Alliance for Justice

A National Association of Organizations Working for Equal Justice

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STATEMENT OF THE ALLIANCE FOR JUSTICE'S JUDICIAL SELECTION PROJECT TO THE SENATE JUDICIARY COMMITTEE ON THE NOMINATION OF ANTHONY M. KENNEDY TO THE UNITED STATES SUPREME COURT

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STATEMENT OF THE ALLIANCE FOR JUSTICE'S
JUDICIAL SELECTION PROJECT

This testimony is submitted on behalf of the Alliance for Justice and its Judicial Selection Project on the nomination of Anthony Kennedy to the United States Supreme Court. The Alliance for Justice is a national association of public interest organizations which addresses issues of common concern to the public interest community, such as access to the courts for those who assert violations of constitutional and federal rights.

The Alliance's Judicial Selection Project was organized in 1985 by a group of law professors and civil rights, public interest and labor organizations. The Project monitors the appointment and confirmation of candidates for the federal judiciary and encourages the racially diverse selection of men and women who are open-minded, fair and committed to equal justice. The Project believes that maintaining a strong, independent judiciary is essential to our democratic system.

The Judiciary Committee hearings on the nomination of Judge Bork served as an historic demonstration of the Senate's constitutional role as full partner with the President in the confirmation of Supreme Court candidates. The Committee's extensive review of Judge Bork's record and its rigorous questioning on his views on the Constitution set a standard for Senate consideration of all future nominees to the Court. In rejecting the nomination, the Senate showed that it must be assured that a Supreme Court nominee will respect the role of the

courts in protecting individual rights and liberties.

Accordingly, the Senate must now examine Judge Kennedy's record and inquire into his understanding of the Constitution. After a careful review of Judge Kennedy's appellate opinions as well as speeches he has made over a period of several years, the Alliance is troubled by Judge Kennedy's lack of demonstrated commitment to equal access to the courts and equal justice.

Over the last thirty years, courts have gradually reduced the barriers that have prevented the poor and other underrepresented individuals from gaining access to the federal courts. There is widespread recognition of the principle that where constitutional rights have been or may have been violated, those who can show specific even if small individual injury will have their day in court.

Several decisions by Judge Kennedy indicate that he takes a narrow and mechanical view of citizens' ability to seek redress for grievances in the courts. He has demonstrated a tendency to read the law governing access to the courts in such a narrow way as to deny underrepresented persons full protection of the law.

For instance, in TOPIC v. Circle Realty, 532 F.2d 1273 (9th Cir. 1976), Judge Kennedy, writing for the court, refused to uphold a district court's grant of standing to a fair housing organization which had challenged the racial steering practices of realtors under the Fair Housing Act. He ruled that the Act conferred standing only on individuals who are the "primary

victims" of discrimination. He wrote:

> "The injuries [the organization's] members may have suffered from living in segregated communities were caused by no specific single act of the defendants, but by a prolonged practice spanning many years. An injunction, if granted, would stop the practice of racial steering by the defendants, but the desired result of establishing an integrated community would not be achieved immediately....In sharp contrast is the denial of access to one seeking to rent or purchase housing, where inability to obtain an immediate judicial remedy may constitute a serious hardship." 532 F.2d at 1276.

At the time, Judge Kennedy's ruling conflicted with nine other federal court decisions holding that persons other than specific victims had standing to challenge discriminatory housing practices. Indeed, in a 7-2 decision written by Justice Powell three years later, Gladstone Realtors v. Bellwood, 441 U.S. 91 (1979), the Supreme Court expressly rejected Judge Kennedy's reasoning.

In another civil rights lawsuit, Pavlak v. Church, 681 F.2d 617 (1982), Judge Kennedy wrote for a divided panel that the statute of limitations for a putative class member was not tolled between the filing of the complaint and the order refusing to certify the class. This decision was vacated by the Supreme Court, 103 S. Ct. 3529 (1983) in light of its decisions in Crown, Cork and Seal v. Parker, 103 S.Ct. 2392 (1983) and Chardon v. Soto, 103 S.Ct. 2611 (1983).

Other examples reveal his hypertechnical interpretation of statutes of limitations. One particularly disturbing case is Allen v. Veterans Administration, 749 F.2d 1386 (9th Cir. 1984), where the plaintiff filed a Federal Tort Claims Act action within

the six months permitted by law, but named and served the Veterans Administration, not the United States, as defendant. Formal service was made on the U.S. Attorney two months later, although he had already received the papers from the agency. Judge Kennedy upheld the district court's dismissal of the complaint on the grounds of failure to name the United States and refused leave to amend Under Rule 15 because the U.S. Attorney was not served before the statute ran out. Judge Kennedy said that the fact that the action was filed and the V.A. was served within the allowable time was irrelevant.

His decision in Allen was troubling since the substitution of an agency for the United States is common and he relied on a minor pleading error to dismiss the plaintiff's case. He also used an unduly technical analysis to dismiss the employment discrimination case, Kouky v. Department of the Navy, 820 F.2d 300 (9th Cir. 1987). The plaintiff mistakenly named the agency, not the agency director, as provided by statute. Judge Kennedy disregarded the fact that the agency director was served six days later (after the time expired).

In a similar vein, Judge Kennedy has interpreted the substantive law of race and sex discrimination in a narrow fashion. A common theme running through his cases is the requirement of proof of discriminatory intent. This has led him to reject many important claims of discrimination.

For instance, in Spangler v. Pasadena Board of Education, 611 F.2d 1239 (9th Cir. 1979), Judge Kennedy wrote a lengthy opinion concurring in the termination of district court

jurisdiction of the Pasadena school desegregation plan. The district court had denied the school board's motion to relinquish jurisdiction, finding that school board members, who had been cited thirteen times for noncompliance with the court order, had criticized the desegregation plan and intended to return to neighborhood school assignments that existed prior to implementation of the plan, thus restoring the previously existing pattern of segregation.

Judge Kennedy refused to accept the district court findings and in so doing violated the longstanding rule that requires deference to the findings of fact by the district court. Despite the overwhelming weight of evidence, he argued that substantial noncompliance had not been shown and wrote that "the evidence does not support the conclusion that the school board harbors an intent to establish, or return to, a dual system." Id. at 1244.

Judge Kennedy's opinion demonstrates a lack of sensitivity to the continuing battle to ensure equal educational opportunity. His opinion was followed in the recent Norfolk School case, Riddick v. School Board of Norfolk, 784 F.2d 521, 537-38 (4th Cir. 1986), in which the Fourth Circuit allowed the Norfolk School Board to eliminate busing and resegregate its elementary schools, resulting in ten formerly desegregated schools becoming 95 percent or more black and six becoming 70 percent or more white.

In Aranda v. Van Sickle, 600 F.2d 1267 (9th Cir. 1979), Judge Kennedy upheld an at-large city council election in an

opinion which ignored factual evidence indicating substantial dilution of minority votes. His opinion could have precluded all future constitutional challenges to at-large elections in the Ninth Circuit were it not for an amendment to the Voting Rights Act in 1982. In Aranda, Hispanic plaintiffs had challenged San Fernando's at-large elections, in place for over sixty years. While the population of the city was 50 percent Hispanic, with 29 percent of the registered voters Hispanic, only three Hispanics had ever been elected to the City Council. The plaintiffs also presented evidence that Hispanic pollsters were routinely harassed and that polling places were seldom located in Hispanic homes. The district court granted summary judgment to the defendants, thus denying the plaintiffs a trial on the merits. The Ninth Circuit affirmed, largely adopting the district court's opinion.

In a concurring opinion, Judge Kennedy first failed to address the legal principles applicable to summary judgment motions, and thus violated the settled rule that in reviewing motions for summary judgment, all inferences must be viewed in the light most favorable to the party opposing the motion. Judge Kennedy also required that the plaintiffs prove that discriminatory intent was the basis for the at-large system. He then refused to conclude that the facts could support an inference of discriminatory intent although the Supreme Court three years later in Rogers v. Lodge, 485 U.S. 613 (1982), held that facts similar to those alleged in Aranda supported an inference that discriminatory intent was behind the at-large

system.

In responding to criticism of his Aranda ruling during testimony before the Senate Judiciary Commitee, Judge Kennedy stated that he failed to consider facts suggesting relief other than vacation of the at-large election because the plaintiffs had asked only for elimination of the election. However, as Antonia Hernandez noted in her testimony before the Committee, Judge Kennedy's summary judgment dismissal precluded the plaintiffs from returning to court to establish liability which could provide the basis for a remedy within the discretion of the Court.

In American Federation of State, County, and Municipal Employees v. State of Washington, 770 F.2d 1401 (9th Cir. 1985), Judge Kennedy reversed the district court ruling that 15,000 Washington state employees established a Title VII sex discrimination claim based on the "comparable worth" theory. The district court's findings that female state employees were the victims of pervasive wage discrimination were based on state-commissioned studies that identified a 20 percent wage disparity between male-dominated and female-dominated jobs of equal skill, effort, responsibility and working conditions.

In a lengthy opinion, Judge Kennedy overruled the careful and detailed fact-finding by the district court, concluding that intentional wage discrimination could not be inferred from Washington's continued use of market wages to establish salary levels. Judge Kennedy's presumption that the State's compensation system and its resulting salary inequities reflected

"prevailing market rates" was also improper since the trial court made no finding as to the impact of the free market on the compensation system. He also summarily rejected liability based on a disparate impact theory. He ruled that Washington's compensation system could not be subjected to a disparate impact analysis since it did not constitute a clearly defined employment practice. This interpretation was repudiated in Antonio v. Wards Cover Packing Co., 43 FEP Cases 130 (9th Cir. 1987).

In addition, Judge Kennedy's record does not reflect sensitivity to the civil rights of the handicapped. In Mountain View-Los Altos Union High School District, 709 F.2d 27 (1983), Judge Kennedy narrowly interpreted the Education for All Handicapped Children Act. He held that parents who transferred their disabled child to a private school were not entitled to receive reimbursement for tuition expenses, even if the parents' decision was subsequently upheld through the administrative process and the courts. The Supreme Court, in an opinion by Justice Rehnquist, unanimously held that the parents were entitled to reimbursement in School Committee of Town of Burlington v. Department of Education, 471 U.S. 359 (1985).

Judge Kennedy's memberships in clubs which have had either express discriminatory practices or that have few minority or women members raise additional concerns about his insensitivity to the interests of minorities and women. The commentary to the American Bar Association's Judicial Code of Conduct states "[i]t is inappropriate for a judge to hold membership in any organization that invidiously discriminates on

the basis of race, sex or religion." In his responses to the Senate Judiciary Committee Questionnaire, he stated that invidious discrimination exists when the exclusion is "intended to impose a stigma upon such persons." And, in testimony before the Judiciary Committee, he explained that he believed that none of the exclusionary policies were the result of ill will. This narrow interpretation of "invidious discrimination" suggests that Judge Kennedy may review discrimination claims in an overly technical manner.

While Judge Kennedy's record on civil rights and discrimination issues is not reassuring, his testimony and opinions demonstrate that in such areas as the First Amendment and criminal law he is not guided by a formula or sweeping judicial philosophy. He does not appear to have an agenda to reverse landmark Supreme Court cases in these or other areas of the law. Judge Kennedy also demonstrated a respect for deciding cases based on a proper understanding of precedent.

Judge Kennedy told the Senate Judiciary Committee that "[o]ver the years, I have tried to become more sensitive to the existence of subtle barriers to the advancement of women and minorities. This [is] an issue on which I [am] continuing to educate myself." The Alliance hopes that Judge Kennedy will continue to grow more sensitive to the rights of the powerless in our society and the role the courts must continue to play in vindicating those rights.