SENATE JUDICIARY COMMITTEE
HEARINGS ON THE NOMINATION OF JUDGE ANTHONY KENNEDY
FOR THE U.S. SUPREME COURT
DECEMBER 14, 1987

STATEMENT OF SENATOR GORDON J. HUMPHREY

JUDGE KENNEDY, WELCOME TO THESE COMMITTEE HEARINGS.

I BELIEVE IT TAKES SPECIAL CHARACTER AND COMMITMENT TO SUBMIT TO A PROCESS WHICH HAS NOW BECOME A PUBLIC ORDEAL. I APPLAUD YOUR WILLINGNESS TO GO THROUGH THIS GRUELLING PROCESS FOR THE GOOD OF THE COUNTRY AND THE COURT.

I WILL MAKE NO SECRET OF THE FACT THAT I DEEPLY REGRET THE SENATE'S REFUSAL TO CONFIRM JUDGE BORK FOR THIS VACANCY. HE WAS UNIQUELY QUALIFIED TO MAKE A VALUABLE CONTRIBUTION TO THE COURT'S WORK AND THE HEALTHY DEVELOPMENT OF OUR LAW. HE WOULD HAVE BROUGHT A PROFOUND APPRECIATION FOR THE LIMITS OF THE JUDICIAL ROLE TO THE HIGH COURT -- LIMITS WHICH THE COURTS TOO FREQUENTLY IGNORE IN THIS ERA OF JUDICIAL POLICY-MAKING.

IT IS A GENUINE HISTORICAL TRAGEDY THAT THE PUBLIC DISTORTION OF JUDGE BORK'S RECORD KEPT HIM FROM THE SEAT WHICH HE SO CLEARLY DESERVED TO FILL.

BUT THAT BATTLE IS OVER, FOR NOW, AND IT IS TIME TO MOVE ON. IF NOTHING ELSE, I HOPE THAT LESSONS LEARNED FROM THE EXCESSES OF THE BORK HEARINGS WILL LEAD TO MORE RESTRAINED TREATMENT OF JUDGE KENNEDY AND THE NOMINEES OF FUTURE YEARS.

I HAVE CAREFULLY EXPLORED JUDGE KENNEDY'S EXTENSIVE JUDICIAL RECORD, AND IT IS A SOUND AND RESPONSIBLE ONE. IT SHOWS PROPER RESPECT FOR THE LANGUAGE AND PRINCIPLES OF THE CONSTITUTION, AND FOR THE DEMOCRATIC PREROGATIVES OF THE ELECTED LAWMAKERS. IT GENERALLY SHOWS KEEN APPRECIATION FOR FOR THE OBLIGATIONS AND LIMITATIONS OF THE JUDICIAL ROLE.

HIS OPINIONS IN THE CRIMINAL LAW AREA ARE ESPECIALLY COMMENDABLE. IN SOME OF THE MOST IMPORTANT CRIMINAL LAW CONTROVERSIES OF THE DAY, JUDGE KENNEDY'S OPINIONS AND DISSENTS HAVE LATER BEEN FOLLOWED BY THE SUPREME COURT. HIS SOUND REASONING HAS LED HIM TO REJECT ATTEMPTS TO HAMPER LAW ENFORCEMENT WITH ARTIFICIAL BARS TO THE USE OF RELEVANT EVIDENCE AGAINST DANGEROUS CRIMINALS. AT THE SAME TIME, HE HAS TAKEN STRONG STANDS TO UPHOLD THE RIGHTS OF THE ACCUSED AND REVERSE CONVICTIONS WHERE THE CONSTITUTION REQUIRES.

IN A DIFFERENT AREA, JUDGE KENNEDY'S OPINION IN THE COMPARABLE WORTH CASE OF AFSCME V. STATE OF WASHINGTON WAS ONE OF THE MOST IMPORTANT COURT OF APPEALS DECISIONS OF THE DECADE. THAT DECISION PROPERLY REJECTED AN EXTREME INTERPRETATION OF TITLE VII WHICH WOULD HAVE COST THE STATE OF WASHINGTON NEARLY ONE **BILLION** DOLLARS AND UNDERMINED THE MOST FUNDAMENTAL PREMISES OF A RATIONAL, COMPETITIVE LABOR MARKET. MORE IMPORTANTLY, IT UPHELD THE PRINCIPLE THAT LEGISLATURES, NOT COURTS, SHOULD MAKE THE POLICY DECISIONS GOVERNING OUR SOCIAL AND ECONOMIC WELFARE.

I CANNOT AGREE WITH ALL OF JUDGE KENNEDY'S OPINIONS. IN A FEW CASES -- SUCH AS HIS EXPANSIVE DISCUSSION OF SUBSTANTIVE DUE PROCESS IN THE CASE OF BELLER V. MIDDENDORF -- HE HAS SEEMED TO STRAY SOMEWHAT FROM THE PRINCIPLE OF JUDICIAL RESTRAINT WHICH HE USUALLY FOLLOWS. BUT EVEN IN THAT CASE HE REACHED THE CORRECT RESULT, AS LATER CONFIRMED BY THE SUPREME COURT'S DECISION IN BOWERS V. HARDWICK.

ON THE WHOLE, HIS JUDICIAL RECORD IS EXEMPLARY AND SOUND. ANY ATTEMPT TO SUGGEST THAT JUDGE KENNEDY IS NOT WITHIN THE SO-CALLED "MAINSTREAM" IS IMPLAUSIBLE. EVEN THOSE OF HIS OPINIONS WHICH MAY BE CRITICIZED BY HOSTILE WITNESSES -- SUCH AS HIS COMPARABLE WORTH OPINION AND HIS DECISION UPHOLDING THE NAVY'S RIGHT TO DISCHARGE HOMOSEXUALS IN THE BELLER CASE -- ARE CONSISTENT WITH RESULTS REACHED BY NUMEROUS OTHER FEDERAL APPEALS COURTS.

THE TEST FOR ME, THOUGH, IS NOT WHETHER HE IS WITHIN SOME SELECTIVE NOTION OF THE "MAINSTREAM"; IT IS WHETHER HE IS FAITHFUL TO THE CONSTITUTION AND THE LIMITS OF THE JUDICIAL ROLE.

FROM WHAT I'VE SEEN AND READ SO FAR, JUDGE KENNEDY SHOULD PASS THAT MORE IMPORTANT TEST. I HOPE HIS TESTIMONY AND HIS ANSWERS TO MY COLLEAGUES' QUESTIONS WILL REENFORCE THAT BELIEF.

The CHAIRMAN. Thank you, Senator.

The Senator from Ohio.

Senator METZENBAUM. Following Senator Humphrey's lead, Senator Simon asked me to put his statement in the record as well.

The CHAIRMAN. I am sure they will be compatible. Without objection, both will be entered.

[The statement of Senator Simon follows:]