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January 22, 1988

The Honorable Joseph Biden
Chairman, Senate Judiciary Committee
United States Senate
Washington, D.C. 20510

Re: Nomination of Anthony M. Kennedy to be Associate Justice of the United States Supreme Court

Dear Senator Biden:

The AFL-CIO hereby requests that this letter -- which states its views on the nomination of Judge Anthony M. Kennedy to be an Associate Justice of the Supreme Court of the United States -- be made part of the hearing record on the nomination. Very simply stated, it is our position that while Judge Kennedy is far from the individual we would hope for in a Supreme Court nominee, taking the circumstances into account, we believe that the national interest is served by his confirmation.

In a number of areas of critical concern to working people, Judge Kennedy's record on the United States Court of Appeals for the Ninth Circuit is quite troubling, and his record is only somewhat reassuring in other areas. Judge Kennedy has, to this point, shown only a limited appreciation of the legitimate needs and aspirations of women, of minorities, and of the other members of this society who, over the years, have been denied equal rights and opportunities. It is a matter of particular concern to us that he has taken an unduly narrow view of the rights of workers and of their unions.

If our position were based solely on our review of Judge Kennedy's judicial record, we would therefore oppose his confirmation. We come out the other way because of considerations regarding the legitimate roles of the President and the Senate in the selection of Supreme Court Justices, the public perception of the Court and its role in our national life, and the tumultuous history of the President's efforts to fill the current vacancy on the Court. It is out of regard for these considerations that we support confirmation.

1. At the outset, we wish to reaffirm our conviction that it is entirely proper for the Senate, as the broadly representative body that it is, to evaluate and consider the judicial philosophy of a Supreme Court nominee and to assure itself that the confirmation of the nominee, taking all relevant factors into account, will serve the good of the country. A judge's social, political, and legal values are proper concerns for the Senate, and the Senate may legitimately demand that its own social, political and legal values are to a significant degree reflected in any nomination.

Chief Justice Rehnquist was correct when, almost 30 years ago, he wrote: "what could [be] more important to the Senate than [a nominee's] view on equal protection and due process."1/ And, as Professor Charles Black has added,

> "In a world that knows that man's social philosophy shapes his judicial behavior, that philosophy is a factor in his fitness. If it is a philosophy the Senator thinks will make a judge whose service on the Bench will hurt the country, then the Senator can do right only be treating this judgment of his, unencumbered by deference to the President's, as a satisfactory basis in itself for a negative vote."2/

The AFL-CIO has repeatedly endorsed the Senate's prerogatives and responsibilities in this regard; in the recent national debate generated by the nomination of Judge Robert H. Bork, the public also has unambiguously added its endorsement.

2. We hasten to add that we are not saying that it would be appropriate for the Senate to refuse to confirm each and every nominee who does not share, in all particulars, the social, political and legal beliefs of a majority of the Senators. Nor would it be responsible for the AFL-CIO (or for any other group) to urge rejection of a nominee simply because that nominee is not within the class of individuals who we would choose had we the right to choose.

1/ Rehnquist, The Making of a Supreme Court Justice, The Harvard Record (Oct. 8, 1959) p. 7.

2/ Black, A Note on Senatorial Consideration of Supreme Court Nominees, 79 Yale L.J. 657, 663-64 (1970).

The selection of a Supreme Court Justice is a unique civic event that engages the two representative branches of government in the constituting of the third branch. That being so, it is of the essence that both the President and the Senate seek in good faith to reach agreement and that neither the President nor the Senate treat the make-up of the Court as simply one more incident in their on-going political and institutional struggles.

The Supreme Court's standing rests on the extent to which the public, in all its diversity, broadly accepts the Court's process of decision as an expression of the ideal embodied in the concept we signify by the term the "law." Although a judge's social and political vision will inevitably play some role in legal analysis, the concept of deciding according to "law" is, of course, infinitely more complex than deciding simply according to the judge's individual predilections, prejudices or social or political philosophy.

Given the basic values stated in the Constitution, the Senate must assure itself that those who reach the Court begin from the understanding that individual rights be broadly recognized and vigorously protected. But more is necessary to preserve public trust: the process as a whole must reassure that the Court is an institution dedicated to reasoned legal deliberation. This requires that the selection process not degenerate into one in which a particular political party or faction simply seeks to prevail over all others as a means of appointing Justices who will decide according to the prevailing group's agenda.

The Supreme Court's status as an institution to be celebrated and respected in our public life thus requires that both the President and the Senate -- each of which are representatives of the public -- treat the appointment process as an aspect of statecraft, calling for an effort to reach consensus.

3. We believe that to some degree the nomination of Judge Kennedy represents an effort by the Administration to take such a conciliatory approach; albeit an effort taken only after the highly divisive controversies sparked by its first two nominations for this vacancy. We believe, too, that the likely costs to the nation of another divisive confirmation battle over this nomination outweigh our concerns -- as deeply felt as those are -- regarding the consequences of the Senate confirmation. In reaching this conclusion we have given three factors great weight.

This nomination -- unlike the two prior nominations -- does not reflect an Administration effort to effectuate a sudden and major shift in the direction of the Court. We objected to the nomination of Judge Bork because it was plain on the record that this Administration, in making that nomination, was intent on undermining fundamentally just legal developments supported by the overwhelming majority of the nation. We do not wish to minimize either the possible influence that Judge Kennedy may have on the Court or the degree to which we will likely disapprove of some of his positions. But, unlike the President's first nominee, Judge Kennedy does not espouse a substantive agenda that begins from the proposition that many of the well accepted developments in such areas as equal protection, due process, and the guarantee of free speech are fundamentally illegitimate.

Judge Kennedy -- again in contrast to Judge Bork -- shows no sign of being attracted to eccentric and rigid theories of jurisprudence that would freeze the meaning of the Constitution by referring only to a simplified view of original intent. It has long been accepted that judges in interpreting the Constitution should, among other sources, look to our historical experiences and our broadly held social values. It is this way that practical meaning and modern application are given to the Constitution's expansive civil rights and civil liberties guarantees. Judge Kennedy -- whatever his other limitations -- appears to approach his responsibilities through this grand tradition of constitutional interpretation.

Finally, Judge Kennedy's opinions generally decide only those issues necessary to the resolution of the specific cases before him; he is not given to using his judicial office to run the society rather than to decide concrete cases and controversies. It is our hope that this reflects that sense of proportion which is essential to the proper exercise of judicial power as well as that sense of human fallibility which is essential to the maintenance of the spirit of tolerant respect for diversity and for individual liberty.

For all these reasons we view Judge Kennedy's nomination as a step away from the partisan extremism reflected in this Administration's earlier nominations, and a step towards consensus based on a decent respect for a wide range of opinion.

4. Notwithstanding our ultimate conclusion on the nomination of Judge Kennedy we would be less than frank -- and less than faithful to our obligations -- if we did not lay out for

the public record the basis for the misgivings we have voiced. This is neither the time nor place to recite chapter and verse. It suffices to say that our reading of the cases indicate that, whether consciously or not, Judge Kennedy has failed to separate his own political and social biases from his legal analysis in certain areas, and that the result has been a substantial number of seemingly result-oriented decisions. Judge Kennedy's treatment of the rights that workers and their unions have secured through their social and political struggles is illustrative.

In our examination of Judge Kennedy's labor law cases, we found that in virtually every case where significant and unsettled issues were presented, Judge Kennedy sided with management. His decisions in favor of unions and/or workers have been confined to settled issues that could generate no major controversies. We do not contend that he uniformly supported indefensible positions or that he never supported unions or workers regardless of the law. But the pattern we found nevertheless reflects a double standard based on a far more open and forthcoming attitude toward the interests and concerns of management than toward those of working people. In effect, he has shown a strong presumption that, on any open issue, the law favors management and opposes workers and their unions.

Our assessment of this aspect of Judge Kennedy's record does not rest simply on our own subjective assessment of his positions. For example, a statistical examination of his voting record (which we are attaching) reflects that over his 12 year career he has voted to deny enforcement to fully one-third of all NLRB orders challenged by managements, while he has never voted to deny enforcement to an NLRB order that was adverse to a labor union. It is this "inexorable zero," Teamsters v. United States, 431 U.S. 324, 342 n.23 (1977), rather than any subtlety of statistical analysis, that creates an unavoidable inference of decision-making infected by anti-union bias. This conclusion is further buttressed by the fact that on three separate occasions Judge Kennedy has adopted a legal position adverse to unions and/or workers regarding a controversial and important legal question, and the Supreme Court, in unanimous or near-unanimous decisions, has then rejected that position and ruled in favor of the union/worker contentions.3/

3/ In Financial Institution Employees v. NLRB, 750 F.2d 757, 758 (9th Cir. 1985), Judge Kennedy argued in a dissent from his court's denial of en banc rehearing that the NLRB properly held

(footnote continued)

This pattern is especially disturbing in an area like labor law, where the issues are generated by congressional enactments. When interpreting statutes, a judge properly acts only to effectuate the values of the legislature, and not his own. The AFL-CIO accepts the primacy of the legislature in making social policy and does not place its faith in judges who cannot separate their own biases -- one way or the other -- from their analyses of legislative will.

5. We end as we began: our concerns about Judge Kennedy do not rise to the level that, given all the relevant factors, cause us to call for his rejection. With all of his faults, this nominee is far superior to those who were previously put forward by this Administration to fill the current Supreme Court vacancy. When all is said and done there is reason for guarded

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(Footnote 3/ continued)

that labor unions could not freely merge with each other without placing their representation rights in question. On review, the Supreme Court unanimously rejected this new and controversial NLRB. See NLRB v. Financial Institution Employees, 106 S.Ct. 1007 (1986).

In Pacific Northwest Chapter v. NLRB, 609 F.2d 1341 (9th Cir. 1979), Judge Kennedy joined an opinion deciding that the NLRB was insufficiently restrictive of union rights in the construction industry. His pro-management position was first rejected by the en banc Ninth Circuit, 654 F.2d 1301, and then by a unanimous Supreme Court. See Woelke & Romero Framing, Inc. v. NLRB, 456 U.S. 646 (1982).

In Kaiser Engineers v. NLRB, 538 F.2d 1379 (9th Cir. 1976), Judge Kennedy dissented from an opinion approving of a long-standing NLRB position that workers could not legally be discharged for acting collectively to obtain workers protection measures from government. The Supreme Court upheld the NLRB -- and rejected Judge Kennedy's position -- by a 7-2 vote. Eastex v. NLRB, 437 U.S. 556 (1978).

While in Financial Institution Employees, Judge Kennedy argued that the NLRB was entitled to extreme deference in its legal holdings, in Pacific Northwest and Kaiser Engineers -- where he called for reversal of pro-union NLRB decisions -- he wholly ignored the issue of deference.

optimism that Judge Kennedy has the qualities of heart and mind to respond to the responsibilities we place on the Supreme Court in the same manner as have others who have become Justices: by showing a heightened sensitivity to the legitimate diversity of interests that characterize our polity and our law. That being so, a continuing stalemate between the President and Senate would be more destructive of the public's confidence in the system stated in the Constitution for filling Supreme Court vacancies -- and possibly of confidence in the Court itself -- than it would be productive of a Supreme Court better fitted to its important tasks. We therefore urge that Judge Kennedy's nomination be confirmed.

Sincerely,

Lane Kirkland
President

ATTACHMENT

JUDGE KENNEDY'S RECORD IN NLRA CASES*/

	NLRB order in favor of union position	NLRB order in favor of employer position
Kennedy votes to enforce NLRB order	30 cases (including 6 majority opinions; 5 concurring opinions; & 0 dissenting opinion)	11 cases (including 3 majority opinions; 2 concurring opinions; & 1 dissenting opinion)
Kennedy votes to deny enforcement of NLRB order	15 cases (including 4 majority opinions; 1 concurring opinion; & 1 dissenting opinion)	0 cases

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*/ This chart includes 12 cases where the court was confronted with both employer and union challenges to the NLRB decision and order and where the court's decision accepted some claims made by the employer and some by the union. These "divided" cases are characterized in the chart according to which side prevailed in the majority of issues, or, if there was not a clear majority of issues on one side, according to which side prevailed on the issue of liability (as distinct from remedy). If all cases in which there are such "divided" results are removed from consideration, there is no change in the relative results:

	NLRB order in favor of union position	NLRB order in favor of management position
Kennedy votes to enforce NLRB's order	21 cases (including 4 majority opinions; 3 concurring opinions; & 0 dissenting opinions)	11 cases (including 3 majority opinions; 2 concurring opinions; & 1 dissenting opinion)
Kennedy votes to deny enforcement of NLRB's order	12 cases (including 4 majority opinions; 1 concurring opinion; & 1 dissenting opinion)	0 cases

The only case which might possibly be classified as support for a union challenge to an NLRB order is one of these "divided" cases, Press Democrat Publishing Co. v. NLRB, 629 F.2d 1320 (9th Cir. 1980). Most of the issues presented were challenges to the NLRB's order by the employer, all of which were rejected; but on one issue of remedy there was a union challenge, which the panel remanded back to the NLRB for further explanation.

Positions Taken by Judge Kennedy in National Labor Relations Board Cases

NLRB decided in favor of union; Kennedy would enforce NLRB order

MAJORITIES

NLRB v. Circle A&W Products Co., 647 F.2d 924 (9th Cir. 1981), cert. denied, 454 U.S. 1054 (1981)

Alfred M. Lewis, Inc. v. NLRB, 587 F.2d 403 (9th Cir. 1978) (enforces on most issues)

Scintilla Power Corp. v. NLRB, 707 F.2d 419 (9th Cir. 1983)

Union Oil v. NLRB, 607 F.2d 852 (9th Cir. 1979)

NLRB v. Mike Yurosek & Sons, Inc., 597 F.2d 661 (9th Cir. 1979), cert. denied, 444 U.S. 839 (1979)

H.C. Macaulay Foundry Co. v. NLRB, 553 F.2d 1198 (9th Cir. 1977) (union found liable by NLRB & didn't appeal; employer appealed early termination of union damage exposure, and union wins on that issue)

DISSENTS/CONCURRENCES

Raley's Inc. v. NLRB, 703 F.2d 410 (9th Cir. 1983) (concur), aff'd as to these grounds after rehearing en banc in which Kennedy was not involved, 728 F.2d 1274 (9th Cir. 1984) (NLRB found for union on 4 grounds; order enforced as to 3)

NLRB v. Apollo Tire Co., 604 F.2d 1180 (9th Cir. 1979) (concur)

Dycus v. NLRB, 615 F.2d 820 (9th Cir. 1980) (concur)

Bell Foundry v. NLRB, 827 F.2d 1340 (9th Cir. 1987) (concur)

NLRB v. International Medication Systems, Ltd., 640 F.2d 1110 (9th Cir. 1981), cert. denied, 455 U.S. 1017 (1982) (concur) (NLRB enforced re unfair labor practices, but remanded re reinstatement due to improperly excluded evidence)

VOTES

NLRB v. Marin Operating, Inc., 822 F.2d 890 (9th Cir. 1987)

NLRB v. Carson Cable TV, 795 F.2d 879 (9th Cir. 1986)

NLRB v. Realty Maintenance, Inc., 723 F.2d 746 (9th Cir. 1984)

NLRB v. Yellow Transportation Co., 709 F.2d 1343 (9th Cir. 1983)

NLRB v. Elixir Industries, 682 F.2d 867 (9th Cir. 1982)

NLRB v. Dick Seidler Enterprises, 666 F.2d 383 (9th Cir. 1982)

East Wind Enterprises v. NLRB, 664 F.2d 754 (9th Cir. 1981)

NLRB v. Pacific Coast Utilities Service, Inc., 638 F.2d 73 (9th Cir. 1980)

Universal Paper Goods v. NLRB, 638 F.2d 1159 (9th Cir. 1979)

Clear Pine Mouldings, Inc. v. NLRB, 632 F.2d 721 (9th Cir. 1980), cert. denied, 451 U.S. 906 (1981)

Press Democrat Publishing Co. v. NLRB, 629 F.2d 1320 (9th Cir. 1980) (pro-union NLRB outcome approved, but case remanded for NLRB to state reasons why a more favorable order had not been issued)

NLRB v. Silver Spur Casino, 623 F.2d 571 (9th Cir. 1980) (enforced as to 5 of 7 issues)

NLRB v. Chatfield-Anderson Co., Inc., 606 F.2d 266 (9th Cir. 1979) (pro-union NLRB order enforced as to unfair labor practice finding, but not as to appropriateness of bargaining order)

NLRB v. Tri-Ex Tower Corp., 595 F.2d 1 (9th Cir. 1979)

Stromberg-Carlson Communications, Inc. v. NLRB, 580 F.2d 939 (9th Cir. 1978)

NLRB v. Tri-City Linen Supply, 579 F.2d 51 (9th Cir. 1978)

Great Chinese American Sewing Co. v. NLRB, 578 F.2d 251 (9th Cir. 1978) (NLRB for union on 6 out 7 issues; 9th Cir. enforced in its entirety)

NLRB v. Squire Shops, Inc., 559 F.2d 486 (9th Cir. 1977)

NLRB v. Magnusen, 523 F.2d 643 (9th Cir. 1975) (enforcement granted as to unfair labor practice, and as to reinstatement with back pay for 2 out of 3 employees)

NLRB decided in favor of union;
Kennedy would deny enforcement

MAJORITIES

May Department Stores, Inc. v. NLRB, 707 F.2d 430 (9th Cir. 1983)

NLRB v. HMO International/California Medical Group Health Plan, 678 F.2d 806 (9th Cir. 1982)

Doug Hartley, Inc. v. NLRB, 669 F.2d 579 (9th Cir. 1982)

NLRB v. International Harvester Co., 618 F.2d 85 (9th Cir. 1980)

DISSENTS/CONCURRENCES

NLRB v. Heyman, 541 F.2d 796 (9th Cir. 1976) (concur)

Kaiser Engineers v. NLRB, 538 F.2d 1379 (9th Cir. 1976) (dissent)

VOTES

Idaho Falls Consolidated Hospitals, Inc. v. NLRB, 731 F.2d 1384 (9th Cir. 1984) (enforcement denied as to all contested issues over which Court has jurisdiction)

NLRB v. Consolidated Liberty, Inc., 672 F.2d 788 (9th Cir. 1982)

NLRB v. Masonic Homes of California, 624 F.2d 88 (9th Cir. 1980)

NLRB v. Sacramento Clinical Laboratory, Inc., 623 F.2d 110 (9th Cir. 1980) (enforcement denied as to 2 of 3 issues)

Pacific Northwest Chapter of the Associated Builders & Contractors, Inc. v. NLRB, 609 F.2d 1341 (9th Cir. 1979)

NLRB v. Aladdin Hotel Corp., 584 F.2d 891 (9th Cir. 1978)

Merchants Home Delivery Service, Inc. v. NLRB, 580 F.2d 966 (9th Cir. 1978)

NLRB v. Yama Woodcraft, Inc., 580 F.2d 942 (9th Cir. 1978)

NLRB v. Four Winds Industries, Inc., 530 F.2d 75 (9th Cir. 1976) (NLRB order in favor of union denied enforcement on 2 of 3 issues)

NLRB decided against union;
Kennedy would enforce NLRB order

MAJORITIES

Service Employees Int'l Union v. NLRB, 640 F.2d 1042 (9th Cir. 1981)

United Association of Journeymen v. NLRB, 553 F.2d 1202 (9th Cir. 1977)

NLRB v. Retail Clerks Union, 526 F.2d 142 (9th Cir. 1975)

DISSENTS/CONCURRENCES

Hotel Employees & Restaurant Employees Union v. NLRB, 760 F.2d 1006 (9th Cir. 1985) (concur)

International Association of Machinists v. NLRB, 759 F.2d 1477 (9th Cir. 1985) (concur)

NLRB v. Machinists Local 1327, 608 F.2d 1219 (9th Cir. 1979) (dissent)

VOTES

Hotel, Motel and Restaurant Employees Union v. NLRB, 785 F.2d 796 (9th Cir. 1986)

United Stanford Employees v. NLRB, 601 F.2d 980 (9th Cir. 1979)

NLRB v. International Long Shoreman's Union, 581 F.2d 1321 (9th Cir. 1978), cert. denied, 440 U.S. 935 (1979)

NLRB v. Int'l Union of Operating Engineers, 580 F.2d 359 (9th Cir. 1978)

Carpenters Local 470, United Brotherhood of Carpenters v. NLRB, 564 F.2d 1360 (9th Cir. 1977)

NLRB decided against union;
Kennedy would deny enforcement

MAJORITIES

None

DISSENTS/CONCURRENCES

None

VOTES

None