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TESTIMONY OF
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On Behalf of the National Organization for Women
and the National Women's Political Caucus

Before the Senate Committee on the Judiciary

Against the Nomination of Anthony M. Kennedy
for Associate Justice to the United States Supreme Court

December 16, 1987

I am Molly Yard, President of the National Organization for Women, the largest feminist organization in the United States working on behalf of equality for women. I speak today for NOW and am honored also to speak on behalf of the National Women's Political Caucus in opposing confirmation of Anthony M. Kennedy as Associate Justice of the United States Supreme Court.

Our concern over Kennedy's court opinions on employment discrimination, right to privacy, school desegregation, voting rights and access to courts is heightened by Kennedy's own hiring practices on the Ninth Circuit Court of Appeals and his long-time memberships in segregated clubs. While touted as a "moderate conservative," Kennedy's record reveals a total lack of commitment to equality and justice under law, a commitment which all Americans have a right to expect from those who sit on the bench at every level, but especially on the United States Supreme Court.

We oppose Kennedy's confirmation because of our serious concern

about the impartiality of his legal reasoning and analysis of statutory as well as constitutional law. We are also disturbed to find that in his hostility to enforcement of remedial anti-discrimination laws passed by Congress, Kennedy has demonstrated a wholly inappropriate willingness to go beyond the lawful role of an appellate court judge and to substitute his own version of the facts when the facts found by the trial court do not fit with Kennedy's desired result.

Even when clearly established by the evidence and the lower court's findings of fact, Kennedy has refused to see discrimination as intentional. Because he also interprets anti-discrimination statutes as narrowly as possible, Judge Kennedy has used his failure to see discrimination as intentional for an excuse to deny women and minorities a legal remedy against discrimination.

Kennedy's refusal to see discrimination as intentional and his great willingness to excuse it, is also evident in his attempts to justify his own long-time memberships in discriminatory clubs. To avoid the proscription against judges belonging to clubs which invidiously discriminate, Kennedy tries to create for himself a loophole by saying that the clubs' segregated membership practices were not "intended to impose a stigma" based on sex, race, religion or national origin and were not "the result of ill-will." This novel redefinition of invidious discrimination would, if carried into his court rulings, severely restrict the constitutional guarantee of equal protection under the law.

I hope, but I wonder whether members of the Judiciary Committee really understand race and sex discrimination. You are, after all,

white males who have never suffered such discrimination. I suppose it is fair to say many have come to understand race discrimination after all the civil rights campaigns of the last thirty years and Congressional legislation as well as court decisions dealing with the problem of discrimination against minorities. We now all understand, I believe, that when Rosa Parks finally refused to sit in the back of the Montgomery bus -- a refusal that reached the far corners of the earth -- she was refusing any longer to be treated differently from white citizens simply because she was black.

When a woman is invited to an all-male club for a meal and is refused admittance at the front door and told she must go through the kitchen door, she knows she is being told she is an inferior being, a second-class citizen unworthy of first-class treatment. Or if her professional colleagues, who are male, belong to clubs which refuse her admittance because she is female, she again knows she is being treated as a second-class citizen by men who seem afraid to compete with her on their own merits. To add insult to injury she also pays for that discrimination, because her colleagues take their dues payments as a legitimate business expense and so claim a tax deduction.

Just as Rosa Parks refused to be treated as an inferior second-class citizen, so do all women refuse such treatment. Membership in clubs refusing membership to minorities and women is racist and sexist. I for one do not understand how any man who believed in equal treatment for all could possibly belong to any club which practiced discrimination. It is a total denial of one's commitment to justice, because such clubs, whether they are aware of it or not, stigmatize all

against whom they discriminate.

Judge Kennedy says he tried to change the rules. However, his leaving the Sutter Club over this issue (after enjoying its benefits for seventeen years) but keeping his membership in the Olympic Club belies his commitment to any real change. One may, furthermore, argue that some persons should remain in discriminatory clubs to affect change. That may well be, but those who sit in judgment in a court of law deciding on the rights of those petitioning for redress of their grievances are persons who should never belong to such clubs, for as the ABA has said, "Membership of a judge in an organization that practices invidious discrimination may give rise to perceptions...that the judge's impartiality is impaired."

EMPLOYMENT DISCRIMINATION

Because his opinion in AFSCME v. Washington exemplifies many of our concerns about Judge Kennedy, we will discuss this decision in some detail.

In this case, a class of state employees in job categories that were predominantly female brought a Title VII suit against the state, alleging sex discrimination in employment. The trial court judge found "that the State had knowledge of the sex discrimination in employment before and after the March 24, 1972 Amendment to Title VII; that the evidence shows the discrimination is pervasive and intentional and is still being practiced by the State; and that the State is adhering to a practice of sex discrimination in violation of the terms of Title VII

with full knowledge of, and indifference to, its effect ...."

Despite the findings by the trial judge that the state had paid discriminatory wages based on sex and had done so intentionally, Judge Kennedy ruled on appeal that there was no violation of Title VII. Kennedy premised his decision on his finding that the state had based its compensation system on the "free market." Kennedy then found "nothing in the language of Title VII or its legislative history to indicate Congress intended to abrogate fundamental economic principles such as the laws of supply and demand or to prevent employers from competing in the labor market." And, although Kennedy admitted that there is discrimination in the free market, he held that "Title VII does not obligate [the State] to eliminate an economic inequality that it did not create."

Thus, the linchpin of Kennedy's decision was his assumption that the state had based its wage structure on market rates. Based on this premise, Kennedy ruled that the pay discrimination by the state was justified.

The problem with Kennedy's premise is that the trial judge made no such finding and it is clearly contrary to the evidence.[1] In fact, the trial court opinion does not even mention the words "free market." If anything about the market rate defense can be argued from the trial court opinion, it is that the trial judge implicitly rejected this

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[1]State officials had testified that, among other subjective considerations, they attempted to "keep the peace" by maintaining "internal alignment" and "historical relationships" in the salary structure. Such efforts to maintain these historical relationships, of course, have the effect of permanently locking into place pay discrimination in female-dominated jobs, irrespective of change in the "free market."

defense by concluding that "there is no credible evidence in the record that would support a finding that the State's practices and procedures were based on any factor other than sex."

Kennedy's willingness to assume as true a factual matter at best not included in the trial court's findings of fact and arguably at odds with the trial court's findings, flies in the face of the federal court rules and Supreme Court precedent on the lawful role of an appellate judge. Rule 52(a), Federal Rules of Civil Procedure, requires an appellate court judge to take the trial court's findings of fact as true unless they are "clearly erroneous." The Supreme Court has emphasized that appellate court judges may not substitute their judgment for that of the trial court on factual issues, but must accept the trial court's findings of fact unless they are so clearly erroneous that no reasonable fact-finder could come to the same conclusion. Anderson v. Bessemer City, 470 U.S. 64 (1985).

Under the federal rules and Supreme Court precedent, one of two courses was properly open to Judge Kennedy. If he believed that the trial court had not given sufficient consideration to whether the underpayment of women's jobs by the state reflected prevailing market rates, he should have remanded the case to the trial judge with directions to make specific findings on this point. If he believed that no reasonable fact-finder could have come to the same conclusion that the trial judge did (that there was no credible evidence that the state's practices were based on any factor other than sex), he should have discussed the evidence regarding market rates to demonstrate why this conclusion was not reasonable or possible. Instead, he took the

wholly inappropriate step of substituting his version of the facts for those of the trial judge.

In a second significant matter, again ignoring the legal restrictions on his authority, Kennedy directly overruled the trial court's findings of fact and held on appeal that the state's wage discrimination had not been intentional. He admitted that an inference of intentional discrimination can be drawn from statistical evidence, such as had been presented in the trial court on behalf of the plaintiffs. He also conceded that there had been independent corroborative evidence of discrimination.[2] However, Kennedy noted that none of the individually-named plaintiffs had testified about specific incidents of discrimination and characterized the other evidence of discrimination as "isolated events."

Thus, Kennedy concluded that the evidence of discrimination was insufficient to establish intent under a disparate treatment analysis, saying in effect that the evidence which convinced the trial judge did not convince him, a clearly inappropriate position under Rule 52(a) and Supreme Court precedent.[3]

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[2]This evidence included sex-segregated job classifications, job advertisements placed under "help wanted - male" and "help wanted - female" columns through 1973, equal pay violations, subjective classification decisions based on sex and statements by state officials and decisionmakers admitting wage discrimination.

[3]Kennedy's consideration of the disparate impact analysis under Title VII was also affected by his inappropriate assumption of a market-based wage system. Selectively citing cases which supported his conclusion and ignoring even Ninth Circuit cases going the other way, he concluded "a compensation system that is responsive to supply and demand and other market forces is not the type of specific, clearly-delineated employment policy...that suffices to support a claim under disparate impact theory." Ultimately the conflict in the Ninth Circuit was resolved against the position taken by Judge Kennedy. Antonio v.

Kennedy went far beyond his lawful authority to achieve the result he wanted in AFSCME v. Washington and to promote a political and economic position with far broader implications than the immediate case. His reliance on the free-market system as an excuse for wage discrimination and his refusal to require an employer, even a public employer, to take any action to correct the discrimination raises a significant threat not only to pay equity, but also to affirmative action and other legal remedies against discrimination. His theories sound a warning not just to women, but also to minority men and all workers who depend on the law for their protection.

Judge Kennedy's failure to understand employment discrimination and the broad remedial purpose of the laws against it, can also be seen in an earlier Title VII case, Gerndom v. Continental Airlines, Inc. In Gerndom, the majority on the Court of Appeals held that female flight attendants were entitled to a judgment of liability against the airline for firing or suspending them under a strict weight restriction program. Despite the fact that the weight requirements applied only to the all-female "flight hostesses" and not to the all-male "directors of passenger service," Kennedy joined the minority on the court in a dissenting opinion accepting as justification for this blatant sex discrimination the airline's excuse that it needed to offer passengers service by thin, attractive "girls."

To accept as a legitimate, non-discriminatory business reason in response to the plaintiffs' prima facie case of discrimination, the employer's excuse "that the degree of customer contact with flight

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Wards Cove Packing Co., 810 F.2d 1477 (9th Cir. 1987) (en banc).

hostesses dictated that they maintain a more attractive appearance" is wholly unacceptable. One can only imagine the outcry which would ensue if the case had dealt with a job category that was all-Black rather than all-female and the dissent had accepted the employer's argument that customer preference dictated the hiring of only light-skinned Blacks. Yet women can be told that in order to hold a job they must be thin and, of course, attractive, and a judge holding such a view is considered a judicial "moderate."

Kennedy goes out of his way to interpret narrowly both substantive and procedural law to rule against plaintiffs in employment discrimination cases. For example, in White v. Washington Public Power Supply System, Kennedy reversed and remanded a $160,000 award to a Native American woman who sued her employer for race and sex discrimination. In his opinion remanding the case for a new trial because of the trial court's incorrect allocation of the burden of proof, Kennedy gratuitously added that Section 42 U.S.C. Sec. 1981 does not give any protection against sex discrimination. This narrow application of Section 1981 is contrary to decisions in other courts.

A second example is Koucky v. Department of Navy. In Koucky, Judge Kennedy authored the Court of Appeals opinion throwing out the discrimination claim of a handicapped former Navy man because he had named as defendant the Department of the Navy instead of the Secretary of the Navy. Saying that this meant the Secretary of the Navy had not had timely notice of the suit, Kennedy refused to allow the plaintiff to amend his pleadings, thus denying the man any opportunity to litigate his employment discrimination claim.

Our concern with Judge Kennedy's lack of commitment to eliminating employment discrimination extends to his own employment practices as an appellate court judge. Since Judge Kennedy's appointment to the Ninth Circuit Court of Appeals in 1975 he has had 35 law clerks. None has been Black; none has been Hispanic; only five have been women. During a time in which the percentage of women in law school has risen from 19.2% in 1975 to 40.4% in 1986, Kennedy has employed only 14.2% women law clerks. During the same period as the enrollment of Blacks rose from 4.5% to 5.9% and Hispanics from .3% to 1.9%, Kennedy hired 0% Blacks and Hispanics. Non-discriminatory hiring would be expected to result in the numbers of women, Blacks and Hispanics among Kennedy's law clerks being roughly proportional to their numbers in law school. Their grossly disproportionate exclusion creates an inference of discrimination and again reflects at best a total insensitivity to equal opportunity in employment, an insensitivity that we submit is underlined by his membership in clubs which practice discrimination.

SEGREGATED CLUB MEMBERSHIPS

Our concern over both the perception and the reality of Judge Kennedy's impartiality in discrimination cases and of his commitment to equality is intensified by his long-time memberships in clubs that exclude women and Blacks.

After twenty-five years' membership, Kennedy finally resigned from the Olympic Club on October 27, 1987. From 1958 through October 22, 1987, he also belonged to the Del Paso Country Club. In September 1980, after seventeen years' membership in the Sutter Club, Kennedy resigned. His membership in the Elks continued for fourteen years,

through March 1978.

All of these clubs are segregated by race or sex or both. Although he now professes to recognize that "real harm can result from membership exclusion regardless of its purported justification," Kennedy enjoyed the benefits of membership in these clubs for many long years.

When Kennedy joined the Olympic Club in 1962 it was restricted in membership to white men only. He remained a member of the club after the Board unanimously voted in February 1967 to retain its whites-only policy. Although the whites-only language was dropped the following year, the Olympic Club retains to this day a male-only requirement for membership under its bylaws and still does not have any Black members. We have also been advised that the Del Paso Country Club does not have any Black members.

Kennedy could not have been unaware of the problems raised by his discriminatory club memberships. As early as 1978, the American Bar Association had adopted policy that no ABA functions could be held in clubs which exclude women or minorities. In 1980, the U.S. Judicial Conference adopted a principle "that it is inappropriate for a judge to hold membership in an organization which practices invidious discrimination." The following year the U.S. Judicial Conference passed a resolution that the commentary to the Code of Judicial Conduct be amended to include this principle.

Although a member of the committee which recommended adoption of this principle by the Judicial Conference, unbelievably, Judge Kennedy continued to maintain his memberships in the Olympic and Del Paso Clubs

for more than seven and one half years more.

In August 1984, the principle that "it is inappropriate for a judge to hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin" was adopted by the ABA House of Delegates. Still Kennedy maintained his memberships in the Olympic and Del Paso Country Clubs.

In September 1986, the California Code of Judicial Conduct was amended to include the principle adopted by the ABA. In June 1987, the San Francisco City attorney warned the Olympic Club that its membership policies violated California's civil rights laws. Still, Kennedy maintained his membership.

Finally, in August 1987, twenty-five years after joining (and nearly seven and one-half years after the U.S. Judicial Conference adopted the principle that it was inappropriate for a judge to belong to invidiously discriminatory organizations), Kennedy wrote a single letter to the Olympic Club urging the club to change its male-only policy. He apparently never took any action to correct the de facto exclusion of Blacks.

Kennedy did not resign from the Del Paso Country Club until the day before Bork was defeated in the Senate, and he did not resign from the Olympic Club until four days later. The timing of his resignations from the Olympic and Del Paso Clubs cannot help but raise the impression of political expediency rather than principle. After enjoying the business and other benefits of membership in the Olympic Club, a single letter and a referenced conversation urging repeal of the bylaws restriction of membership to males hardly seems an adequate

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substitute for a genuine commitment to equality.

His attempts to define away the invidious discrimination of the Olympic Club against women and Blacks is not only offensive, but also gives rise to the question whether he would carry this narrow definition of invidious discrimination over to cases arising under the equal protection clause of the Constitution.

RIGHT TO PRIVACY

Lesbian and Gay Rights: Equally disturbing are the implications for the constitutional right to privacy found in Kennedy's opinion in Beller v. Middendorf. In that case, Kennedy approved as constitutional the Navy's policy of mandatory dismissal of lesbian and gay sailors with otherwise excellent service records. Although Kennedy conceded that there may be a constitutional right to privacy for lesbians and gay men, he overruled the individuals' right in these cases, citing the special needs of the armed forces.

However, even in the context of the military, limitations on individual constitutional rights should be drafted no more broadly than necessary to meet what Kennedy calls the "military necessities." In light of Kennedy's admission that the Navy's mandatory dismissal rule was "perhaps broader than necessary to accomplish some of its goals," we find it troubling that he saw no need to require the Navy to more carefully tailor alternative means of achieving its goals. Less restrictive means were clearly possible, since after the cases before Judge Kennedy arose, but before he wrote his opinion, the Navy had adopted narrower regulations permitting at least some flexibility in

dealing with the discharge of homosexuals.

Although he claimed to be mindful that the rule discharging the plaintiffs was a harsh one in the individual cases before him, Kennedy brushed this aside with a reference to the "relative impracticality" of regulations which would turn more specifically on the facts of each individual case.

In an earlier opinion, Singer v. U.S. Civil Service Commission, Kennedy had signed on to an opinion which allowed a gay activist to be dismissed from his EEOC job for being, according to the Civil Service Commission, "an advocate for a socially repugnant concept." The Supreme Court vacated the decision saying that an employee cannot be summarily discharged without some showing that his or her homosexual conduct is likely to impair the efficiency of the Civil Service. The Singer reversal might well explain Kennedy's toned-down language in Beller v. Middendorf. However, the result is the same -- mandatory dismissal, irrespective of the ability to do the job required.

Abortion and Birth Control: Judge Kennedy has not ruled as a judge on the constitutional right to privacy in matters of birth control and abortion. Especially in light of the Supreme Court's 4-4 split decision affirming the appellate court decision in Hartigan v. Zbaraz, the importance of Judge Kennedy's support for the constitutional right to safe, legal abortion and birth control, including access of minors and poor women to birth control and abortion, cannot be overstated.

Senator Jesse Helms has been quoted as saying that in his view Kennedy would look favorably on any case in which the court's earlier

decision legalizing abortion might be overturned. He is quoted as saying that "I am as certain as I can be without having heard him say 'I shall vote to reverse Roe v. Wade'...."

In light of his opinion in Beller v. Middendorf, the support of his confirmation by anti-abortion leader Helms and the now wide acceptance by right-to-life leaders that he is one of "theirs," we have serious question whether Kennedy would uphold a woman's right to privacy in birth control and abortion.

We do not find any comfort in Judge Kennedy's analysis in his speech "Unenumerated Rights and the Dictates of Judicial Restraint."

> [W]e must be careful about rhetoric and semantic categories in talking about fundamental rights. A helpful distinction is whether we are talking about essential rights in a just system or essential rights in our own constitutional system. Let me propose that the two are not coextensive. One can conclude that certain essential, or fundamental, rights should exist in any just society. It does not follow that each of those essential rights is one that we as judges can enforce under the written Constitution. The Due Process Clause is not a guarantee of every right that should inhere in an ideal system. (At p. 13.)

Would Judge Kennedy, if confronted by Roe v. Wade, find that a woman's right to choose abortion is one of the "essential rights in our own constitutional system" or one of the unprotected "essential rights in a just system"? Would he find that the state has some compelling interest in preserving a fetus that outweighs a women's constitutional right to abortion? How broadly would he allow limitations on a woman's right to choose to be drafted to meet the perceived state need?

Roe v. Wade remains the law of the land, with former Justice Powell having voted in the majority to uphold it. To replace Justice Powell with someone who would vote to reverse Roe v. Wage or erode it

piecemeal over a period of time would be unconscionable.

The young woman who is little more than a child herself, the older woman who has an increased medical risk from pregnancy, the single mother with two or three children who is already stretched to her limits physically, financially and emotionally -- these women must have protection for their right to make responsible decisions about their own reproductive lives.

The chaos which would ensue if Roe v. Wade were reversed would rival that which resulted from Prohibition. We would see massive breaking of the law, since women would continue to seek abortions when the circumstances of their lives made it the right decision for them. Organized crime would again move back in to provide abortions, as they did before Roe v. Wade when millions of dollars filled their coffers every year. Rich women would once again fly to other countries for safe, legal abortions; middle-class women would seek out doctors in this country willing to disregard the law; and poor or very young women would once again be driven to back-alley butchers or to the extreme of self-abortion. Hospitals would again know "Saturday night massacres" when women with botched abortions, suffering from high fever due to infection or hemorrhaging profusely, would come in to save their lives, sometimes in vain.

We simply cannot afford to take the risk of having confirmed to the Supreme Court a justice who does not support the constitutional right of a woman to birth control and abortion. For women it is a bottom line question. It is our lives which are at stake.

ADDITIONAL AREAS OF CONCERN

Our belief that Judge Kennedy lacks a commitment to equality and justice is strengthened by Judge Kennedy's earlier opinions on school desegregation, voting rights and access to courts in fair housing cases. These cases reflect the same disregard for individual and civil rights seen in his later employment discrimination cases. They also reflect the same disturbing pattern, seen later in AFSCME v. Washington, of disregarding settled judicial principles which establish fact-finding as the duty of the trial judge.

School Desegregation: In Spangler v. Pasadena Board of Education, the Board of Education had requested the District Court to relinquish its continuing jurisdiction over a school desegregation plan. The District Court, at the urging of the Justice Department, found that the Board had been out of compliance with the court-approved desegregation plan on thirteen occasions and that recently-elected Board members had expressed their intent to revoke the desegregation plan and thereby to resegregate the schools. As a result, the trial court decided to retain continuing jurisdiction over the school district. The Appellate Court reversed. Judge Kennedy filed a lengthy concurring opinion. Sweeping aside the District Court findings, he said there was no evidence of intent to return to a dual system and voted to relinquish the court's continuing supervisory jurisdiction.

Voting Rights: In Aranda v. Van Sickle, Kennedy wrote a concurring opinion finding no illegal dilution of the Hispanic vote in an at-large election system. He reached this conclusion despite the

fact that in the city's entire 65-year history, this election system had resulted in the election of only three Hispanics to the City Council in a city which had grown to be 50% Hispanic. Kennedy concluded that there was no intent to dilute the Hispanic vote by maintaining the at-large system for elections. Although this effectively ended constitutional challenges to at-large elections within the Ninth Circuit, legislative challenges continued, and in 1982 Congress amended Section 2 of the Voting Rights Act to clarify that electoral practices which have a discriminatory effect are illegal, irrespective of the intent behind them.

Access to Courts: In TOPIC v. Circle Realty, Kennedy ruled against a fair housing organization and three individual home owners who brought suit against the racial steering practices of various real estate brokers. Although the trial court had upheld the plaintiffs' right to bring the suit, Judge Kennedy reversed and directed that the case be dismissed, stating that the plaintiffs had no standing. This view was squarely rejected three years later by the Supreme Court in an opinion written by Justice Powell, the justice Kennedy is proposed to replace.

CONCLUSION

On his record in Title VII cases, civil rights cases, his questionable support of the right to privacy, and in view of Judge Kennedy's own hiring practices and his life-long memberships in clubs which practice sexism and racism, we find him totally insensitive to the long struggle of women and minorities for equality in this country. Our society has made real progress, much of it through legislation

passed by Congress, in achieving a more just union. President Reagan and his Department of Justice have done much to obliterate that progress. He should not, and he must not, be allowed to place on the Supreme Court one who would continue that obliteration.

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