, history, and structure that is not tied down by any doctrinaire and backward-looking philosophy of an originalist sort. Of course, Judge Kennedy recognizes a judicial duty to reexamine prior decisions when powerful arguments are mounted that those decisions were profoundly misguided -- especially in the constitutional setting, where a judicial refusal to reconsider past errors may be particularly devastating given the difficulty of changing the constitutional text through the amendment

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process. But such a willingness to reexamine the past seems, for Judge Kennedy, to be part and parcel of a generally open-minded and evolutionary approach to law itself as an organic, developing body of understanding.

Indeed, among the most striking of Judge Kennedy's views as expressed in his testimony before this Committee in December 1987 was his notion that, with the passage of time and the flow of history, judges become not less capable of divining the original meaning of constitutional provisions enacted long ago but more capable of understanding what those provisions truly meant and should be interpreted to mean. For the understanding judges seek is not a strictly historicist unearthing of the subjective beliefs or assumptions of particular individuals who may have written, or voted for, specific texts but, rather, an appreciation of the objective principles and premises implicit in the texts promulgated through the institutional process of constitution-making.

In the context of this quite subtle and indeed profound conception of the judicial process, it is not surprising that Judge Kennedy should have testified, as he did, that *stare decisis* is less a method or doctrine than a summary of how courts, building their understanding of texts and traditions in part upon the perceptions of their judicial predecessors, inevitably operate in a system such as ours. Just as Judge Kennedy opined that the search for "original intent" is less a method to be followed than a goal to be sought, so he opined that respect for precedent is less a technique to be codified -- complete with rules as to when precedent should be deemed less binding than usual -- than an objective to be pursued. Ideally, in the judicial world envisioned by Judge Kennedy, it is the ongoing process of refining and perfecting the vision of the future implicit in the work of the past that marks the judge's mission. By definition, that mission is respectful of, but not rigidly bound by, decisions made by prior courts. That view of *stare decisis*, if I understand Judge Kennedy correctly, is considerably more humble, more modest, and more attuned to each judge's need to draw on the wisdom of those who came before him, than was true of the approach championed by Judge Bork. I count myself a critic of the Bork approach and an admirer of the Kennedy approach.

Respectfully submitted,

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