The CHAIRMAN. We will give you plenty of time to beat up on us, Joe. You will have all day, if you want it.

Professor Ross.

Professor ROSS. With some reluctance, we are present today to oppose the nomination of Judge Kennedy to the Supreme Court.

We recognize that in certain areas of constitutional and statutory rights, he has displayed some sensitivity. However, that has not characterized his approach to sex discrimination issues.

We fear that if Judge Kennedy's treatment of these issues were adopted, the court's precedents guaranteeing women's rights would be seriously undermined.

The positions Judge Kennedy has taken in a series of sex discrimination and employment cases raise serious questions about his respect for and adherence to Supreme Court precedent.

These cases involve situations in which women and men were exclusively and admittedly treated differently because of their sex.

In such cases, the Supreme Court has held that such sex based practices are discriminatory on their face, and has gone on to examine whether there might be a defense to such a policy.

In contrast, Judge Kennedy does not appear to recognize the existence of such facial sex discrimination, or its significance.

This leads him in turn not to find discrimination when the sex discrimination is clear cut.

We have related concerns about his interpretation of the meaning of intentional discrimination. Where facially sex based classifications are used, the Supreme Court has never sought to require any additional showing of intent.

As Justice O'Connor wrote in a 1982 case, because the challenged policy expressly discriminates among applicants on the basis of gender, it is subject to scrutiny under the Equal Protection Clause.

And as Justice Stevens wrote in a 1978 case, a policy which treats people differently simply because each of them is a woman, rather than a man, is in direct conflict with both the language and the policy of title VII.

It constitutes discriminations and is unlawful unless exempted by some affirmative justification.

In contrast, Judge Kennedy appears to want to apply some higher, more difficult standard of proving intentional discrimination based on sex, which would result in overturning most of the Supreme Court decisions finding sex based practices to violate the Equal Protection clause.

Finally, we are also very disturbed at Judge Kennedy's approach to the doctrine of disparate impact, a doctrine central to the effort to eradicate sex discrimination.

He has indicated discomfort with following the Supreme Court precedent in this area. And in a major wage discrimination case, he basically refused the apply the doctrine at all.

My written statement discusses in some detail cases in which Judge Kennedy has refused to find facially discriminatory practices directed against women to be discrimination.

I will briefly summarize the facts of some of those cases.

A facially discriminatory practice is the most obvious kind of discrimination, and the Supreme Court has repeatedly found that

facial discrimination is a per se violation of Section 703(a) of title VII.

The earliest example of that kind of Supreme Court decision was a 1971 case involving an employer that refused to hire mothers of preschool aged children while hiring fathers of preschool aged children.

Twelve years later, Judge Kennedy was faced with a similar employment policy. An airline required its flight hostesses to be thin or lose their jobs.

Men who also served passengers on the planes did not have to be thin.

The weight rule was quite strict. For example, a woman who was 5 feet 2 inches tall could weigh no more than 114 pounds dressed in a full uniform with her shoes on.

The airline fired or suspended many of the women for exceeding the weight limit. They fired not men, because the rule did not apply to men.

The court's majority found the airline's policy to be facial discrimination. Judge Kennedy did not.

Another 1982 case involved a Native American woman who claimed she suffered sex and race discrimination. She was awarded $161,000 after a full trial.

Her strongest evidence consisted of a statement by a supervisor that she was passed over for a clerical position because he wanted to hire a male in order to break up the female ghetto.

What was this but an admission that the supervisor refused to consider her for the job because she was a woman, not a male?

It was the strongest possible evidence that the decision was based on sex. Yet it was not strong enough to convince Judge Kennedy that she was a victim of sex discrimination.

He reversed the award and sent her back to the lower court.

A similar case came before him in 1984. A woman in training to be a police officer lost her job in the middle of training. After a full trial, the court ruled she was a victim of sex discrimination and awarded monetary relief.

The court found that she performed as well as the male trainees, yet was graded with lower scores than men whose performance was no better, and often worse than, hers.

Listen to the kinds of criticisms that the training officers leveled at her. One suggested that she was "too much like a woman." Another suggested that she try not to look "too much like a lady." Surely this evidence strongly suggested sex discrimination. Her performance was acceptable, but she was judged to act like a woman. The officer seemed to have preferred a man, someone who, by definition, would never act "too much like a woman." Yet Judge Kennedy reversed once more. Even the most obvious sex discrimination did not seem obvious to him.

Judged by how he applies doctrine to facts, Judge Kennedy is implicitly applying a narrow definition of discrimination, one never adopted by the Supreme Court. If so, that would explain why even facial discrimination does not seem like clear-cut discrimination to him.

The clearest indication of his thinking is found in his explanation to this committee of why, in his view, clubs with admitted poli-

cies of excluding women did not practice invidious discrimination. He explained that invidious discrimination suggests that the exclusion of particular individuals on the basis of their sex is intended to impose a stigma on such persons, and that the policy was not the result of ill will. In other words, the question of whether invidious discrimination has occurred turns not on the conduct but on the subjective state of mind of the discriminator.

Not a single Supreme Court decision on facial sex discrimination has required women who were attacking facial discrimination to show that the discriminators acted out of ill will or a desire to stigmatize women. And if that were the test, women would have lost most of the cases they had won before the Supreme Court. The court has accepted that most facially sex discriminatory statutes have been enacted to serve administrative convenience, to protect women, or to comply with a set of stereotypical views about the different roles in life that men and women should play.

I describe many of those cases in my statement. Let me just give you one example here. In the court's landmark *Craig* v. *Boren* decision in 1976, the court rules that the Oklahoma law barring males but not females from purchasing beer "invidiously discriminates against males 18 to 20 years of age." There was no discussion of ill will or stigma as to the males but, rather, an analysis of whether the sex-based classification was substantially related to achieving Oklahoma's traffic safety goals.

My third point today focuses on Judge Kennedy's refusal to apply the Supreme Court's disparate impact doctrine in a wage discrimination case. Disparate impact analysis is a very important doctrine in eliminating both sex and race discrimination and its more subtle but nevertheless devastating forms. It says that even when an employer takes apparently neutral action toward all workers, that action is illegal if it has a harsher impact on blacks than on whites, or on women than on men, if the employer cannot justify it with solid business reason. Judge Kennedy appears not to like the doctrine, having disparaged other judges who follow it in a speech where he said that "Those judges were gripped by the automatic rule syndrome." With this attitude, it is perhaps not surprising that he simply refused to apply the doctrine in the *AFSCME* v. *State of Washington* case.

In sum, Judge Kennedy has repeatedly failed to recognize and remedy even the simplest and most blatant sex discrimination cases. His record of enforcing title VII demonstrates that he does not recognize, despite strong precedent, that explicit sex-based discrimination is necessarily discrimination. He has developed a result-oriented analysis rejecting disparate impact cases that would undermine existing law. His judicial philosophy, taken together with his failure to adequately appreciate the existence of facial discrimination under title VII suggests that he may well undo anti-discrimination precedent with respect to sex if given the chance by setting new tests of ill will, malice or stigma—tests that will be impossible to meet in the sex discrimination context.

The questions we raise are so serious in their implications for how he would enforce the guarantees of equal rights for women that we urge you to call him back for further questioning. Will he recognize facial discrimination as discrimination? Will he adopt the

court's existing precedents on proof of intentional discrimination? Will he follow disparate impact doctrine?

Thank you.

[The statement of Professor Ross follows:]