

STATEMENT
OF
FRANK CARRINGTON,
ATTORNEY AT LAW
IN SUPPORT OF
THE NOMINATION OF JUDGE ANTHONY M. KENNEDY
FOR THE OFFICE OF ASSOCIATE JUSTICE
OF
THE SUPREME COURT OF THE UNITED STATES,
BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE.
DECEMBER, 1987

Mr. Chairman: My name is Frank Carrington; I am an Attorney at Law; I reside, and practice, at 4530 Oceanfront, Virginia Beach, Virginia, 23451; office telephone: (804) 422-2692; home telephone (804) 428-1825.

I appear, herein, as a private citizen, to urge that this Committee, and the Senate as a whole, Advise and Consent to the nomination of Judge Anthony M. Kennedy as Associate Justice of the Supreme Court of the United States.

My frame of reference is the record of Judge Kennedy on certain criminal justice issues, with particular emphasis on the rights and needs of the victims of crime in America.

My credentials to speak on these issues can be summarized as follows: I received an LL.B. degree from the University of Michigan Law School in 1960, and a Master of Laws degree, in Criminal Law, from Northwestern University Law School in 1970.

The first ten years of my career were spent in active law enforcement work on the federal and local levels, the next ten years were spent in work in the private sector in support of professional law enforcement and in support of the rights of the victims of crime; the past seven years have been devoted almost exclusively, through my practice of law, private sector work, and government service, to the rights of victims of crime. Thus, I have been actively involved in the cause of crime victims for the past 17 years.

I have served in the following capacities:

- Member, President Reagan's Task Force on Victims of Crime.
- Member, Attorney General's Task Force on Violent Crime.
- Member, and Vice Chairman, Advisory Board, National Institute of Justice, United States Department of Justice.
- Member, Vice Chairperson and Chairperson, Victims Committee, Criminal Justice Section, American Bar Association.
- Former Member, Board of Directors, National Organization for Victim Assistance.
- Assistant Director for Criminal Justice Policy Coordination, Reagan/Bush Transition Team (1980-81).
- Member, National Law Enforcement Council. (1980-Current).
- Consultant on Victims Issues, National Judicial College, Reno, Nevada (1983).

I have authored, or co-authored, two books on the rights of crime victims; ¹ one book documenting the case for capital punishment, ² and one book on evidence law for the police.³ I have written four law review articles and a number of articles for professional journals on victims, ⁴ and criminal justice issues, particularly on the exclusionary rule.⁵

I have spoken, as a guest lecturer on criminal justice and crime victims issues at, inter alia, the University of Michigan Law School, the University of Richmond Law School, the National College of District Attorneys at the University of Houston Law School, Suffolk University Law School and the FBI National Academy at Quantico, Virginia.

I am currently Legal Consultant and Director of the Crime Victims Litigation Project of the Sunny von Bulow National Victim Advocacy Center, Fort Worth, Texas,⁶ and Executive Director of the Victims Assistance Legal Organization, Virginia Beach, Virginia.

The plight of crime victims in this country is a constant, pervasive problem that should be addressed at the highest policy-making levels every time that a national issue which is relevant to the rights and needs of victims of crime comes to the fore. The instant proceedings: Hearings on the nomination of Judge Kennedy for confirmation as associate Justice of the Supreme Court, is clearly such an issue.

It belabors the obvious to state that, if we did not have crime, we would not have victims, and, as a consequence, we would not need a criminal justice system. Unfortunately, the converse is true: we do have crime; we do have victims; hence, the record and views of a Supreme Court nominee on criminal justice issues becomes, a fortiori, an issue of major concern to the victims of crime, and to those who represent them.

The current situation of the "victims of crime", which term includes all of us, actual or potential victims, was described in the Final Report of the President's Task Force on Victims of Crime:

Something insidious has happened in America: crime has made victims of us all. Awareness of the danger affects the way we think, where we live, where we go, what we buy, how we raise our children, and the quality of life as we age. The specter of violent crime and the knowledge that, without warning, any person can be attacked or crippled, robbed, or killed lurks at the fringes of consciousness. Every citizen of this country is more impoverished, less free, more fearful and less safe because of the ever-present threat of the criminal. Rather than altering a system that has proved itself incapable of dealing with crime, society has altered itself.⁷

Indeed, even Justices of the Supreme Court, to which Judge Kennedy has been nominated, have commented on the victims' perspective in criminal justice issues. Justice Antonin Scalia, writing for himself, Chief Justice Rehnquist, Justice White and Justice O'Connor, in his dissenting opinion in Booth v. Maryland,⁸ stated:

Recent years have seen an outpouring of popular concern for what has come to be known as "victims rights" - a phrase that describes what its proponents feel is the failure of courts of justice to take into account in their sentencing decisions not only the factors mitigating the defendant's guilt, but also the amount of harm he has caused to innocent members of society. (Emphasis supplied.)⁹

Justice Scalia was speaking in the context of criminal sentencing; however, from the perspective of the actual and potential victims of crime, I submit that he could have been speaking about most of the other important criminal justice issues confronting this country today; and the same "outpouring of public concern" would be applicable to all of them.

The foregoing statement by Justice Scalia was in a dissenting opinion. Earlier on, however, in a majority opinion, the Supreme Court stated specifically that: "in the administration of criminal justice, courts may not ignore the concerns of victims."¹⁰

With all of this in mind, I will address the rest of my testimony to the issue of whether Judge Kennedy, upon being elevated to the Supreme Court, would continue this laudable (and long overdue) concern for the victims of crime. From a reading of the cases in which he wrote the opinion, or participated, while on the United States Court of Appeals for the Ninth Circuit, it is my firm conviction that Judge Kennedy would reflect the same

concerns. Judge Kennedy's opinions on criminal justice issues, which are, of necessity, of primary concern to crime victims, supports this assertion.

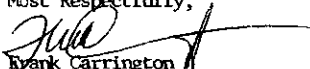
I will not engage in a lengthy rehash of all of Judge Kennedy's cases on criminal justice issues; to do so would be redundant. This Committee has studied them, can, and probably will, question Judge Kennedy about such opinions, his judicial philosophy, and so on. Accordingly, I will only note briefly his important cases as they may be perceived from the point of view of the victims of crime.

On issues of primary concern to crime victims, Judge Kennedy has taken a forthright position that a balance must be struck between the rights of victims and the rights of accused and convicted criminals. Such issues include: 1) The Exclusionary Rule¹¹; 2) Capital Punishment¹²; 3) Drug Smuggling¹³; 4) Homicide¹⁴; 5) Organized Pornography¹⁵; and, 6) Drunk Driving¹⁶.

Mr. Chairman, it is difficult to purport to speak for an amorphous clientele such as victims of crime; however, I am sincerely convinced, based on having represented and consulted with hundreds, if not thousands, of crime victims over the past 17 years, that by far the greatest majority of such victims would enthusiastically endorse the confirmation of Judge Anthony M. Kennedy for the position of Associate Justice of the Supreme Court of the United States.

With thanks for such consideration as the Committee may give to the information contained herein, I am,

Most Respectfully,


Frank Carrington
Attorney and Counselor
at Law

NOTES: Statement of Frank Carrington, Attorney at Law, relative to the confirmation of Judge Anthony M. Kennedy for the office of Associate Justice of the Supreme Court of the United States, before the Committee on the Judiciary, United States Senate, December, 1987

1. See: Rapp, Carrington and Nicholson, *School Crime and Violence: Victims' Rights*, Mailbu, CA, Pepperdine University (1986); Carrington, *The Victims*, New Rochelle, NY, Arlington House (1975).
2. See: Carrington, *Neither Cruel Nor Unusual: The Case for Capital Punishment*, New Rochelle, NY, Arlington House (1978).
3. See: Inbau, Aspen, and Carrington, *Evidence Law for the Police*, Philadelphia, Chilton Books (1970).
4. See: Carrington and Nicholson, *Victims' Rights: An Idea Whose Time Has Come*, 11 *Pepperdine L. Rev.* 1 (1984); Carrington, *Victims Rights: A New Tort?—Five Years Later*, 19 *Trial* 50 (1983); Carrington, *Death, Deterrence and the Victims of Crime*, 35 *Vanderbilt L. Rev.* 587 (1982); Carrington, *Victims' Rights: A New Tort?*, 13 *Trial* 39 (1978); Carrington, *Victims' Rights Litigation: A Wave of the Future*, 11 *U. Rich. L. Rev.* 447 (1977).
5. See, e.g. Carrington, *Good Faith Mistakes and the Exclusionary Rule*, 1 *Criminal Justice Ethics* 35, (1982); Carrington, *Chimel v. California: A Police Response*, 45 *Notre Dame Lawyer* 559 (1970).
6. See: Paul Marcotte, *Project to Aid Crime Victims*, *A.B.A.L.J.*, September 1, 1987, p.20, col.1.
7. *Final Report, President's Task Force on Victims of Crime*, *The White House*, Washington, D.C., December, 1982, p.vi, col.1.
8. *U.S.* ___, 41 Cr.L. 3282 (1987). In *Booth* the Court held, 5 to 4, that "victim impact statements" by the survivors of homicide victims could not be used during the penalty in the trial of the person accused of the homicide.
9. *U.S.* ___, at ___, 41 Cr.L. 3282, at 3288.
10. *Morris v. Slappy*, 103 S.Ct. 1610, at 1617 (1983); (emphasis supplied.)
11. *United States v. Leon*, #82-1093 (9th Cir. Jan. 19, 1981; dissenting opinion, non-pub.); *United States v. Peterson*, 812 F.2d 486 (9th Cir. 1987).
12. *Adams v. Ricketts*, 789 F. 2d 722 (9th Cir. 1986, dissenting opinion); *Neuschafer v. Whitley*, 812 F. 2d 1390 (9th Cir. 1987).

13. United States v. Alien, 633 F 2d 1373 (9th Cir. 1980).
14. Barker v. Morris, 761 F. 2d 1396 (9th Cir. 1985).
15. United States v. Sherwin, 539 F. 2d (9th Cir. 1976).
16. United States v. Harvey, 711 F. 2d 144 (9th Cir. 1983; dissenting opinion).