

STATEMENT OF CAROLYN B. KUHL
IN SUPPORT OF THE NOMINATION
OF JUDGE ANTHONY M. KENNEDY
BEFORE THE SENATE JUDICIARY COMMITTEE
December 17, 1987

I am pleased and honored to have the privilege of appearing before this Committee in support of the nomination of Judge Anthony M. Kennedy to be Associate Justice of the United States Supreme Court. I was Judge Kennedy's law clerk during his third year on the bench, in 1977 and 1978. I am now a partner in the Los Angeles law firm of Munger, Tolles and Olson. In the recent past I served in the United States Department of Justice for five years, where I had an opportunity to concentrate in appellate and Supreme Court litigation as Deputy Assistant Attorney General in the Civil Division and as Deputy Solicitor General.

I will address two aspects of Judge Kennedy's qualifications for the High Court: first, his general approach to deciding cases, and second, the personal qualities he brings to his work.

The business of judging, of deciding cases, is complex. Though some would wish for a system in which results are fully predictable, and decisionmaking a matter of automatic application of well-defined syllogisms, our legal system is not so. Judging is more art than science. Thus, it is not easy to explain or analyze how a judge decides cases. But I will try to describe several characteristics of Judge Kennedy's decisionmaking: practicality, collegiality, courage, and restraint.

Judge Kennedy's approach to the law is, above all, practical. By that I mean that he is concerned with how a legal principle will work in practice. Judge Kennedy was a trial lawyer and a general practitioner. He understands how lawyers approach their representation of clients, the discovery process and its potential for abuse, how a case is actually tried to a judge or jury, and what types of matters are best determined at the trial level. Judge Kennedy understands that appellate judges, through their decisions, are supervisors of a complex legal system. He thinks carefully about how each rule of decision set forth in an opinion will affect the interplay of that system.

Judge Kennedy also places great importance on collegiality. I have heard him observe that collegial decisionmaking is different from decisionmaking by an individual judge. He strives to maintain good relationships, based on mutual respect, with other Ninth Circuit judges with whom he tends to disagree, as well as with those with whom he usually agrees. I think he has generally been successful in this effort. Judge Kennedy also believes that there should be one, consistent body of precedent within a circuit. Thus, he has great respect for the "law of the circuit;" that is, he decides cases consistently with the cases previously decided in the Ninth Circuit. If he disagrees with circuit precedent he may seek to have the issue reviewed by the Ninth Circuit en banc, but he does not simply ignore prior precedent or purport to distinguish it on a spurious basis.

Judge Kennedy has demonstrated courage in his decisionmaking. That quality is important for all judges, but is especially vital for Justices of the Supreme Court who are faced more often with cases in which the Branches of our Government are pitted against each other. A Justice of the Supreme Court must have the courage to confront the Political Branches if they should act in contravention of our Constitution. Judge Kennedy has faced and met that challenge. His decision in Chadha v. Immigration and Naturalization Service, (which was upheld by the Supreme Court), analyzed carefully, and then declared unconstitutional, the legislative veto device that had been used by Congress for decades in dozens of statutes. He has been as vigilant in halting or reversing Executive Branch actions when he has found them contrary to law.

But while Judge Kennedy has shown courage in striking down improper actions of the Political Branches, he has shown restraint in exercising this judicial power. His own personal views of what is right and wrong do not govern his decisions. He strives always to follow the letter and intent of statute or Constitution, letting justice be defined by written law rather than the feelings or beliefs, however sincere, of himself and his fellow judges. I remember especially one case where Judge Kennedy articulated great distress about the personal consequences to the individual plaintiff of the district court's decision. Nonetheless, Judge Kennedy upheld the district court because he believed that that result was required by an honest

application of the relevant statute and existing Circuit precedent.

This brings me to the personal qualities Judge Kennedy would bring to his work on the Supreme Court. Judge Kennedy gave you some idea of what kind of person and what kind of judge he is when, in response to this Committee's questionnaire, he described the key qualities of a judge as "compassion, warmth, sensitivity, and unyielding insistence on justice." I have already mentioned Judge Kennedy's expression of sorrow and compassion for the consequences of a particular statutory requirement to a plaintiff. While he did not often articulate to his clerks his personal feelings about cases, I believe his compassion and sensitivity show through in his decisions.

I would be remiss if I did not mention Judge Kennedy's humility. Lawyers comment among themselves that men and women often tend to change and to become aloof after they take the bench. Judge Kennedy, however, has avoided that phenomenon. I can recall his discomfort when lawyers or others in Sacramento's legal community would come up to him and greet him in an obsequious manner, recognizing his status as one of Sacramento's highest ranking federal officials. Humility, it seems to me, is an extremely valuable trait for one who is to spend the rest of his career in the very formal and isolated environment of the Supreme Court.

Finally, Judge Kennedy is unselfish. Whenever I speak to someone who has met Judge Kennedy, I hear stories of his kindness to others, of his doing small human acts as simple as holding the door for another judge's law clerk. When I clerked for Judge Kennedy, any of his law clerks who could not be with family on a holiday could be sure of an invitation to the Kennedys' own family celebration. Perhaps this character trait is what makes collegiality so important to him.

Judge Kennedy has many other fine qualities, but I know the Committee's time is short. Suffice it to say that if Judge Kennedy is confirmed, the current Supreme Court Justices will be lucky indeed to have so genial a colleague, and the country will be well served by a jurist of proven integrity and ability.

Thank you again for this opportunity to be here today. I would be happy to answer any questions the Committee may have.