

# The Nation Institute.

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December 31, 1987 .

The Hon. Joseph R. Biden  
Chairman  
Committee on the Judiciary  
U.S. Senate  
224 Dirksen Senate Office Building  
Washington, D.C. 20510

Dear Senator Biden:

Two weeks ago, Audrey Feinberg testified on behalf of The Nation Institute before your Committee on the record of Judge Anthony Kennedy. As she stated, the Institute concluded after extensive research that aspects of Judge Kennedy's civil rights record, particularly in the area of discrimination, were deeply troubling. Moreover, Judge Kennedy's case-by-case method, and his usually short opinions, made it difficult to ascertain his views on key constitutional issues.

Judge Kennedy's testimony did little to allay the Institute's fears. Judge Kennedy avoided making substantive responses to questions in some important areas, and was not questioned at all in other areas. Unless our concerns are addressed by Judge Kennedy, The Nation Institute cannot endorse his nomination.

Our written testimony included twenty suggested questions for the Senate to ask Judge Kennedy. Many of these questions remain unanswered. Moreover, the hearings raised additional concerns. As a result, we have attached an amended list of questions for Judge Kennedy.

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We request that you submit these questions to Judge Kennedy before the Committee votes on his confirmation. We also ask that this letter, any written questions to Judge Kennedy, and the responses, be made part of the record and be made publicly available before the vote, so that we and all other interested members of the public can make a fully informed decision on this nomination.

cont'd.

**EXECUTIVE DIRECTOR**  
Emily J. Sack

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When our panel was testifying before the Committee, you commented:

I have grave doubts about Judge Kennedy; grave doubts. And quite frankly, if I was certain that he was going to rule on the bench in the Supreme Court exactly how he has been for the last fifty-two years of his life, I do not see how I could vote for him, to tell you the truth; it would be awfully tough.

We appreciate the honesty of your statement and we share your doubts. We believe, however, that the burden of proof should be on the nominee to relieve these doubts. You and your Committee should not have to guess about a nominee's sensitivity to civil rights and civil liberties issues; failure to satisfy doubts in these critical areas would be doing yourselves and the American public a great disservice.

In this spirit, we hope that you will make certain that the many remaining concerns about Judge Kennedy are fully examined. A position on the Supreme Court is too important to leave to guesswork.

Thank you.

Sincerely,



Emily Sack  
Director

ES/sjs

(questions attached)

ES/sjs

(questions attached)

Questions the Senate Should Ask Judge KennedyDiscrimination in Employment

1. Do customers' gender preferences excuse employment discrimination?

In Gordon v. Continental Airlines, 692 F.2d 602 (9th Cir. 1982) (en banc), cert. dismissed, 460 U.S. 1074 (1983), Judge Kennedy joined a dissent stating that airline passengers' perceived preferences for slender flight attendants might permit the airline to impose strict weight requirements on women but not on men. A majority of the Ninth Circuit rejected this view.

2. Can Congress require affirmative action as a remedy for intentional discrimination?

3. Are the courts powerless to remedy wage disparities between men and women in government jobs requiring comparable education, skills, and effort?

In AFSCME v. State of Washington, 770 F.2d 1401 (9th Cir. 1985), Judge Kennedy denied relief to women employees with low wages compared to men, based not only on the controversial-comparable worth theory, but also based on traditional disparate impact analysis.

Discrimination in Voting Rights

4. In Aranda v. Sickie, 600 F.2d 1267 (9th Cir. 1979), cert. denied, 446 U.S. 951 (1980), why didn't Judge Kennedy allow the Mexican-American plaintiffs to go forward and try to prove discrimination at a trial?

Judge Kennedy testified that the remedy the plaintiffs sought was not proper. But judges have the authority to decide cases in two steps: liability and remedy. Also, judges often substitute more appropriate remedies for the ones requested by plaintiffs.

Discrimination in Private Clubs

5. Does Judge Kennedy think that the Olympic Club practices invidious discrimination? What is his definition of invidious discrimination?

The ABA Code of Judicial Conduct, Canon 2 commentary (1984) states that it is inappropriate for a judge to belong to a private club that practices invidious discrimination.

Discrimination in Education

6. When racially segregated neighborhood schools are caused by racially segregated neighborhoods, are the courts powerless to intervene?

In Spangler v. Pasadena City Board of Education, 611 F.2d 1239 (9th Cir. 1979), Judge Kennedy concurred in the termination of court supervision of a school board that had been found liable for intentional race discrimination. Judge Kennedy said that neutral school assignment systems in already racially segregated neighborhoods may not represent illegal discrimination by the school board.

7. Under what circumstances, if ever, is school busing a proper remedy for racially segregated schools?

#### Discrimination in Criminal Law

8. Is the crime of rape of a woman less reprehensible than the crime of forcible sodomy of a man?

In United States v. Smith, 574 F.2d 988 (9th Cir.), cert. denied sub nom. Williams v. United States, 439 U.S. 852 (1978), Judge Kennedy stated that a harsher sentence could be imposed for forcible sodomy than for rape based on traditions and community attitudes. He found no equal protection violation for the different sentences.

#### Right of Privacy

9. Is there a constitutional right of privacy that protects marriage, contraception, and procreation? What are the boundaries of any such right?

Criminal Law

10. Should the exclusionary rule, that excludes from criminal trials evidence obtained through police misconduct, be limited further?

In United States v. Leon, 468 U.S. 897 (1984), the Supreme Court created an exception to the exclusionary rule when police officers relied in good faith on a facially deficient warrant. In United States v. Peterson, 812 F.2d 486 (9th Cir. 1987), a case that had nothing to do with a deficient warrant, Judge Kennedy expanded the "good faith" exception to include situations where American officials incorrectly relied on the assertion by foreign officials that their overseas search was not illegal. How broadly does Judge Kennedy interpret the "good faith" exception? In what additional circumstances other than a facially deficient warrant would he apply this exception?

11. Does Judge Kennedy agree with the Supreme Court's pronouncements that because death is different in its severity and finality from all other sentences, the imposition of capital punishment must be attended by procedural safeguards that might not be guaranteed by the Constitution in other contexts?

12. Should the police ever be required to supply additions to the standard Miranda warnings if a suspect's special circumstances suggest he may unknowingly waive his constitutional rights?

In United States v. Contreras, 755 F.2d 733 (9th Cir.), cert. denied, 476 U.S. 832 (1985), Judge Kennedy affirmed convictions of defendants who mistakenly thought their statements were taken under a grant of immunity.

13. What sorts of errors by criminal defense counsel suggest that he is providing less than the constitutionally required "effective assistance" of counsel?

In United States v. Medina-Verdugo, 637 F.2d 649 (9th Cir. 1980), Judge Kennedy held that "counsel need not be infallible" but only reasonably competent.

14. Should an appellate judge defer in all circumstances to a trial court's determination of effective assistance of counsel?

Judge Kennedy suggested extreme deference in Satchell v. Cardwell, 653 F.2d 408, 414 (9th Cir. 1981) (Kennedy, J., concurring), cert. denied, 454 U.S. 1154 (1982).

#### Freedom of Speech and Association

15. To what extent do government workers have First Amendment rights?

In Singer v. United States Civil Service Commission, 530 F.2d 247 (9th Cir. 1976), vacated, 429 U.S. 1034 (1977), Judge Kennedy joined in an opinion, later vacated by the Supreme Court, supporting the termination of a government employee for publicly asserting his homosexuality. The employee was active in the Seattle Gay Alliance, had displayed homosexual advertisements in his automobile, and publicly announced his homosexuality.

#### Judicial Philosophy

16. To what extent should the courts, in interpreting the Constitution, move beyond the framers' initial conceptions of its provisions to a more flexible reading of the ideals and goals it expresses?

17. To what extent should principles of federalism affect the abilities of civil rights litigants to seek redress in the federal courts?

Judge Kennedy has often advocated judicial restraint and vigorous assertion of various principles of federalism, such as abstention, that require that federal courts not hear cases in which state courts are already involved. For example, in World Famous Drinking Emporium v. City of Tempe, 820 F.2d 1079 (9th Cir. 1987), Judge



Kennedy, in a concurrence, stated that federal courts should not hear this First Amendment challenge that was also litigated as a zoning dispute in the state courts. In this case, the owner of a dance club challenged zoning requirements and other state laws that would have restricted his club.

18. Does the nominee believe it would be constitutional, as some have proposed, to limit the jurisdiction of Article III courts to eliminate cases involving sexual and racial discrimination, habeus corpus, prisoner civil rights complaints, social security cases, and environmental cases with only limited possibility of review?

Religion

19. Is a short morning prayer conducted in public elementary schools constitutional?

20. To what extent must employers and unions modify their rules and methods to accommodate an employee's religious practices?

Judge Kennedy's opinion in International Association of Machinists & Aerospace Workers v. Boeing Co., Nos. 86-4345, 86-4373 (9th Cir. Nov. 27, 1987) (available Dec. 2, 1987 on LEXIS, Genfed library, Usapp file), upheld a worker's objection to paying union dues on religious grounds.