Testimony of NATHANIEL S. COLLEY, SR., Senior Partner, Colley, Lindsey, and Colley, Attorneys at Law, 1810 "S" Street, Sacramento, California 95814, In Support of The Nomination of Judge Anthony M. Kennedy To The United States Supreme Court Given Before The Judiciary Committee of The United States Senate on December __, 1987.

Mr. Chairman, and Members of The Committee.

My purpose today is to express my unqualified endorsement of Judge Anthony M. Kennedy for confirmation as a member of the United States Supreme Court. I am here because I know Judge Kennedy well. He is a man of great integrity who has a sincere devotion to the rule of law. While I realize that I am not here seeking confirmation of myself, it seems appropriate that you know who I am so that you can better evaluate the worth of my remarks.

I was born in rural Alabama, but it became evident quite early that my talents were not in picking cotton. Only my mother believed me when I insisted that all farm labor made me sick. Her love was so great and her belief in me so strong that when others said I was a lazy faker her reply was that so far as she was concerned if I said it made me sick, it made me sick. The truth of the matter is that it did make me sick. I was allergic to almost every blade of grass, wild flower bloom or domestic crop which grew in Alabama. My eyes itched and fluid flowed from my nostrils. That was real sickness in an era before anti-histamines were put in general use. In addition to the impediment imposed by my allergies, I was too skinny and clumsy to excell in any endeavor which required physical agility.

I shall be forever grateful for the fact that my mother believed in the Bible which teaches that everyone has a talent. She knew that mine was not in physical activity. For that reason she convinced me that my talent is in my mind, and I should read books and do something in life which does not depend upon superior physical performance. This led to the idea of going to college, even though no member of

my immediate family had been so bold as to dream to reach such a high goal.

I attended Tuskegee University on a five-year work scholarship and graduated with highest honors. Later I was a Captain in a racially segregated U.S. Army unit. That was a disturbing experience because I questioned the propriety of risking my life for democracy abroad even though for my people it did not exist at home.

An ever present brooding over the unequal condition of Black people in almost every facit of American life literally dictated my career choice. As a lawyer I thought I could be in a better position to seek social change within the framework of constitutional limitations. The federal government had the G.I. Bill of Rights in place for those of us who sought further education. In those days Stanford did not welcome Blacks, Columbia had a quota system, Harvard was too far from Harlem, so I went to Yale.

Since January 11, 1949, I have continuously practiced law in Sacramento, California. One of the greatest joys of my life is having our son and one of our daughters as my law partners.

It was my pleasure to know Judge Kennedy's father. He and the late attorney Archibald M. Mull, Jr., made it a point to see that I was well received as a member of the Sacramento County Bar Association even though it had never had a Black applicant or member, and the Los Angeles Bar Association had no Black members. They also encouraged me to apply for membership in the American Bar Association. They accepted me. That was in the year 1949, and I can assure you that these were bold moves at that time.

Suffice it to say, however, I am not here out of gratitude for the friendship of Judge Kennedy's late father. That friendship, however, is relevant because it shows the type of home in which Judge Kennedy was reared. If Judge Kennedy has gone astray on racial issues, and I know of no evidence that he has, it must have happened after he left home.

You are aware of the fact that at least one civil rights group has announced its objections to the confirmation of Judge Kennedy on the ground that he lacks sensitivity to the problems of ethnic minorities. They have offered three of his opinions as evidence in support of their position. I have carefully read and analyzed each of those opinions. In none of them did I find one scintilla of evidence that Judge Kennedy is insensitive to the struggle of ethnic minorities to achieve full participation in every aspect of American life. Each of the cases cited was decided on narrow procedural grounds. It might be helpful to briefly discuss each of the ones to which reference has been made.

1. TOPIC vs. Circle Realty, 532 F.2d 1273 (1976).

This case involved a claim by a local citizens organization that real estate brokers in two small Los Angeles County cities were steering Black home buyers to Black neighborhoods, and White home buyers to White neighborhoods. Judge Kennedy held that since the citizen's group was attempting to assert the rights of others it did not have standing to sue. He also held that the action was brought under Title 42 Section 3612 of the Fair Housing Law, and that section permits suits only by those who themselves have been direct objects of housing discrimination. Another section of the law, Section 3610, Judge Kennedy said, confers standing upon community groups such as TOPIC, but exhaustion of administrative remedies is a predicate to suit in federal court under the latter section.

In my judgment Judge Kennedy erred in the TOPIC case by giving too narrow an interpretation of the statute involved. It is written in the books, however, that "To err is human, to forgive is devine". I say let those who have never made an honest error cast the first stone. Further, a case may be made for the claim that the administrative remedy found in Title 42 Section 3610 is far less expensive and more expedient than direct court action. If that is not true Congress engaged in futile action in passing the fair housing law because court remedies have been

available for over a century. Congress obviously felt that the court remedy was inadequate to deal with the pervasive racial discrimination in housing in this country Judge Kennedy has never said that either remedy should be abolished. All he held was that those who are not direct victims themselves should be restricted to a different procedure. Those who see an insensitivity to the rights of minorities in that decision have strained at a gnat and swallowed an entirely unrelated camel.

2. Spangler vs. Pasadena City Board of Education, 552 F.2d 1326 (1977).

In this case, seven years after a decision which found de jure racial segregation to exist in the Pasadena, California public schools, a group of Black parents who were not parties in the original suit requested the court to enjoin certain school board practices. The parents did not file a formal motion to intervene in the case. Judge Kennedy held that since the parents did not file a motion to intervene they were not parties to the action and could not attack the alleged unlawful discriminatory practices. He expressly held that if on remand the parents filed a motion to intervene the U.S. District Court should hold a hearing and decide the question of the need for the parents to intervene.

Judge Kennedy expressed no opinion as to the merits of the claims made by the parents. He simply held that they should move to intervene if they wished to participate in the litigation. It is certainly not an expression of racial bias for a Court to require that those before it be either intervenors by motion or parties by joinder. It is difficult to see how else the court can supervise its affairs and enforce its decrees.

3. Aranda vs. Van Sickle, 600 F.2d 1267 (1979).

This case was brought by Mexican-Americans to invalidate an at-large system used by San Fernando, California for the election of members to the City Council. Judge Kennedy affirmed summary judgment against the plaintiffs on the ground that they had failed to raise a genuine issue of fact indicating that they had been denied access to the political process, or that the at-large election scheme constituted a purposeful device for racial discrimination.

It is my view that in that case both the circumstantial and direct evidence produced by the plaintiffs should have precluded the granting of summary disposition of the case, and that Judge Kennedy should have voted to reverse the judgment. This view, however, does not lead me to an irrational conclusion that the decision tends to prove that Judge Kennedy is a racist. He belived in good faith that the U.S. Supreme Court precedents did not justify a different result.

In addition to the objection to the foregoing opinions rendered by Judge Kennedy some of my friends urge his rejection because of his past membership in organizations and clubs which do not have women or ethnic minorities as members. Membership in such clubs in this day and age in America is suspect, but we all too often forget that the present attitude has not always prevailed. If you expelled every member of the Senate who has held such a membership I hazard the guess that you could not get a quorum.

Let us remember that in the past we have all sinned. This society has always been highly polorized along the lines of race. Many Black organizations had no White members and did not desire to have any. Most White organizations had no Black members and fought to keep it that way. There were exclusively male clubs and female clubs.

Recently, however, a new age of enlightenment is being born, but lifting the veil of ignorance and prejudice from the eyes of a people is a slow and painful task. Some who truly desire to see racism banished from our society use the shock effect of immediate resignation from such clubs, others remain within and use their influence in an effort to persuade these groups to enter the new age of enlightenment. The vast majority of poeple will take no action at all.

I fail to see how Judge Kennedy's past club affiliations disqualify him from membership on the U.S. Supreme Court. He has done the honorable thing with respect to each of them. He fought for internal change and when

he realized that he would not succeed he resigned. It is simply not true that he made no objection to discriminatory club policies until a giant sugar plum danced before his eyes. His objections are long standing and his resignations commenced in 1980. Let me ask you a rhetorical question. How many White males in your acquaintance objected to discriminatory clubs prior to 1980 and sought to change them as Judge Kennedy did? I am not unmindful of the chorus of voices castigating Judge Kennedy for waiting so long before he resigned from some of these clubs. To those people I reply with a statement attributed to Justice Frankfurter.

> "All too often, wisdom never comes. For this reason, no one should reject it merely because it's late".

I urge you to evaluate Judge Kennedy on his whole record, and when this is done there is no doubt in my mind that you will reach the conclusion that he deserves this promotion to the major leagues. Turning him down because some of us assert that he made an incorrect decision on an isolated case here and there would be like banishing Willie Mays to the minor leagues because he once dropped a fly ball, or benching Mickie Mantle because he struck out now and then. Perhaps a more recent analogy could be offered by saying Judge Kennedy's rejection would be like cutting Jerry Rice because he tends to drop three out of every 400 passes, or like firing Montana because last week he failed to complete the 24th consecutive pass he threw.

Very little comment has been made concerning the case of Flores vs. Pierce, 1617 F.2d 1386 (1980) in which Judge Kennedy wrote the opinion affirming a judgment against certain public officials in Calistoga, California who objected to a Mexican-American entreprenuer securing a wine and beer license in that city. Judge Kennedy held that the disparate impact the action had upon Mexican-Americans was some evidence of the requisite intent to discriminate. He also expressly adhered to the rule announced in the case of Columbus Bd. of Education vs. Penick, 433 U.S. 449, at P. 464 where it was held that:

> "Adherence to a particular policy or practice with full knowledge of the predictable effects of such adherence upon racial imbalance in a school system is one factor among many others which may be considered by a court in determining whether an inference of segregative intent should be drawn".

These cases lead me to believe that Judge Kennedy has a full grasp of the inherently elusive nature of segregative intent, and views the total picture so as to enable him to flush out racism wherever it raises its ugly head.

My relationship with Judge Kennedy has, with one exception, been very good. Both of us are frustrated law professors at heart, so we teach one course per week at the University of The Pacific, McGeorge Law School in Sacramento. He taught constitutional law, and I teach jurisprudence. Since both subjects embrace constitutional theory, our lectures at times overlap. It is a well known fact that at the end of some of his lectures his students stand, applaud and cheer. I confess my jealousy. All I get at the end of my lectures is an occasional sigh of relief that it is over. It is sincerely hoped that when Judge Kennedy moves to Washington, D.C., the students will feel inclined to cheer me once in a while.

One of my friends in the civil rights movement questioned the wisdom of my appearance here. He said that not enough is known about Judge Kennedy's views on civil rights issues. My reply was that I know enough about Judge Kennedy as a fair and honest person, and as a brilliant scholar and judge to enable me to come before you with confidence that to evade this opportunity would constitute an act of partisan cowardice for which I would be ashamed for the balance of my life. If I ever harbored any doubts about Judge Kennedy, which I have not, they would have been erased by the response he gave to another judge at a judges conference where Brown vs. The School Board was discussed. This is what Judge Kennedy said of Brown vs. The School Board:

> "I do not skirt around it. I embrace it. All of us reject the narrow originalist construction that you are advancing and attributing to us. Plessy vs. Ferguson was wrong when it was decided. Justice Harlan dissented at the time and he was correct. The only thing wrong with Brown is that it wasn't decided 80 years earlier".

Most Black people in America view the decision in Brown as our Magna Carta. It was to us a second and perhaps a more meaningful Emancipation Proclamation. It forced America to commence the long and painful process of reconciling its practices with its high sounding theories. Without Brown, America would be considered not much more than a giant joke when it attempts to lecture the rest of the world about protection of human rights.

I close with a heart-felt willingness to return Judge Kennedy's embrace of Brown with a fond symbolic embrace of him. I urge this Committee to do likewise.

Thank you.

NATHANIEL S. COLLEY, SR.

NATHANIEL S. COLLEY, SR.
Sacramento, California, 1987

EDUCATION BACKGROUND

1. B.S. Degree, Tuskegee Institute, 1941 in Secondary Education with high honors.

2. J.D. Degree, Yale University Law School, 1948; won C. LaPue Munson Prize for most significant contribution of any Yale student to New Haven, Connecticut Legal Aid Society. Shared Benjamin Shipp Prize for best legal essay of any Yale Law student in 1948.

PROFESSIONAL EXPERIENCE

1. Private practice of law January 1949 to date. Senior Partner COLLEY, LINDSEY and COLLEY, 1810 "S" Street, Sacramento, California.

2. Part-time Professor of Law, University of the Pacific, McGeorge College of Law, 1971 to date.

3. Lecturer, Continuing Education of Bar, University of California Extension Service.

4. Lecturer, California Trial Lawyers Association Seminars, since 1965.

5. Western Regional Counsel, NAACP, member, National Legal Committee, NAACP.

PROFESSIONAL ASSOCIATIONS

1. American Bar Association.

2. California State Bar Association.

3. Sacramento County Bar Association.

4. American Trial Lawyers Association.

5. California Trial Lawyers Association.

6. American Board of Trial Advocates.

CIVIC AND EDUCATION BOARD MEMBERSHIPS

1. National Board of Directors, NAACP, 1961 to date.

2. National Board of Directors, National Committee Against Discrimination in Housing, 1967 to 1968.

3. Board of Trustees, Tuskegee University 1966 to date.

4. Member, California State Board of Education, 1960 to 1964.

5. Executive Committee, Yale Law School Association, 1981-1982.

6. Member, Board of Directors, Charles F. Kettering Foundation, Dayton, Ohio, 1973 to date.

7. Former Board Member of Travelers Aid, United Crusade and Lincoln Christian Centers, Sacramento, California.

8. Former President, California Federation for Civic Unity.

9. Member, Board of Directors, California Journal, 1975 to 1978.

10. Chairman, California Horseracing Board, 1976-1983.

11. Member, California Judicial Council, 1978-1980.

12. Chairman, Board of Trustees, NAACP Special Contribution Fund.

POLITICAL

1. Former member, President's Committee on Discrimination in the U.S. Armed Forces, 1961 to 1962.

2. Former member, California State Democratic Central Committee.

3. Former member, Sacramento County Democratic Central Committee.

4. Northern California Chairman, Humphrey for President, 1972.

MILITARY

1. Entered in U.S. Army, 1942 as private.

2. Discharged 1946 with rank of Captain.

3. Philippine Liberation Ribbon.

PUBLICATIONS

1. "The California and Washington Housing Cases", Law in Transition, 1962.

2. "Civil Actions for Damages In Civil Right Cases", Hastings (University of California, San Francisco, California) Law Journal.

3. "Tort Law In The Year 2000", California Trial Lawyers Journal, 1970.

4. "Injury Without Impact In FELA Cases", 1968 Seminars, California Trial Lawyers Association.

5. "Extraordinary Writs In Criminal Law Practice", 1968 Seminars, California Trial Lawyers Association

6. "The NAACP - Agitation or Advancement", Torch Magazine.

7. "New Dimensions of Negro Political Thought", The New Democrat, 1954.

HONORS

1. Who's Who In The West.

2. Who's Who In America.

3. Who's Who In The World.

4. Sacramento's Man Of The Year, 1981.

5. William R. Ming, Advocacy Award, NAACP.

6. National Medical Association's National Citizenship Award.

7. National Bar Association's Equal Justice Award.

8. California Association of Black Lawyers Loren Miller Award.

FAMILY

1. Married to Jerlean J. Jackson. Five children, Jerlean E. Daniel, Ph.D.; Ola Marie Brown; Attorney Natalie S. Lindsey; Sondra A. Colley; and Attorney Nathaniel S. Colley, Jr.