NOW Legal Defense and Education Fund

STATEMENT OF

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ON BEHALF OF THE

NOW LEGAL DEFENSE AND EDUCATION FUND

ON THE NOMINATION OF JUDGE ANTHONY M. KENNEDY

TO THE SUPREME COURT OF THE UNITED STATES

Committee on the Judiciary
United States Senate

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Introduction

With some reluctance, we are present today to oppose the nomination of Judge Kennedy to the Supreme Court. We recognize that in certain areas of constitutional and statutory rights he has displayed some sensitivity. However, that has not characterized his approach to sex discrimination issues. We fear that if Judge Kennedy's treatment of these issues were adopted, the Court's precedents guaranteeing women's rights under both the Equal Protection Clause of the Fourteenth Amendment and Title VII of the Civil Rights Act of 1964[1] would be seriously undermined. In these circumstances, we feel it is our duty--in Justice Marshall's recent words--to inform this Committee of our analysis of Judge Kennedy's views on sex discrimination issues.

We object to the nomination of Judge Kennedy on the ground, first, that the position he has taken in a series of sex discrimination in employment cases raise serious questions about his respect for and adherence to Supreme Court precedent. These cases involve situations in which women and men were explicitly and admittedly treated differently because of their sex. In such cases, the Supreme Court has held that such sex-based policies are discriminatory on their face and gone on to examine whether there might be a defense to such a policy. In contrast, Judge Kennedy does not appear to recognize the existence of such facial sex discrimination, or its significance. This leads him in turn

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1 42 U.S.C. §2000e et seq. (as amended).

not to find discrimination where the sex discrimination is clearcut.

We have related concerns about his interpretation of the meaning of "intentional" discrimination in both the Title VII, statutory context and under Equal Protection principles. Where facially sex-based classifications are used, the Supreme Court has never sought to require any additional showing of intent, either in statutory or constitutionally-based cases. As Justice O'Connor wrote in Mississippi University for Women v. Hogan, 458 U.S. 718, 723 (1982), "Because the challenged policy expressly discriminates among applicants on the basis of gender, it is subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment." And as Justice Stevens wrote in City of Los Angeles, Dept. of Water and Power v. Manhart, 435 U.S. 702, 711 (1978), a policy which treats people differently

> simply because each of them is a woman, rather than a man, is in direct conflict with both the language and the policy of [Title VII]. Such a practice does not pass the simple test of whether the evidence shows "treatment of a person in a manner which but for the person's sex would be different." It constitutes discrimination and is unlawful unless exempted by ... some ... affirmative justification.

In contrast, Judge Kennedy appears to want to apply some higher, more difficult standard of proving intentional discrimination based on sex. Indeed, the test he suggested to this Committee--looking for stigma or ill-will--in explaining why he had not resigned from clubs which had facial policies of excluding women is a test we believe would result in overturning

most of the Supreme Court decisions finding sex-based state laws to violate the Equal Protection Clause.[2]

Finally, we are also very disturbed by Judge Kennedy's approach to the doctrine of disparate impact in sex discrimination cases brought under Title VII. He has indicated discomfort with following the Supreme Court precedent on this doctrine; and in a major wage discrimination case he basically refused to apply the doctrine at all. Since the disparate impact doctrine is a concept central to the effort to eradicate sex discrimination, we are extremely concerned about Judge Kennedy's approach.[3]

Statement

Part I: Title VII Standards

Since the Supreme Court decided Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971), its first Title VII case addressing an issue of sex discrimination, the law of the land has been clear that where an employer adopts an employment policy that applies only to employees of one sex, the policy is discriminatory on its face. In Phillips, the employer had a policy of refusing to employ women with preschool age children, a policy which the lower federal courts held did not discriminate on the

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2 Judge Kennedy's views on Title VII standards for examining intent are discussed in Part I of this testimony; his views on the Constitutional standards are examined in Part II.

3 Our remarks on this issue are in Part I of this statement.

basis of sex. The Supreme Court, unanimously and per curiam, reversed, explaining: "Section 703(a) of the Civil Rights Act of 1964[4] requires that persons of like qualifications be given employment opportunities regardless of their sex. The Court of Appeals therefore erred in reading this section as permitting one hiring policy for women and another for men--each having preschool aged children.[5]

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4 Section 703(a) of the Civil Rights Act of 1964, as amended, 42 U.S.C. Sec. 2000e - 2(a), provides that:

> It shall be an unlawful employment practice for an employer--(1) to fail or refuse to hire or to discharge, any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
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> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual's race, color, religion, sex, or national origin.

5 Once it is established that the employer has discriminated on the basis of sex (§ 703(a)), the employer is permitted to argue that the discrimination is justified (§703(e)). To do so, the employer must establish that sex is a "bona fide occupational qualification" (bfoq) for the job. This exception is a narrow one and the burden on the employer stringent indeed. See, e.g., Western Air Lines, Inc. v. Criswell, 472 U.S. 400 (1985); Dothard v. Rawlinson, 433 U.S. 321 (1977); Diaz v. Pan American World Airways, Inc., 422 F.2d 385 (5th Cir. 1971), cert. denied, 404 U.S. 950 (1971). In Phillips, the issue raised was what constituted discrimination for the purposes of 703(a), not whether the defense was established. As we shall show, it is on this initial question, resolved by the Supreme Court in 1971, that Judge Kennedy strays.

Phillips v. Martin Marietta is but one prominent example of a large body of case law sometimes referred to as "facial discrimination cases." These are the cases, many of which appeared in the early years after passage of Title VII, in which defendants explicitly used applicants' or employees' sex in some manner to affect employment decision-making. An employer may have, as in Phillips, applied an employment requirement only to members of the female sex. An employer may have admitted that he wanted a man for the job. Evidence may have been adduced that the employer or its agents explicitly used the employee's sex, rather than her actual job performance, as the basis for evaluating her job performance.

Facial discrimination cases are not difficult to adjudicate. As Phillips illustrates, the process of evaluating the question whether disparate treatment--that is, differential treatment based upon the employee's sex--has occurred, is simple. One simply asks whether the sexes are treated differently with respect to a shared characteristic (in Phillips, parenthood).

Most of the sex discrimination cases under Title VII in which Judge Kennedy has addressed the question of whether unlawful discrimination has occurred have presented "facial discrimination" issues and, in each such case, Judge Kennedy has undermined the principle that different treatment of the sexes should be considered sex discrimination, contrary to the analysis required by Phillips.

In Gerdom v. Continential Airlines, 692 F.2d 602 (9th Cir.

1982), Judge Kennedy ignored straightforward evidence of explicit sex-based treatment when he joined a dissenting opinion. At issue in Gerdom was Continental Airlines' policy that flight hostesses, all of whom were women, must meet certain weight requirements while men who also served passengers in-flight (albeit with different job titles) had no such requirement imposed on them. The weight policy for female employees "resulted in a loss of wages and employment only for women employees and it was never applied to male employees, even those who worked side by side with plaintiffs serving passengers on flights." 692 F.2d at 606. In the rehearing en banc in the Ninth Circuit, the majority held that flight hostesses who were suspended or terminated under the strict weight restrictions had been subjected to unlawful sex discrimination. The court then granted summary judgment to the flight attendants since the female-only policy was obviously sex-based and thus discriminatory. The court rejected Continental's attempt to justify the policy on the basis that it sought to compete with other airlines by featuring thin, attractive, female cabin attendants, stating that the justification was discriminatory on its face. The majority explained its reasoning:

> A facial examination of the weight program here reveals that it is designed to apply only to females. Where a claim of discriminatory treatment is based upon a policy which on its face applies less favorably to one gender, this court has held that the plaintiff need not otherwise establish the presence of discriminatory intent. [Citing among others Norris v. Arizona Governing Committee, 671 F.2d 330 (9th Cir. 1982) aff'd 463 U.S. 1073 (1983)].... The fact

> that this policy applied to an intentionally all-female job classification does not alter the analysis.... By Continental's own admission, the policy was enforced only against women because it was not merely slenderness, but slenderness of female employees which Continental considered critical....
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> The only justification that has been advanced for the weight program is Continental's desire to compete by featuring attractive cabin attendants. Subsumed in its assertion is the view that, to be attractive, a female may not exceed a fixed weight. Continental has never argued that all people, regardless of gender, are unattractive if they exceed fixed weight criteria. Nor has it suggested that the same competitive image would have been served by hiring thin males as well as females.
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> The difficulty with the justification, therefore, is that it is not neutral. It is discriminatory on its face....

692 F.2d at 608-09. Under Phillips and its progeny, the majority analysis is clearly correct: a weight limit was placed on women that was not placed upon men, all of whom attended to passenger needs on Continental's flights.

A poorly-reasoned dissent rejected the majority's analysis that this was obvious facial discrimination; Judge Kennedy joined that dissent. The dissent argued, inter alia, that the disparate treatment claim required a trial on the merits since the airline's alleged justification for its facially discriminatory policy--that the degree of customer contact with flight hostesses dictated that they maintain a more attractive personal appearance--created an issue of fact concerning whether the weight requirement was based on sex or on customer contact needs.

The record already made it clear, however, that the men had customer contact but were not subjected to weight requirements; indeed, as the majority pointed out, the difficulty with the asserted neutral justification was that it was in fact sex-based, since Continental had only sought thin women, not thin men. Thus, the dissent in which Judge Kennedy joined avoided acknowledging the obvious sex discrimination in this case.

In White v. Washington Public Power Supply System, 692 F.2d 1256 (9th Cir. 1982), Judge Kennedy again refused to recognize the existence of obvious sex discrimination. There, Ms. White, a Native American woman, alleged that her employer had discriminated against her in initial hiring and in later opportunities for promotion based on her sex and race. At trial, the plaintiff's strongest evidence was "a statement by a supervisorial employer that she was passed over for a clerical position because he wanted to hire a minority male in order 'to break up a female ghetto'"--in other words, an admission that she was barred from consideration for the position because she was a woman, not a man. Additional evidence showed that women and minorities were underrepresented in the work force, and that White was more qualified than the persons hired for the jobs she sought.

The trial court found in favor of White and awarded her $161,000 in compensatory and punitive damages, back pay and attorneys' fees. On appeal, Judge Kennedy reversed and remanded. He relied on Texas Department of Community Affairs v. Burdine,

450 U.S. 248 (1981), which sets forth a prima facie case and shifting burdens of production of evidence from which courts can infer whether or not a policy is based on sex when there is no admission of a sex-based policy. Judge Kennedy reversed on the basis that the trial court had not assigned the correct burden of proof to the employer under Burdine.[6] In explaining why he thought a remand was necessary despite White's strong evidence of discrimination, Judge Kennedy stated: "While we do not hold that such evidence is insufficient to support liability, we do not think White's case so clear that the court's error in allocating the burden of proof can be disregarded." 692 F.2d at 1289.

In fact, if there was ever a case where the evidence was strong enough to avoid remand, this is such a case, with its overwhelming evidence of sex-based intent in the supervisor's desire "to break up a female ghetto" by hiring a "male." For inexplicable reasons, however, Judge Kennedy did not even discuss the supervisor's admission that he would not hire White because he wanted a man.[7] Under either the trial court standard or the Burdine standard, this was clearly sufficient evidence of sex-based discrimination.

In Fadhl v. Police Department, 741 F.2d 1163 (9th Cir. 1984)

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6 Although the trial judge orally applied the correct standard, his written opinion did not, and Judge Kennedy felt compelled to rely on the latter.

7 Judge Kennedy did discuss two other types of evidence about which there was room for argument, but he failed to discuss the clear evidence of sex-based discrimination which should have defeated the remand.

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Judge Kennedy again reversed and remanded a Title VII judgment and damage award of $86,000 to a female probationary police officer who was terminated in the middle of her field training program. The defendants' action had seemed clearly based on sex: one superior criticized plaintiff Fadhl for being "too much like a woman;" another said that she was "very ladylike at all times which in future may cause problems," and also suggested that she try not to look "too much like a lady." Yet a third stated that, "after work she can become feminine again." 741 F.2d at 1165. In addition to supervisors' statements of sex bias, there was evidence that the numerical evaluations given to Ms. Fadhl were lower than scores given to men whose performance was similar or worse, and that her scores did not correspond to guidelines that had been established for numerical evaluation. There was also evidence that Fadhl was denied certain training that the city admitted was necessary for success in the program. In short, the record was replete with evidence of sex-based discrimination against plaintiff Fadhl. While the Police Department did not explicitly admit that it wanted a man for the position, the comments of the three supervisors who were upset that Fadhl acted "like a woman", along with the other evidence, strongly suggested that the Department would have preferred a man--someone who, by definition, would never act "too much like a woman." Nonetheless, Judge Kennedy reversed and remanded for further consideration of the impact on the finding of liability of the trial court's erroneous finding that Ms. Fadhl was absent from

her departmental termination hearing. Given the exceptionally strong evidence of the Department's preference for policemen, it is extremely difficult to see how Fadhl's possible appearance at the hearing could have negated the finding of discrimination.[8]

Judge Kennedy later discussed this opinion in a speech before the management lawyers' group, Defense Research and Trial Lawyers Association. These remarks[9] suggest that evidence of clear sex-based evaluation of an employee will not be sufficient for a finding of liability to survive remand in Judge Kennedy's court. Something in excess of mere discrimination will be required. Although Judge Kennedy has not openly declared what he is looking for, his past statements suggest that he may well require discrimination plus hostility to sustain a finding of employer liability.[10] If so, this might explain why he appears

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8 Indeed, on remand, the district court deleted the erroneous finding and reinstated its finding of discrimination--which was then affirmed on the second appeal to the Ninth Circuit by a panel on which Judge Kennedy was not sitting. Fadhl v. City and County of San Francisco, 804 F.2d 1097, 1098 (9th Cir. 1986).

9 He stated "There was ample evidence from which the district court could, and did, find discriminatory, if not hostile, attitudes toward her candidacy." See n. 10, infra.

10 That Judge Kennedy remanded both Fadhl and White despite his acknowledgement of the "ample," even "overwhelming" (in White) evidence of discrimination, strongly suggests that, either explicitly or implicitly, he requires proof of something more in order for the plaintiff to obtain relief. What precisely that "something more" is, is suggested by a variety of comments he has made in several different contexts. Taken together, these comments imply that Judge Kennedy believes, contrary to well-established precedent, that a plaintiff must produce some evidence that the defendant was motivated by hostility, in order for the discrimination to be actionable. As noted above, with respect to Fadhl, he stated, "There was ample evidence from which

(Footnote continued)

to ignore facial discrimination in a number of cases. In his speech, he also suggested that assessment of the amount of damages would be "a specific, measurable, substance, i.e. money, to demonstrate the merits of a particular position." Id. at 8. But, the amount awarded is not the measure of practical liability in Title VII. Unlike the garden variety tort case, the amount is not reflective of the trier's sense of outrage, since back pay and attorneys' fees are the only form of monetary liability that may be awarded. Moreover, to use monies as a measure of merit in a Title VII case would undermine the entire body of law which emphasizes the importance of non-monetary relief--in the form of declaratory and injunctive relief--in combatting discrimination. Further, this standard (assessing the merits of a case by the amount of money at stake) would undermine the Supreme Court's landmark sexual harassment decision, Meritor Savings Bank v. Vinson, 477 U.S. _____, 106 S.Ct. 2399 (1986), because the Supreme Court decided that the plaintiff (Vinson) had a valid

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10(continued)
the district court could, and did, find discriminatory, if not hostile, attitudes toward her candidacy." Kennedy Speech to Defense Research and Trial Lawyers Association at p.8. Yet, he remanded for further findings on whether the holding of liability was justified. When asked whether any of the clubs to which he has belonged practiced invidious discrimination, he responded that "[a]s far as [he] is aware, none of [the clubs'] policies or practices were the result of ill-will." Questionnaire at p.50. Finally, in AFSCME v. State of Washington, 770 F.2d 1401, 1407 (9th Cir. 1985), he wrote that, "The requirement of intent is linked at least in part to culpability." The content of Judge Kennedy's concept of "culpability" or "ill-will" and the degree to which be believes it is an essential element of a sex discrimination case, are questions that must be explored.

Title VII claim for the maintenance of a discriminatory work environment even if she could show no "economic harm," in the sense of lost wages or benefits.[11]

The theme of ignoring facial sex discrimination can be seen once again in Judge Kennedy's opinion in AFSCME v. State of Washington, 770 F.2d 1401 (9th Cir. 1985). Plaintiffs charged that the State of Washington discriminated in compensation based on sex by paying predominantly female jobs about 20% less than predominantly male jobs where employees in both the male and female jobs had the same knowledge and skills, mental demands, accountability, and working conditions. In addition to documenting the pay disparity between men and women and the equivalence of their jobs, the plaintiffs put on evidence that the State of Washington had practiced facial sex discrimination for many years by barring women from some jobs and men from others, and advertising for jobs on that basis. Plaintiffs also presented expert witnesses who testified that facial sex segregation of this sort has a causal relationship with sex-based wage discrimination and often persists after the sex segregation has been discontinued. Judge Kennedy completely discounted the evidence of facial sex discrimination and its impact on wages, ruling that the official policy of sex-based job assignments did not "justify an inference of discriminatory motive by the State

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11 The claimed harassment in that case involved a concerted pattern of sexual harassment including brutal sexual attacks upon Ms. Vinson by a Vice President of the Bank, her supervisor.

in the setting of salaries" because individual plaintiffs had not testified, and because, in his view, the segregation consisted of "isolated incidents."[12]

In contrast, the Supreme Court has taken quite a different view of the conclusions to be drawn from evidence concerning other acts of discrimination by an employer in examining the acts alleged to be discriminatory in a pending lawsuit against the same employer. In McDonnell Douglas Corp. v. Green, 411 U.S. 792, 805 (1973) the Court ruled that "statistics as to [the company's] employment policy and practice may be helpful to a determination of whether [the company's] refusal to rehire [the plaintiff] in this case conformed to a general pattern of discrimination against blacks." In other words, evidence that an employer practiced one form of race or sex-based discrimination can lead to the conclusion that the same employer was likewise motivated by race or sex in making another different employment decision. This has obvious relevance to the AFSCME case; if the state discriminated on the basis of sex in hiring and job assignments, that could well support the conclusion that it also discriminated on the basis of sex in setting wages.

Judge Kennedy's opinion in AFSCME is also troubling in two other respects--his interpretation of what is intentional discrimination, and his negative result-oriented examination of disparate impact analysis. The standard Judge Kennedy used in

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12 The trial court made no factual finding that the sex segregation was isolated.

AFSCME to analyze whether intentional discrimination was proven was not drawn from Title VII precedent, but rather from case law analyzing equal protection cases, where a heavier burden of proof is placed on plaintiffs. See, e.g., Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979). Moreover, the standard he used was not appropriate for facially sex-based cases but was drawn from the one used for analyzing neutral policies; in such cases plaintiffs must meet a higher burden to show that the employer's policy was actually based on sex despite its neutral appearance. In AFSCME, Judge Kennedy quoted this higher standard as the appropriate Title VII standard without acknowledging that there is more than one standard. Thus, he ruled that "the plaintiff must show the employer chose the particular policy because of its effect on members of a protected class." Id., at 1405, quoting Personnel Administrator of Massachusetts v. Feeney, 442 U.S. at 279, and that, "discriminatory intent implies selection of a particular course of action at least in part 'because' of not merely 'in spite of', its adverse effects upon an identifiable group." Id. Judge Kennedy gave a passing nod to the less onerous Title VII standard drawn from the Supreme Court's opinion in International Brotherhood of Teamsters v. United States, 431 U.S. 325, 335 n.15 (1977) ("plaintiff must allege the employer 'treats some people less favorably than others because of their race, color, religion, sex, or national origin'"). However, his discussion of intent elsewhere in the opinion makes clear that he demands adherence to

a higher and more difficult standard than Teamsters requires. Thus, while he acknowledges that the Supreme Court allows an inference of intent to be drawn from statistical evidence, he also implies that the Court demands independent corroboration in addition to the statistics. In fact, the holding in Teamsters specifically allowed a prima facie case of intentional discrimination to be established based on statistics alone. Seen in this light, his AFSCME holding is doubly troubling--for it first erects a new and difficult standard requiring statistics to be corroborated by other evidence of discrimination, while concurrently dismissing highly probative evidence of long-standing facial sex discrimination as such corroboration.

With regard to disparate impact, Judge Kennedy's AFSCME opinion entirely rules out the possibility of disparate impact analysis applying to wage discrimination cases in any way. He argues that the two leading Supreme Court cases on disparate impact (Griggs v. Duke Power Co., 401 U.S. 424 (1971), a race case, and Dothard v. Rawlinson, 433 U.S. 321 (1977), a sex

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13 The rule of law in disparate impact cases under Title VII is that, where a plaintiff can show that a neutral employment policy or practice has a disparate impact on members of one protected group (women or racial minorities, for example), such proof is sufficient to prove unlawful discrimination unless the employer can meet the burden of proving that the policy or practice in question serves a genuine business necessity. See Dothard v. Rawlinson, 433 U.S. 321 (1977)(minimum height and weight requirement has disparate impact on women and is not justified by business necessity); Griggs v. Duke Power Co., 401 U.S. 424 (1971)(education and testing requirements having disparate impact on minorities insufficiently related to employer's job needs for manual labor jobs).

case)[13] require that disparate impact analysis be "confined to cases that challenge a specific, clearly delineated employment practice applied at a single point in the job selection process." Id. at 1405. But no such limitation can be found in these cases.[14] Indeed, the employment tests that were at issue in the landmark Griggs decision shared many of the characteristics of the wage-setting system in AFSCME that led Judge Kennedy to conclude that disparate impact analysis was inappropriate. Both the test and grading scale used for assessing candidates at Dukes Power Company and the final wage under the wage system implemented for Washington State employees involved "the assessment of a number of complex factors, not easily ascertainable" and were the result of complex deliberations on the part of each employer. Both the test and the wage system arrived at one quantifiable number (a grade or a wage), the impact of which on protected classes could be readily assessed using statistical measures. In short, Judge Kennedy analyzed the disparate impact doctrine in such a manner as to preclude its use in wage discrimination cases. Such a negative result-oriented analysis finds support neither in Supreme Court precedent nor in logic. But an explanation for Kennedy's position may be found in a speech he made to the Defense Research and Trial Lawyers

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14 Judge Kennedy's views in this regard also relied on Circuit Court cases which held that disparate impact analysis may not be applied to subjective employment practices. This view was recently rejected by the Ninth Circuit en banc in Atonio v. Wards Cove Packing Co., Inc., 810 F.2d 1477 (9th Cir. 1987).

Association, when he suggested "[t]he rule, for instance, that a prima facie case of disparate impact is established by a comprehensive statistical case might be seized upon by a judge gripped by the automatic rule syndrome as an automatic, conclusive, simple way to resolve the case." These seem to be the remarks of someone who is less than comfortable with the doctrine.[15]

That his ruling on disparate impact was a result-oriented decision not based on precedent is also suggested by the way his decision supports the conservative consensus that sex-based wage differentials attributable in part to sex discriminatory market forces should not be actionable under Title VII. Again, however, Supreme Court precedent suggests otherwise. In Corning Glass Works v. Brennan, 417 U.S. 188, 205 (1974), the Court ruled on a

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15 In addition to the Title VII cases discussed above, Judge Kennedy joined, but did not write, four other Ninth Circuit decisions involving claims of sex discrimination under Title VII in which the lower court rendered summary judgment against the plaintiff. In none of these cases did he join a decision finding sex discrimination. In two of these cases, the court of appeals affirmed the summary judgment against the plaintiff. See LaBorde v. Regents of the University of California, 686 F.2d 715, rehearing and rehearing en banc denied, 686 F.2d 719 (9th Cir. 1982); Fountain v. Safeway Stores, Inc., 555 F.2d 753 (9th Cir. 1977). In the two other cases, the Court of Appeals affirmed the summary judgment in part but found that genuine issues of material fact remained that, under Federal Rules of Civil Procedure 56, required trial on the merits with respect to certain issues. See Nolan v. Cleland, 686 F.2d 806 (9th Cir. 1982)(affirming dismissal of Equal Pay claim; reversing summary judgment on Title VII claim because issues of material fact remain); Abramson v. University of Hawaii, 594 F.2d 202 (9th Cir. 1979)(reversing summary judgment concerning claims of sex discrimination and retaliation under Title VII because genuine issues of material fact remain; affirming summary judgment on Equal Pay claim).

sex-based pay disparity that "arose simply because men would not work at the low rates paid women inspectors." "[The disparity] reflected a job market in which Corning could pay women less than men for the same work. That the company took advantage of such a situation may be understandable as a matter of economics, but its differential nevertheless became illegal once Congress enacted into law the principle of equal pay for equal work."

Part II: Equal Protection Doctrine

Judge Kennedy has decided only two Equal Protection Clause cases involving sex discrimination and the analysis of the sex discrimination issues in them was cursory, at best. However, Judge Kennedy's performance in the Title VII cases involving facial discrimination and his judicial philosophy generally raise serious questions about whether he would apply existing equal protection doctrine to facial sex discrimination. In particular, we question whether he would require a new test for finding sex-based classifications unconstitutional--a test requiring that a plaintiff show the government was motivated by ill-will or hostility or a desire to impose a stigma upon one sex in adopting a sex-based classification.

Under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, the Supreme Court has considered essentially two kinds of cases--cases involving an explicitly sex-based government policy and cases involving a purportedly neutral governmental practice that has harmful

effects on a protected class.[16] In the early 1970's, the Supreme Court adopted a heightened standard for judging the constitutionality of a governmental policy involving explicit sex-based treatment, although it did not settle on the final form of that heightened scrutiny until 1976. See, e.g., Frontiero v. Richardson, 411 U.S. 677 (1973) (plurality applies strict scrutiny)[17]; Reed v. Reed, 404 U.S. 71 (1971)(applying a

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16 In the case of a purportedly neutral practice having a harmful effect upon members of one class, the Supreme Court has required that a plaintiff show that the group-based effect was intended in the use of the purportedly neutral practice or procedure. See Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979); Washington v. Davis, 426 U.S. 229 (1976). This requirement of proof of intent in the equal protection cases where there is a challenge to a neutral rule or practice seems to have led Judge Kennedy to require special proof of "intent" in the form of ill-will even in cases involving explicit sex-based classifications. (Judge Kennedy applies such a standard in his discussion of the ABA standard of judicial conduct concerning membership in exclusionary clubs. See pp. 26-30 below. See also our discussion above of his imposition of this intent requirement governing neutral rules into a Title VII disparate treatment context--i.e, the AFSCME case.) But Judge Kennedy misconstrues the intent standards of Feeney. The "intent" required is not special hostility, but rather a showing that the conduct or policy in question was adopted with an intent to effect an unfavorable result based upon an individual's group membership, i.e., sex or race. With explicit sex-based classification, that intent is obvious.

17 In Frontiero v. Richardson, 411 U.S. 677 (1973) the Supreme Court invalidated a statute which automatically allowed certain fringe benefits to dependents of male members of the uniformed services, but required dependents of similarly situated service women to prove the status of their dependents, thus denying some women such benefits for their families. In so doing, the Court was deeply influenced by the historical reality that traditional "romantic paternalism" had served as a rationalization for relegating women to an inferior status. The Court held that the classification itself constituted unconstitutional discrimination in violation of the Due Process Clause of the Fifth Amendment, rejecting the government's rationale that the classification was justified and motivated by administrative convenience concerns.

heightened rationality test to strike down sex-based statute).[18] In 1976, the Court settled on an intermediate standard of review for sex-based classifications, in the case of Craig v. Boren, 429 U.S. 190 (1976). The Craig standard applies to a governmental law, regulation, rule or practice in which sex is explicitly used as a basis for classification. It provides that:

> [to] withstand constitutional challenge,... classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives. 429 U.S. at 197.

Under this test, the Supreme Court found that the Oklahoma statute at issue in Craig--making it unlawful for males, but not females, under the age of 21 to purchase 3.2% beer--"invidiously discriminates against males 18-20 years of age." Id. at 204. As in the prior cases, there was no discussion of ill-will or hostility directed toward males, but rather simply an analysis of whether the ban on boys purchasing beer was necessary in order for Oklahoma to achieve its traffic safety goals. Under the Craig analysis and the results in Reed and Frontiero, the Supreme

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18 In Reed v. Reed, 404 U.S. 71 (1971), the Supreme Court struck down a provision of a probate statute which required the automatic appointment of a male of a decedent's estate over a similarly situated female. That statute had not been enacted specifically in order to disadvantage women, but rather it reflected the policy that men had more business experience than women, and it was therefore rational to prefer men over women in designating the administrators of estates. The specific justification for preferring men was to save the courts time by automatic appointment of persons more likely to have business experience. The Court did not discuss intent in the holding, because the statute, on its face, created an impermissible sex-based classification subject to scrutiny under the Fourteenth Amendment.

Court has consistently struck down other laws explicitly using sex as a classification.[19]

For example, in Weinberger v. Wiesenfeld, 420 U.S. 636, (1975), a challenge to a federal statute allowing social security survivors' benefits only to women with minor children, the Supreme Court held that the statute was invidiously discriminatory on its face in violation of the Fifth Amendment guarantee of equal protection. Recognizing that the true purpose of this provision was to protect families by enabling widows to remain home and care for their children, id. at 644, the Court found that the "gender-based generalization" nevertheless operated to denigrate the efforts of wage-earning women and offended the Constitution. Id. at 645. There was no ill-will toward women intended in the statutory scheme, however; indeed, the government argued the statute was designed to help widows. In Stanton v. Stanton, 421 U.S. 7 (1975), the Court invalidated a state statute which set a greater age of majority for male dependents than for female dependants for purposes of terminating child support payments. The Court had no trouble concluding that Reed was controlling and that the arbitrary distinction denied women (the female children receiving child support) equal protection of the laws. Id. at 17. The presence or absence of

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19 The exceptions to this pattern occur where the Court has refused to strike down a statute because it was convinced that the use of gender classifications was adopted to redress "'our society's longstanding disparate treatment of women.'" See, Califano v. Webster, 430 U.S. 317 (1977); Kahn v. Shevin, 416 U.S. 351 (1974).

malice on the part of the Utah legislature was not of concern to the Court, since the classification was, on its face, irrational and discriminatory. Among the "old notions" on which the distinction was based was the idea that a boy's education must be ensured, while a girl was destined to marry and remain at home. Id. at 15. This was not a reflection of ill-will or malice, but just a remnant of the view that men and women should have different roles in society. In Califano v. Goldfarb, 430 U.S. 199 (1977), the Court struck down a gender-based classification which provided that survivor's benefits would be payable to a widower only upon showing that he "was receiving at least one-half of his support" from his deceased wife. A widow was not required, under the statute, to make such a showing. The Court held that Weinberger and Frontiero were controlling on the question of whether this distinction constituted an equal protection violation under the Fifth Amendment Due Process Clause. Far from finding that Congress was motivated by a desire to harm women when it struck down the statute, the Court held that its intention was to "aid the dependent spouses of deceased wage earners, coupled with a presumption that wives are usually dependent." Id. at 217.

In these and other cases addressing sex-based classifications in the law, the Supreme Court carefully analyzed the statutory purpose behind the sex-based classification, its importance, and whether the different treatment of men and women was really necessary in order to achieve the government's stated

purpose. In none of these cases did the court consider whether the government had been motivated by ill-will or hostility toward men or women, or whether it intended to stigmatize one group. Rather, the question was whether the governmental purpose was sufficiently important, and the sex-based classification really necessary to achieve this purpose. If not, the statute violated equal protection principles.

By contrast, in approximately the same time period as these cases, in United States v. Reiser, 532 F.2d 673 (9th Cir. 1976), Judge Kennedy joined a three paragraph per curiam decision upholding male-only registration for the draft. Without explanation or analysis, the opinion merely stated in the most conclusory terms that there was "a clear rational relationship between the government's legitimate interests, as expressed in the Act, and the classification by sex." 532 F.2d at 673. Whatever the appropriate outcome may have been, see Rostker v. Goldberg, 453 U.S. 57 (1981), the treatment of the equal protection question is troubling. The opinion used the lowest standard of review despite the fact that it came five years after the Supreme Court first applied heightened review in Reed v. Reed. Moreover, it in no way grappled with the nature of the governmental interest or the necessity for the sex-based classification.[20]

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20 Kennedy's other sex-based classification equal protection decision similarly exhibits a lack of the kind of analysis the Supreme Court undertakes in equal protection cases. The case was United States v. Smith, 574 F.2d 988 (9th Cir. 1978), cert.

(Footnote continued)

Judge Kennedy's refusal to recognize facial discrimination in Title VII cases casts doubt upon his willingness or ability to recognize the circumstances in which the Craig analysis (or for that matter Reed or Frontiero) should apply. More importantly, Judge Kennedy's apparent lack of concern for enforcing the clear dictates of Title VII raises questions about the position that he will take with respect to equal protection of the sexes under the Constitution. In his comments to the Ninth Circuit Judicial Conference on August 21, 1987, Judge Kennedy provided insight into his judicial philosophy on Constitutional analysis. He stated that he believed in the doctrine of "original intent," and

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20(continued)
denied, 439 U.S. 852 (1979), in which a statute resulting in harsher penalties for forcible sodomy of a man than for forcible rape of a women (presumably vaginal rape) was upheld against an equal protection challenge by the man convicted of sodomy. While the opinion started by quoting the Craig intermediate review standard, it ended by merely saying the two crimes were rationally distinguishable, without explaining what the governmental interest was in punishing sodomy more harshly than rape or why it was necessary to use a sex-based classification to achieve that purpose. Thus, Judge Kennedy's opinion stated:

> The physical abuses against the victim's anatomy committed in this case were acts distinct in kind from the act of rape as ... defined by common law. It is rational to determine that the harm, both physical and mental, suffered by victims of these two crimes are of a different quality, in each instance. These distinctions are reflected in traditions and community attitudes that have prevailed for centuries, and penal laws may properly take account of such differences by assigning a separate generic classification to each offense.

574 F.2d at 991. This analysis is merely the old rational review analysis, which results in automatically upholding a statute.

that this doctrine is "responsive" to some of his concerns "when you have spacious phrases like are contained in the Fourteenth Amendment [and] the answer in the text clearly is not there." Id. at p. 5. Judge Kennedy has also stated his belief that the Constitution is not the "panacea for every social ill", Speech to Sacramento Chapter of the Rotary Club, February, 1984, p.7, and that such ills should be rectified in the political arena. This philosophy raises substantial questions whether Judge Kennedy, as a sitting Supreme Court Justice, while giving lip service to the idea that the Constitution guarantees equal protection to women, will not apply the standard as rigorously as it has been applied by the existing Court.

Judge Kennedy's membership in discriminatory organizations, and his recent attempts to justify those actions, further reflect his misunderstanding of the basic concepts of discrimination and equal protection law. Over the past twenty-five years Judge Kennedy has belonged to clubs that specifically have excluded women as well as, in some cases, minorities. Most of those clubs have not only practiced this discrimination but have also incorporated their discriminatory policies directly into their by-laws. In other words, the policies of those clubs on their face discriminated against women and minorities.

Because these organizations had, or continue to have, policies which discriminate on their face,[21] there is no need for

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21 Judge Kennedy was appointed to the 9th Circuit in March, 1975. At that time he belonged to the Olympic and Sutter Clubs,
(Footnote continued)

further inquiry as to whether or not the organizations were or are discriminatory. Certainly were the equal protection doctrine or the prohibitions of Title VII to apply to such clubs[22] the answer would be clear that they had engaged in unlawful discrimination.

But in answer to questions posed to him by this Committee in

21(continued)
both of which excluded women (See Judge Kennedy's Response to Senate Judiciary Committee Questionnaire, 47-48) and the Del Paso Country Club, which had no formal policy of exclusion but had no black and almost no female members. In March, 1980, the U.S. Judicial Conference adopted the principle "that it is inappropriate for a judge to hold membership in an organization which practices invidious discrimination." In September, 1980, Kennedy resigned from the Sutter Club. Id. at 45.

However, despite the August 1984 adoption by the ABA House of Delegates of a Commentary to Canon 2, ABA Code of Judicial Conduct, echoing the 1980 Judicial Conference principle, id. 49, and the September 1986 amendment of Canon 2, California Code of Judicial Conduct to state that same principle, Judge Kennedy continued his memberships with the Olympic and Del Paso Country Clubs until October 1987. He resigned from the Del Paso Country Club the day before Judge Bork's nomination to the Court was rejected by the Senate; he resigned from the Olympic Club three days after that defeat and two days before the nomination of Judge Ginsburg. Id. at 45-46.

22 Of course, equal protection doctrine applies only to governmental action and Title VII applies only to "employers" as defined by that statute. Challenges to clubs' exclusionary membership policies have been made under state and local antidiscrimination statutes--public accommodations or human rights laws--which usually adopt an analysis similar to that under Title VII. In litigation pursuant to state and local human rights or public accommodations laws concerning clubs having exclusionary policies, the question has not typically been whether such exclusion is "discrimination" but rather whether the club is properly covered by the antidiscrimination statute and, if so, whether the statute's coverage of the club is an unconstitutional infringement upon the freedom of association. See, e.g., Rotary Int'l v. Rotary Club of Duarte, 481 U.S. ___, 107 S.Ct. ___, 95 L.Ed 2d 474 (1987); Roberts v. United States Jaycees, 468 U.S. 609 (1984).

this nomination process, Judge Kennedy constructs a new and additional standard for invidious discrimination to explain why these exclusionary policies are not discriminatory. He thereby attempts to excuse his membership in these organizations. In his response to this Committee's questionnaire, Judge Kennedy defines invidious discrimination as follows:

> "Invidious discrimination" suggests that the exclusion of particular individuals on the basis of their sex, race, religion or national origin is intended to impose a stigma on such persons.

Response of Judge Kennedy to Senate Judiciary Committee Questionnaire, p.50. In justifying why various club policies were not "invidious discrimination," Judge Kennedy also says they were not the result of "ill-will." Id.

If this definition of "invidious discrimination" were in fact the law, there would be virtually no actionable sex discrimination cases. Indeed, all of the equal protection cases discussed above would have been decided differently, since none of them were motivated by ill-will or an intent to stigmatize one sex. See Reed v. Reed; Frontiero v. Richardson; Weinberger v. Weisenfeld; Stanton v. Stanton; Califano v. Goldfarb. Most facially sex discriminatory statutes and policies have historically been enacted to "protect" women and have been rooted in sterotypical notions of taking care of the weaker sex rather than motivated by malice. With "ill-will" as the standard for liability, those discriminatory laws would still be with us today. Moreover, it is almost always impossible to determine the

exact internal state of mind or reasoning of any person, organization or group in adopting discriminatory practices. Judge Kennedy implicitly recognizes this in his answer to this Committee's questions. With regard to the policies of the Olympic Club he states:

> I was not involved in the club's decisions to limit membership and, consequently, do not feel competent to articulate the reasons for such restrictive policies.

Id. at 47. With regard to the Sacramento Elks Lodge #6's policies he provides the identical excuse. Id. at 49. How, then, can Judge Kennedy, using his incorrect standard for invidious discrimination, state with certainty that the discriminatory policies of these clubs were not based on ill-will and intended to impose a stigma? He cannot have it both ways.

The standard for discrimination articulated by Judge Kennedy is also at variance with the commentary to the ABA Code of Judicial Conduct, as amended in 1984, concerning membership in organizations that practice invidious discrimination. The ABA commentary expresses the concern and rationale for the standard, by stating that membership in such organizations "may give rise to perceptions by minorities, women and others, that the judge's impartiality is impaired." In other words, a judge should avoid any appearance of lack of impartiality. Judge Kennedy failed to do that by continuing to maintain membership in clubs having facially exclusionary policies that he now acknowledges could harm women or minorities or even result in stigma,[23] long after he took the bench and long after questions concerning such club

memberships had been raised in the ABA and before Congress. His justification for doing so in no way redeems his behavior but only serves to highlight his apparent lack of concern for eradicating sex discrimination or his lack of knowledge about Supreme Court jurisprudence on sex discrimination cases.

Conclusion

Judge Kennedy has repeatedly failed to recognize and remedy even the simplest and most blatant sex discrimination. His record of enforcing Title VII demonstrates that he does not recognize, despite strong precedent, that explicit sex-based discrimination is necessarily discrimination. He has taken the position that even where we recognize its occurrence it may be discounted. He has even suggested that it may be excused if it does not translate into cognizable monetary harm. He has developed a result-oriented analysis rejecting disparate impact cases that would undermine existing law. His judicial philosophy taken together with his failure to adequately appreciate the existence of facial discrimination under Title VII suggest that he may well undo constitutional equal protection doctrine with respect to sex if given the chance, by setting new tests of ill-will, malice, or stigma--tests it will be impossible to meet

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23 We understand that Judge Kennedy's recognition that stigma could result from facial exclusion came only in response to Senator Kennedy's questioning before this Committee, and not in his original written response to the Committee.

in the sex discrimination context. Finally, Judge Kennedy's analysis of the ABA standards of judicial conduct with respect to exclusionary clubs, in two of which he was a member until nearly the eve of these hearings, reflects the chilling reality that Judge Kennedy takes an aggressively apologist approach to the exclusionary practices, in effect arguing that such practices are not discriminatory. Such analysis is fundamentally inconsistent and flawed and flies in the face of any acceptable analysis of discrimination in existing law.

The testimony that we present here is necessarily limited, focusing only upon publicly available materials bearing on the nominee's thinking about sex-based equity. The hasty scheduling of these hearings has not afforded the time for an analysis of the nominee's judicial philosophy that would provide this Committee a precise understanding of the impact that confirmation of Judge Kennedy could have on decision-making by the highest court of this land in sex discrimination cases. The Committee has not even garnered all the materials that are reflective of the nominee's thinking. We urge you not only to hold the record open but also to continue the hearings at a later date, after this Committee has gathered all of the relevant materials on Judge Kennedy. Finally, we urge you to call him back for further questioning concerning the extent to which he will recognize facial discrimination as discrimination, and whether he will adopt the Court's existing precedents on proof of intentional discrimination and the use of disparate impact doctrine.