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## United States Senate

COMMITTEE ON THE JUDICIARY  
 WASHINGTON, DC 20510-6275

STATEMENT OF SENATOR CHARLES E. GRASSLEY  
 ON THE NOMINATION OF ANTHONY M. KENNEDY  
 TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT  
 DECEMBER 14, 1987

JUDGE KENNEDY, LET ME ADD MY WELCOME TO YOU AND YOUR FAMILY. I'D LIKE TO CONGRATULATE YOU ON BEING CHOSEN BY PRESIDENT REAGAN TO SERVE ON THE SUPREME COURT.

THREE MONTHS AGO THIS COMMITTEE CONVENED FOR THE PURPOSE OF ASSISTING THE SENATE'S ADVICE AND CONSENT RESPONSIBILITY. SADLY, IN MY JUDGMENT, THE COMMITTEE AND SENATE MANAGED TO TRANSFORM A NARROW CONSTITUTIONAL FUNCTION INTO A FULL-BLOWN, FEAR AND SMEAR CAMPAIGN.

THE ADVICE AND CONSENT FUNCTION -- LOCATED AS IT IS IN THE EXECUTIVE BRANCH ARTICLE OF THE CONSTITUTION -- SIMPLY CANNOT MEAN THAT THE SENATE'S LAST WORD IS TO BE THE ONLY WORD. I BEGIN THESE HEARINGS FULL OF HOPE THAT THIS NOMINATION WILL RETURN THE SENATE TO ITS MORE TRADITIONAL, AND APPROPRIATE ROLE.

IN THE PAST, I HAVE SET OUT WHAT I BELIEVE IS A PRINCIPLED, THREE-PART STANDARD FOR EVALUATING A NOMINEE:

- (1) DOES THE NOMINEE POSSESS KNOWLEDGE OF AND RESPECT FOR THE CONSTITUTION AS A PRECIOUS INHERITANCE FOR ALL AMERICANS, AND AS THE SOLE RULE OF DECISION IN CONSTITUTIONAL CASES ?
- (2) DOES THE NOMINEE HAVE FULL APPRECIATION OF THE SEPARATE FUNCTIONS BETWEEN THE UNELECTED JUDICIARY AND THE POLITICAL BRANCHES ? AND
- (3) WILL THE NOMINEE EXERCISE SELF-RESTRAINT ? SELF-RESTRAINT WHICH MAKES A JUDGE RESIST THE TEMPTATION TO REVISE OR AMEND THE CONSTITUTION ACCORDING TO THAT INDIVIDUAL'S VIEW OF WHAT IS GOOD POLICY.

MR. CHAIRMAN, I BELIEVE THIS IS A GOOD OCCASION TO REPEAT SOME OFTEN-CITED HISTORY ABOUT THE THIRD BRANCH.

FIRST, ACCORDING TO THE FRAMERS, THE JUDICIARY WAS TO BE THE "LEAST DANGEROUS" BRANCH TO THE POLITICAL RIGHTS GUARANTEED IN THE CONSTITUTION.

SECOND, COURTS ARE TO MAKE DECISIONS BASED ON THE LAW RATHER THAN PERSONAL PREFERENCE. COURTS DERIVE THEIR LEGITIMACY AND AUTHORITY FROM THIS RESTRICTION. THEY LOSE BOTH WHEN THEY GO BEYOND IT. AS JUSTICE FRANKFURTER ONCE EXPRESSED IT: "THE ULTIMATE TOUCHSTONE OF CONSTITUTIONALITY IS THE CONSTITUTION ITSELF, NOT WHAT WE HAVE SAID ABOUT IT."

MUCH OF THE FUROR OF THE PAST FEW MONTHS ONLY UNDERSCORES THE FACT THAT SOME PREFER A JUDICIARY THAT OBLITERATES THE DELICATE BALANCE STRUCK BY THE FRAMERS IN THE CONSTITUTION'S FIRST THREE ARTICLES . . . A JUDICIARY WHOSE ACTS HAVE NO ROOTS IN THE TEXT OR HISTORY OF THE CONSTITUTION AND LAWS . . . A JUDICIARY WITH LITTLE REGARD FOR THE CONSENT OF THE GOVERNED OR SEPARATED POWERS.

OF COURSE, GOOD INTENTIONS WILL BE PLEADED BY THE DEFENDERS OF AN UNTETHERED JUDICIARY. BUT GOOD INTENTIONS OUGHT NOT TO PREVAIL OVER THE CONSTITUTION ITSELF, IF WE ARE TRULY TO BE A NATION OF LAWS, NOT MEN.

FOLLOWING THE BORK HEARINGS, A CONSTITUENT OF MINE REMINDED ME OF THE WORDS OF A FORMER IOWA CONGRESSMAN, JOHN WILLIAMS GWYNNE. HIS WORDS EXPLAINED IT QUITE PLAINLY:

"A CONSTITUTION IS A DOCUMENT WRITTEN BY PEOPLE IN THEIR BETTER MOMENTS . . .

TO PROTECT THEMSELVES IN THEIR WORST MOMENTS.

A CONSTITUTION IS NOT ONLY TO PROTECT MAN FROM HIS ENEMIES . . . BUT ALSO FROM HIS FRIENDS."

MR. CHAIRMAN, I THANK YOU FOR SCHEDULING THESE HEARINGS, AND LOOK FORWARD TO THEM AS I EVALUATE THIS NOMINEE ON THE VITAL QUESTIONS CONCERNING THE JUDICIAL BRANCH. THANK YOU.