

WRITTEN STATEMENT RE CONFIRMATION OF JUDGE ANTHONY KENNEDY'S
NOMINATION TO THE UNITED STATES SUPREME COURT

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This statement is filed in support of Judge Anthony Kennedy's nomination to the United States Supreme Court. I am senior partner in the San Francisco law firm of Cartwright, Slobodin, Bokelman, Borowsky, Wartnick, Moore & Harris, Inc. located at 101 California Street, 26th Floor, San Francisco, California 94111. My practice and that of my firm of some 23 attorneys is limited to the processing and trial of civil cases only arising out of wrongful acts or omissions of the government, manufacturers, insurance companies, businesses and/or private individuals thereby causing injury, harm or damage. The injury, harm or damage may be personal injury, wrongful death, violation of civil rights and what are commonly called business or commercial torts to persons or companies involved in business.

Our practice is overwhelmingly confined to the representation of plaintiffs, i.e. the victims of said wrongful acts and omissions as distinguished from representing the defendants and/or the wrongdoers. Our focus thus is on obtaining redress under the civil justice system for the victims of wrongful acts and/or omissions and our concern with the election and/or appointment of judges is in obtaining

judges who have the courage, the heart and the desire to protect the rights of innocent victims of civil wrongs in our society when justice and equity indicates and mandates that there should be a remedy for the wrong committed, no matter whether same is by government, manufacturers, insurance companies or other large vested interests and/or individual tortfeasors.

I have practiced in this particular specialty for over 35 years with my offices during this time located in San Francisco, California. During those years among other honors, I have served as the President of The Association of Trial Lawyers of America (ATLA - 1974-1975), the California Trial Lawyers Association (CTLA - 1967-1968) and the San Francisco Trial Lawyers Association (SFTLA - 1964-1965). In 1985 I had the privilege of serving as President of Trial Lawyers for Public Justice. This is a public interest law firm which I helped found and which has its headquarters in Washington, D.C. It has as members or partners therein approximately 500 of the most dedicated and capable plaintiff trial lawyers in America. This firm has been financed by our members and is devoted to handling causes in the civil justice field which have not historically been handled or redressed by either the public sector or the private sector.

I have co-authored two books on products liability,

have written many articles and have lectured on trial practice and procedure as well as substantive aspects thereof in most of the states, including Alaska and Hawaii. With reference to appellate cases, I have had a number of personal cases where I handled the appeal. Additionally in my capacity as a member of the California Trial Lawyers Association Amicus Curiae Committee for approximately 20 years and as chairman for 12 years, I have participated in over 100 landmark California appellate court decisions during the last 25 years, most of which were at the Supreme Court level. I accordingly have had extensive experience at the appellate level in the presenting of briefs and the arguing of cases, albeit almost always on the side of the plaintiff or victim. Attached hereto is my curriculum vitae which sets forth in much greater detail my background, experience and orientation.

I have known Judge Kennedy for approximately 20 years and am familiar with his reputation in California as a distinguished scholar, lawyer and jurist. To my knowledge, Judge Kennedy is uniformly held in the highest regard in California by all members of the bench and bar. This is without regard to their political persuasion and/or whether they are plaintiff or defense lawyers.

Judge Kennedy is considered to be a man with impeccable credentials. He did his undergraduate work at Stanford

and then went to Harvard Law School. He was a Phi Beta Kappa in his undergraduate work at Stanford and is considered to be a jurist with superb intellectual abilities.

He has the distinction of having worked in a large corporate type law firm and from there he took over his father's general practice when his father died and thereafter handled all kinds of cases, first as a sole practitioner and then later in partnership for private individuals and small businesses. He did this until he was appointed as a judge of the United States Appeals Court in 1975. Since his appointment to the bench in 1975, he has authored over 400 extremely well written and reasoned decisions and has participated in over 1300 opinions. I have personally read a number of his decisions and while I don't agree with the holding in every one of them, I find that his legal writing skills and analytical abilities are excellent. He writes clearly, concisely and persuasively in setting forth his point of view. He has a reputation of being willing to listen to the attorneys who argue before him and of being courteous and fair in his treatment of said attorneys.

With reference to his knowledge of constitutional issues, it is significant in my opinion that Judge Kennedy for approximately the last 20 years has taught constitutional law in Sacramento at the McGeorge School of Law. His reputation

as a teacher is excellent. It is my understanding that he has been well received and extremely well liked by his colleagues at McGeorge and by the students who he has taught. He certainly understands not only our constitution but the decisions which have been rendered through the years interpreting the constitution.

This leads us to the issues which I would like to address and which are of vital concern to the ordinary citizen in this country and particularly to those who either have been or will become innocent victims of injury, damage and/or harm, either to their persons, their personal relations and/or in their business pursuits. Will Judge Kennedy turn back the clock as many feared would be the case with Judge Bork with reference to the tremendous advancements and improvements that we have seen in recent years in the fields of civil rights, personal rights, products liability, medical malpractice and in the field of business or commercial torts? Does he believe in our civil justice system and in the right of individuals who have been wronged or harmed to obtain redress? Does he believe in our tort system and the right to vehicles and/or procedures to protect and enforce the rights of our people?

The answer to all of the above questions, in my opinion, is that Judge Kennedy will not turn back the clock and that he will be a vigorous and forceful enforcer of the

rights of our citizens to obtain redress and justice under our civil justice system. I have talked personally with Judge Kennedy about a number of these issues. I have read a number of his decisions. I have either read verbatim or summaries of a number of his speeches that he has given with reference to his views and I have personal knowledge of his reputation. Judge Kennedy has told me personally that he does believe in our tort system, that he understands the wonderful therapeutic and prophylactic effect that it has in preventing and/or deterring wrongful acts or omissions, thereby saving injuries, lives and economic damage to others in the future as well as compensating those who have already been harmed. Judge Kennedy personally after taking over his father's practice had the privilege and opportunity of representing ordinary citizens in our society and he understands the necessity of protecting the rights of those who have been innocently harmed or injured.

He has spoken on the fact that the forgotten person oftentimes, particularly in criminal cases is the victim, and he has been vigilant in his opinions in endeavoring to strike a proper balance between protecting the rights of the victims and yet observing proper procedural constitutional safeguards for the accused. While he hasn't participated in as many tort cases as he has criminal, it is self evident

to me, however, that this same philosophy of zealously protecting the rights of victims against government, insurance companies and others has been and will continue to be adhered to and observed by Judge Kennedy in the cases that come before him.

There are a number of such civil cases which I could cite, but just to illustrate, I will mention three. The first is Ramirez v. United States of America, (1977) 567 F.R.2d 854 et seq. in which he held in an extremely well written and reasoned opinion that an action may be brought under the Federal Tort Claims Act to recover for the alleged negligence of a government physician in failing to warn a patient of the risk of a particular operation - i.e. the failure to obtain a proper informed consent. Judge Kennedy and his court held that this failure to obtain a proper informed consent did not fall within one of the exceptions to the Federal Tort Claims Act. It does not allow recovery where there has been a misrepresentation or deceit by a government employee. In the case of Morrill v. United States, (1987) 821 F.R.2d 1426 et seq. Judge Kennedy held that a go-go dancer at a government facility who was assaulted by a Navy enlisted man and raped was not precluded from recovery against the United States Government under the Federal Tort Claims Act because of another exception contained in the Federal Tort Claims Act, namely, that

there can be no recovery for assault and battery by a government employee. Judge Kennedy and his court held that the government could be held liable for its independent negligence in failing to properly supervise and control the government facility, the premises and the people in question.

In Kalland v. North American Van Lines, (1983) 716 F.R.2d 570 et seq., the issue involved apportionment of liability between two defendants. The issue involved a rather esoteric issue, namely, the intertwining of the defendants' causal connection with the accident as distinguished from their percentage share of negligence under comparative negligence principles. Judge Kennedy in a very clear and extremely well written opinion points out that the apportionment between the two defendants is to be made on the basis of their relative percentage of negligence where the injury caused is indivisible and it cannot be said which defendant caused the injury in question.

I believe that it is clear from reading Judge Kennedy's decisions and from talking to him and from reading his speeches that he understands that neither the constitution and/or the common law should be like a straight jacket and/or a stagnant pond and that both must keep pace with the times, needs and requirements of society. In a recent speech in Hawaii for

example, he suggested that "Besides the constitution itself, the courts and government must also heed an unwritten constitution that consists of our ethical culture, our shared beliefs, our common vision. . . ." He said this unwritten code is an additional brake, an additional restraint on government powers. While he didn't specify exactly how this may work, it isn't too difficult to conclude from his remarks themselves that Judge Kennedy would find in accordance with and approve those fundamental concepts that all right thinking people believe in, such as the right of privacy, the right to vote and the right to travel from state to state, even though they aren't specifically set forth in the constitution. Perhaps even more importantly from the standpoint of the civil justice system and the right of innocent victims such as those I represent to recover, I would perceive this to mean that Judge Kennedy understands that there are certain fundamental principals upon which this country was founded and which still exist as taught to us in our churches, in our schools and in our homes, namely, our "shared beliefs," such as principles of good faith, fair dealing, business morality, honesty and integrity and that if these are violated by anyone including the government, insurance companies, manufacturers

or other tortfeasors that there must be a remedy to allow recovery for the violation and breach of these "shared beliefs."

In short, I believe that we will be in good hands with Judge Kennedy and I urge his confirmation. I am confident that he will go down in history as one of our truly great Supreme Court justices and that he will make us proud.