TESTIMONY OF

WENDY COLLINS PERDUE

BEFORE THE SENATE JUDICIARY COMMITTEE

ON THE CONFIRMATION OF

JUDGE ANTHONY M. KENNEDY

TO THE UNITED STATES SUPREME COURT

Mr. Chairman, Members of the Senate Judiciary Committee, my name is Wendy Collins Perdue. I am an Associate Professor of Law at the Georgetown University Law Center. From the Fall of 1978 to the fall of 1979, I served as a law clerk to Judge Kennedy. My testimony here today is based largely on that experience.

A law clerk has a unique opportunity to observe a judge in action. As a result of my clerking experience, I have the highest regard for Judge Kennedy's abilities as a judge and his fitness to serve on the United States Supreme Court. I believe he possesses all of the attributes that would make him an outstanding Justice.

Judge Kennedy was always careful and thorough in his preparation. He examined precedent and legal authorities in a disciplined and intellectually honest way. As a court of appeals judge, he respected binding authority but not without close scrutiny of whether the holdings were truely on point. I never knew him to reach a conclusion first then seek out or construe authority simply to justify that preconceived result. I believe Judge Kennedy viewed the very process of writing an opinion as an on-going search for the right result and rationale. He actively sought out the views of his clerks and encouraged us to speak honestly. When there was a disagreement, he sincerely sought to understand the source of that disagreement. He was never doctrinaire and always open minded in his approach to cases.

I beleive Judge Kennedy profoundly appreciated the role of a judge. He understood that cases are not mere intellectual

excercises. They involve real people and they have real effects. At the same time, he viewed his role as a limited one of deciding the controversy before him. If a case posed a difficult question of judgment, he never shyed away from making that judgment. However, he never used his opinions as a vehicle for expounding doctrine beyond that which was called for by the particular case.

Two cases come to mind as illustrations of the judge's approach. The first is James v. Ball.[1] The issue in that case was the constitutionality of an Arizona statute providing that voting in elections for directors of an agricultural improvement and power district was limited to land owners, with votes apportioned according to acreage. The voting scheme was challenged as a violation of the equal protection clause of the 14th amendment and Judge Kennedy upheld that challenge, finding the voting scheme unconstitutional. Judge Kennedy's opinion not only includes a careful examination of prior precedent, it also includes a thorough and careful examination of how the water district at issue operated and that district's impact on the lives of millions of people. The case was a close one; Judge Kennedy was ultimately reversed, but by a sharply divided Supreme Court, with the four dissenters explicitly endorsing Judge Kennedy's opinion. Regardless of one's views of the merits of that case, it is, I believe, a good illustration of Judge Kennedy's careful, but pragmatic approach.

The second case is United States v. Penn.[2] The case is

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[1] 613 F.2d 180 (9t Cir. 1979), rev'd, 451 U.S. 355 (1981).

[2] 647 F.2d 876 (9th Cir. 1980)(en banc).

instructive because it demonstrates that although Judge Kennedy is, quite accurately I believe, portrayed as a restrained and moderate jurist, he is passionate in the pursuit of justice. In this case, a police officer, present at a residence pusuant to a search warrant, offered the defendant's five year old son a $5 bribe if the son would show the police where his mother had hidden a cache of drugs. The child showed the police where the drugs were hidden and as a result the child's mother was indicted. The Ninth Circuit, sitting en banc, held that the evidence obtained through this use of the child should not be suppressed. Judge Kennedy dissented. Observing that the parent-child union occupies a fundamental place in our culture, he concluded his opinion as follows: "I know for a certainty that none of my brothers sitting in this case would neglect for an instant their duty to protect essential liberties; I regret only that we the dissenters have been unable to convince them that the case before us presents a question of this gravity....I view the police practice here as both pernicous in itself and dangerous as precedent. Indifference to personal liberty is but the precursor of the state's hostitly to it. That is why the judgment is entered over my emphatic dissent."[3]

Let me conclude on a more personal note. I came to my clerkship with Judge Kennedy somewhat jaded after three years in law school dissecting and critiquing judicial opinions. I left that clerkship with a much less cynical view. In working with

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[3] Id. at 889.

Judge Kennedy, I observed a man of integrity, who struggled with some truely difficult cases and attempted to reach just resolutions consistent with precedent and our system of government. He is, I believe, well qualified in every respect to sit on the United States Supreme Court.