Testimony of

Joseph L. Rauh, Jr.

On Behalf Of

AMERICANS FOR DEMOCRATIC ACTION, INC.

On The

Nomination of Anthony Kennedy

SENATE JUDICIARY COMMITTEE

December, 1987

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ON THE NOMINATION OF ANTHONY KENNEDY

Mr. Chairman, members of the Committee, I am Joseph L. Rauh, Jr., a founder, former national chairman, and presently a national vice president of Americans for Democratic Action, Inc. I have appeared before this Committee many times on behalf of the ADA. I have also appeared here often on behalf of the Leadership Conference on Civil Rights, of which I am counsel, but I am not acting in that capacity today.

On December 12, 1987, the ADA Executive Committee voted to oppose the confirmation of Anthony Kennedy as Associate Justice of the Supreme Court. We believe Judge Kennedy has not evidenced the devotion to the Bill of Rights that we deem the prime requisite for a member of the Supreme Court at this time. In that belief we urge the Committee and the full Senate to reject his nomination.

ADA and I have the deepest respect for the institution and role of the Supreme Court. I was Justice Benjamin Cardozo's last law clerk and Justice Felix Frankfurter's first. I have enjoyed arguing many times before the Court in support of the Bill of Rights and related subjects. And along with this view ADA and I have worked hard in opposition to the nominations of Judges Haynsworth, Carswell, Bork, and Ginsburg, whose records did not appear to measure up to those standards of the final arbiter of these very rights.

Most respectfully, Mr. Chairman, I believe I have a greater devotion to the Supreme Court than has been evidenced by the Committee in the confirmation process on this nomination. There has been woefully inadequate time (less than half the time between the Bork nomination and Hearing) for a comprehensive

study of the extensive record of Judge Kennedy -- his opinions, writings and statements. (It is for this reason that our analysis is less comprehensive than we would otherwise normally feel comfortable in submitting to the Committee.) This hearing is being held in the shadow of year-end adjournment when Senators' minds are quite naturally on last minute legislative problems of great concern to their constituents. Also, we unsuccessfully sought the opportunity to testify next month when Judge Kennedy's responses here could have been adequately digested and analyzed. Finally and most importantly, the Committee has failed to get from the Justice Department all the information available to the Department on Judge Kennedy's views on the issues that will likely come before the Court in the years ahead.

It is not too late for the Committee to act on this last point even now. For seven years this Administration has spared no effort to roll back the advances in civil freedom of the last quarter-century, most importantly to permit prayer in the schools, to ban abortion, to eliminate affirmative action and to dilute vital remedies needed for school desegregation. In furtherance of its roll-back effort, the Administration has sought constitutional amendments, statutes and court reversals -- largely without success. Now the Administration seeks, in a last ditch effort, to obtain a majority on the Supreme Court to accomplish at long last what it has been unable to do up to the present moment.

It is inconceivable that the Administration has made this nomination without knowing from Judge Kennedy, directly or indirectly, or from third parties, what the Judge's views are on the issues of primary interest to the Administration. This Committee, the full Senate, the press, and the public have a right to know what Mr. Meese and his colleagues know. It is up to the Committee to obtain that information from the Justice Department before it is too late.

I interpret the Senate's action in rejecting the Bork nomination as expressing the Senate's unwillingness to see the civil rights and civil liberties advances of recent decades refought at this time. Yet the confirmation of Judge Kennedy would open the door to just such a reconsideration of the past. Even in the short time available since his nomination, Judge Kennedy's insensibility to the Bill of Rights has been evidenced in at least six cases that have come to public notice. It is our considered opinion, given the record of this nominee that had he been the first choice, the battle which would have been waged by both the public and within this Committee would have been just as intense as Bork's.

A word about a number of Judge Kennedy's cases which concern us is appropriate:

* Aranda v. Van Sickle, 600 F. 2d 1267 (1979). In this case, Hispanic plaintiffs challenged at-large elections in San Fernando, California. Although only three Hispanics out of the large Hispanic population had ever been elected to the City Council in 61 years, Judge Kennedy's concurring opinion upholds at-large voting. The Judge even approved summary judgment against plaintiffs, riding roughshod over plaintiffs' allegations of long-time and widespread discrimination of all kinds against plaintiffs. No one who cared about the voting rights of Hispanics could have written that opinion.

* TOPIC v. Circle Realty, 532 F. 2d 1273 (1976). In this case, plaintiffs, individual homeowners and an organization supporting fair housing, sued under the Fair Housing law contending they were denied an integrated environment by real estate brokers steering customers along racial lines. Judge Kennedy, writing for the Court, dismissed the suit on standing grounds even though plaintiffs had enough of an interest in an integrated neighborhood

to act as testers and to sue on the basis of their testing results. Other federal courts ruled to the contrary as did the Supreme Court in an opinion written by Justice Powell, the man to whose seat Judge Kennedy aspires.

* Spangler v. Pasadena Board of Education, 611 F. 2d 1239 (1979). Here the issue was whether the District Court's order concerning school desegregation should be terminated. The District Court ruled in favor of retaining jurisdiction. But Judge Kennedy, in a concurring opinion, became a trier of facts without seeing the witnesses, overruled the District Court and terminated its supervisory jurisdiction. Contradicting the record, Judge Kennedy found there had been no showing of recent noncompliance with the District Court's order and he rejected plaintiffs' contention that school board members were seeking to return to a dual system; nor did he find it significant that school board members favored returning to neighborhood schools with its obvious resegregative effect. Judge Kennedy demonstrated here his insensitivity to school integration in an area that will require the attention of the Supreme Court in the years to come.

* AFSCME v. State of Washington, 770 F. 2d 1401 (1985). This case involves a claim that the wages paid by the State of Washington for jobs predominantly performed by women are sexually discriminatory and thus violate Title VII of the 1964 Civil Rights Act. The District Court so found. Judge Kennedy reversed on the ground that the State pays market rates. But there is no finding by the District Court that the State pays market rates; on the contrary, the District Court apparently resolved that issue in favor of the plaintiffs who introduced strong evidence that the State did not set wages on market rates. Again here, Judge Kennedy reached out for facts or assumptions to bolster a decision against civil rights -- in this case the rights of women.

This is, at best, insensitivity on an issue to come before the Supreme Court; at worst, it reflects deep-seated hostility to the ever growing demand for women's rights and against wage discrimination.

* Gerdom v. Continental Airlines, Inc., 692 F. 2d 602 (1982). Here the airline terminated flight hostesses above a certain weight in the interest of having only thin, attractive "girls" in passenger service. The weight limit did not apply to male employees, even "directors of passenger services." The Court, en banc, found this facially sex-discriminatory, but Judge Kennedy joined the dissent which held there was no disparate impact because flight hostesses were all females. What more could one do to show insensitivity to women's rights?

* Beller v. Middendorf, 632 F. 2d 788 (1980). This case involved a challenge to the Navy's rule requiring termination of homosexuals. Judge Kennedy upheld the Navy's ban on homosexuals because of military need without providing any substantial basis for those alleged military needs. The least that can be said of this opinion is that privacy is low on the Judge's order of priorities.

Judge Kennedy's insensitivity to the Bill of Rights evidenced in these and other cases is compounded by his continued membership over the years in private clubs which excluded blacks and women. He even continued his membership after the U.S. Judicial Conference adopted the principle "that it is inappropriate for a judge in an organization which practices invidious discrimination." The lame excuse he offered in his response to the questionnaire from this Committee was that exclusion on race or sex grounds is invidious only where "intended to impose a stigma" or resulted from "ill-will" only reinforces our

belief in the insensitivity of the nominee to the rights of all persons. For the Committee to ignore this behavior sends a most inappropriate message to the public and future nominees. You won't get the job if you quit smoking marijuana ten years ago but you will if you happen to quit a discriminatory club a month ago.

The issues before the Supreme Court today differ substantially from those in the 1930's when I was privileged to be a law clerk for the distinguished Justices I mentioned earlier. Then the significant questions centered around the constitutional validity of federal power to cope with the existing and future depressions, or in short, around the validity of the New Deal. Those issues have now been largely resolved. Today the great issues concern the rights of individuals and here the record of Judge Kennedy is too muddy for the Senate to risk his confirmation to this most important and pivotal position.

Judge Kennedy, yes and even Judge Bork, might have been acceptable risks on the Court with a majority clearly devoted to the Bill of Rights. Their differing views might well have sharpened the deliberations of such a Court. But a Supreme Court balanced four to four on the primary rights issues of the day (only this week the Court split four to four on an abortion issue) requires a ninth Justice who has evidenced clear devotion to the rights of all. Especially at a time when our nation is demanding that other countries respect human rights, we cannot afford to play Russian Roulette with our own dedication to the Bill of Rights. A vote for the confirmation of Judge Kennedy is a vote to take risks with the very fabric of our society.

It is for these reasons that ADA has taken this position. We are not so naive as to think our testimony alone will change the tide of this Committee or the entire Senate, but, having reviewed the record, we could not sit idly on

the sidelines and not come out in opposition. Both on principle and our sense of values, we urge this Committee to reject the nominee and force the President to submit the name of one of the thousands of distinguished lawyers who embrace whole heartedly the civil and constitutional rights of all Americans.

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