The CHAIRMAN. Thank you very much, Professor.

Mr. Levi.

Mr. LEVI. Thank you, Mr. Chairman. I want to thank you for the opportunity to testify before you today on the nomination of Judge Kennedy.

The CHAIRMAN. Welcome back.

Mr. LEVI. The National Gay and Lesbian Task Force is the nation's oldest and largest gay and lesbian civil rights advocacy organization representing the 10 percent of the American population that is lesbian and gay.

The gay and lesbian community seeks from a Supreme Court nominee——

The CHAIRMAN. Excuse me. Is that a membership, 10 percent of the population are members?

Mr. LEVI. No. Ten percent of the American population that is lesbian and gay.

The CHAIRMAN. You presume to speak for that 10 percent. They are not like NOW, for example, have actual members.

Mr. LEVI. We are a membership organization.

The CHAIRMAN. How many members do you have?

Mr. LEVI. We have 10,000 members, and we represent about a hundred local organizations around the country.

The CHAIRMAN. Thank you.

Mr. LEVI. The gay and lesbian community seeks from a Supreme Court nominee nothing more or less than other Americans: We seek a nominee committed to the concept that the rights contained in the Constitution are meant to be inclusive of all Americans, including gay and lesbian Americans. If there is one trend that is clear in modern American constitutional history, it is our continued expansion of the definition of groups and minorities who have come to be protected by the Constitution's umbrella.

Unfortunately, the Supreme Court still fails to include gay and lesbian Americans under that umbrella. The court and Judge Kennedy continue to deny us rights that most Americans take for granted. These rights include privacy in consensual, adult sexual expression as well as protections against simpler forms of discrimination from employment to child custody. This leaves gay and lesbian Americans as perhaps the last—and fairly large—minority lacking such constitutional protections. Our appeals for inclusion in the American constitutional family have been rejected at almost every turn, most dramatically last year in *Bowers* v. *Hardwick*. That decision affected privacy rights of gays and nongays alike in the half of the country that still has sodomy laws.

With that as a preface, we look to Judge Kennedy's record in hope of finding indication that his definition of American society and the Constitution is more inclusive. Unfortunately, little hope can be found. It can be said that Judge Kennedy has, over the last decade, repeatedly ruled to deny gays equality under the law.

Judge Kennedy supported exclusion of gay and lesbian service people from the military, deferring to the Defense Department's claim of the special circumstances of military life. He said this despite the fact that there is no evidence to suggest that gays are a security risk or in any other way less capable than their heterosexual counterparts to serve their country. The morale argument used

against gays in the military are painfully similar to those used 40 years ago to justify continued racial segregation in the armed forces. And Judge Kennedy bought those tired arguments.

Judge Kennedy has disagreed with other court decisions holding that government employees may not be fired because they are gay unless an adverse impact on job performance can be shown. He joined in denying former civil servants relief as a class even though they had been unconstitutionally fired because they were lesbian or gay. He also saw no constitutional protection for federal employees who were openly gay, thus seeking to relegate lesbians and gays to the closet. It seems that in Judge Kennedy's view it is all right for gays to be so—just as long as they do not tell anyone. Imagine saying that to other minorities, such as Jews. Such an opinion would then be seen for what it is—reducing a minority to second-class citizenship.

Finally, Judge Kennedy wrote an opinion in an immigration case that devalued the legitimacy of gay relationships in denying a hardship claim involving separation of life partners who happened to be gay. Judge Kennedy was, in effect, saying that gay relationships—simply because they involve persons of the same sex—are by definition less committed than those of heterosexuals, hardly a provable concept.

Time does not permit a consideration of Judge Kennedy's record toward other minorities—minorities of which gays and lesbians are also a part. But my colleagues on this panel and others will certainly address them adequately.

If this brief survey shows anything, it is that Judge Kennedy's record, at least toward one minority, has a far too narrow definition of the universe of Americans entitled to the rights guaranteed under the Constitution. His past opinions offer little hope to gays and lesbians challenging adverse treatment in the courts. Judge Kennedy's views may be expressed without the vitriolic rhetoric associated with Judge Bork, but his conclusions are the same. I ask that you examine Judge Kennedy's record by the same standard as you did Judge Bork's. If you do so, I think your conclusion will have to be the same: Judge Kennedy's notion of justice is too narrow for him to be worthy of a role as a final arbiter of the meaning of the U.S. Constitution.

Thank you.

[The statement of Mr. Levi follows:]