The CHAIRMAN. Thank you. Mr. Wallace.

Mr. WALLACE. Thank you, Mr. Chairman.

The National Association of Criminal Defense Lawyers has conducted a thorough review of all of Judge Kennedy's opinions in criminal cases, some 120 in number.

We have surveyed all of our members who practice in the ninth circuit for input on his professional qualifications.

The result is a 50-page report which was furnished to the committee last week, and which is summarized in my written statement.

Since our report takes a position of no opposition to Judge Kennedy's nomination, we would not ordinarily feel a need to testify. The report should speak for itself.

But this committee will be hearing later from a panel of eight law enforcement witnesses characterizing Judge Kennedy's record on criminal law issues from a law enforcement perspective.

Our concern is that this would leave the committee with only half the picture. Under this Nation's adversarial system of criminal justice, the search for truth—that is, the pursuit of the whole picture—requires an equal opportunity for responsible input from both sides.

We believe this is just as true in the halls of Congress as it is in the courtroom. We feel it would be irresponsible of us not to speak up now to share our perspective with the committee to ensure the fullest possible record for the Senate's deliberations.

This is not to say that we come out 180 degrees opposite from the law enforcement community. The main difference is probably that we have analyzed his record from a very critical point of view rather than from a friendly one.

But our final conclusions are probably similar. We have a high respect for Judge Kennedy, for his grasp of criminal issues, his instinct for fairness, and his integrity and professionalism.

We see him as a mainstream conservative. He approaches cases with a general presumption that the Government is correct, but appears to entertain all arguments fairly and with an open mind.

He respects precedent, and is careful to make his opinions no broader than they need to be to address the case before him.

We do, however, have some serious concerns. We do not accept his pragmatic theory of both the exclusionary theory and the *Miranda* decision.

The exclusionary rule is not a mere tool for deterring police misconduct. The Supreme Court, in creating the rule in 1961, said that the rule is an essential part of both the fourth and the 14th amendments.

And this is not just a matter of the Warren Court pushing the law, as Judge Kennedy said yesterday, to its verge. Way back in 1914, in the *Weeks* case, the Supreme Court held, nine to nothing, that if evidence seized in violation of the fourth amendment can be used against an accused, quote, his right to be secure against unreasonable searches and seizures is of no value, and might as well be stricken from the Constitution, end quote.

We are impressed that Judge Kennedy respects this right, and the exclusionary rule itself. But we would hope that he could grow to be less concerned with the rule's pragmatic function, upon

which he premises his support for the good faith exception, and more sensitive to its constitutional essence, the absolute right of individuals to be free from unreasonable searches and seizures.

Nothing in the fourth amendment, or in any constitutional provision, either expressly or in spirit, purports to allow violations of the Constitution if only they are done with good intentions.

On the *Miranda* warnings, which are fundamentally grounded in the fifth and sixth amendments, we would add our hope that before Judge Kennedy goes about finding them unworkable, and tinkering with them, he would bear in mind their function of giving substance to constitutional protections for society's underclasses.

Attorney General Meese and Ivan Boesky do not need the warnings when they come under criminal investigation. They already know their rights.

But the warnings are absolutely irreplaceable for the uneducated and unsophisticated individuals suspected of crime.

We are also concerned about Judge Kennedy's occasional willingness to discount as harmless error some serious procedural lapses by the government against unsympathetic defendants. I refer the committee to the governmental misconduct cases discussed in our report.

We are also concerned about a possible insensitivity to the sixth amendment right to counsel, in the *Gouveia* case, cited in our report, where he took the position that an individual's constitutional right to counsel does not exist until indictment, even where a prisoner was already being punished for a crime he had not yet been convicted of, or even charged with.

Finally, we share the concerns about his record on sex discrimination that were voiced earlier this afternoon, because of what it may say about his overall sensitivity to individual rights.

In the final analysis, however, these are matters of disagreement, not disqualification.

The National Association of Criminal Defense Lawyers has only opposed one federal judicial nominee in its entire 29 history: Robert Bork. And our concerns about Judge Kennedy's sensitivity to individual rights, his openmindedness, or the possibility of him having an ideological agenda, are infinitesimal compared to those surrounding the Bork nomination.

Thank you.

[The statement of Henry Scott Wallace follows:]