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STATEMENT OF OPPOSITION TO THE NOMINATION OF JUDGE KENNEDY

INTRODUCTION

The Center for Constitutional Rights is opposed to the nomination of Judge Anthony Kennedy to the Supreme Court. We believe that a justice of the Supreme Court must affirmatively demonstrate a commitment to civil rights and civil liberties and not merely be "not as bad as Judge Bork." We hope that members of Congress and organizations who opposed Judge Bork insist that the American people have a right to a justice who will truly do justice. Judge Kennedy is not such a nominee.

Judge Kennedy repeatedly rules against constitutional and statutory rights asserted by women, homosexuals, Blacks, Latinos, Indians, aliens and prisoners. His opinions express a strong pro-business, anti-union and anti-employee bias. He favors the death penalty and has watered down the protection against illegal searches and seizures protected by the Fourth Amendment. He has been criticized for ignoring the proper role of an appellate judge and substituting his judgment for that of the trial court in order to reach the result he desires. While he may not have espoused a philosophy as pernicious as that of Judge Bork's, he

reaches similar retrograde results.

In certain areas, such as the First Amendment, he has not expressed unmitigated hostility toward litigants' rights. This is true in selected criminal cases as well. However, these limited exceptions do not overcome a narrow view of civil and constitutional rights which does not guarantee justice for all.

WOMEN'S RIGHTS

Two decisions in the area of women's rights are particularly striking. In AFSCME v. State of Washington, 770 F.2d 1401 (9th Cir. 1985) he reversed the trial court and held that a class of 15,000 employees of the State of Washington failed to establish a Title VII sex discrimination claim despite overwhelming evidence that the women employees were receiving lower wages than men for comparable work. This was despite the State's admission that such discrimination had taken place. Judge Kennedy permitted such discrimination because, in his view, it was based upon the free market system and the law of supply and demand. In other words, if discrimination is rooted in the society it is allowable.

Judge Kennedy concurred in a dissenting opinion in Gerdon v. Continental Airlines, 692 F.2d 602 (9th Cir. 1983) applying a similar analysis to a claim by airline flight attendants that strict weight requirements for women and not for men were discriminatory. The

airlines' justification was not safety, but rather that its passengers preferred being served by attractive women. Fortunately, the majority refused to accept this as a legitimate reason and held it discriminatory on its face. However in another decision, White v. Washington Public Power Supply Commission, 692 F.2d 1286 (9th Cir. 1982) he ruled, contrary to other courts, that section 1981 of the Civil Rights Act applied only to discrimination against Blacks and did not protect women. These decisions reflect actions in his personal life. Until a short time ago he belonged to the Olympic Club in San Francisco, a club that permitted no women members. (He resigned because he knew he was being considered for the Supreme Court.)

GAY AND LESBIAN RIGHTS

Judge Kennedy, like Judge Bork, authored an opinion upholding the right of the Navy to discharge personnel who engaged in homosexual conduct. Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980) Rather than decide whether such conduct was a fundamental aspect of the right to privacy, he accepted the claim of the Navy that military necessity justified the dismissal of homosexuals. While referring to the Supreme Court decisions protecting privacy and the right to abortion, notably absent was any affirmation that he affirmed or adopted the reasoning of those cases.

In an earlier case, Singer v. U.S. Civil Service

Commission, 530 F.2d 247 (9th Cir. 1976). Judge Kennedy signed on to an opinion which allowed a gay activist to be dismissed from his government job for being, according to the Civil Service Commission, "an advocate for a socially repugnant concept." The Supreme Court vacated the decision saying an employee cannot be summarily discharged without some showing that his or her homosexual conduct is likely to impair the efficiency of the Civil Service. The Singer reversal might well explain Kennedy's toned-down language in Beller v. Middendorf. The result is the same -- mandatory dismissal -- but Kennedy reaches for language about the "special needs of the military" to justify the result.

RACIAL DISCRIMINATION

Decisions in the area of racial discrimination demonstrate that Judge Kennedy has no understanding that laws protecting racial equality are to be broadly and liberally construed. His decision in Topic v. Circle Realty, 532 F.2d 1273 (9th Cir. 1976) denied access to the courts to a fair housing organization and homeowners against a group or realtors involved in racial steering. To reach this result he had to bend previous Supreme Court decisions and reject the reasoning of a number of other courts. Three years later, in an opinion by Justice Powell, the Supreme Court by a 7-2 margin rejected Judge Kennedy's position. In Spangler v.

Pasadena Board of Education, 611 F.2d 1239 (9th Cir. 1979) a school desegregation case, Judge Kennedy concurred in the result by writing a long opinion which disregarded important principles of judicial fact-finding and gave a narrow view of the constitutional right to attend desegregated schools.

VOTING RIGHTS

In what could have been a disaster for voting rights litigation, Judge Kennedy wrote a long concurrence rejecting a challenge to at-large voting by Latinos in California, Aranda v. VanSickle, 600 F.2d 1267 (9th Cir. 1979). His analysis not only set forth a requirement of invidious intent for such challenges to be heard, but determined facts in a manner that allowed him to reach the result he desired. This decision essentially held up voting rights litigation in the 9th Circuit until 1982 when Congress, by legislation, overruled the narrow way in which Judge Kennedy and some other judges had read the Voting Rights Act.

NATIVE AMERICANS

Indians, like other minorities, have not fared well in cases decided by Judge Kennedy. In Oliphant v. Schile, 544 F.2d 1007 (1976), a case challenging the right of an Indian tribe to try non-Indians for offenses committed on the reservation, Judge Kennedy dissented from permitting the tribe such jurisdiction. He labeled the idea that Indian tribes had inherent sovereignty to

try such offenses as novel, and inconsistent with prior practice. In Blackfeet Tribe of Indians v. State of Montana, 729 F.2d 1192 (1984), Judge Kennedy joined a dissent which demonstrated hostility toward the principle that ambiguities in statutes are to be resolved in favor of Indians. This is one of the cardinal principles of Indian law.

IMMIGRATION

While Judge Kennedy claims to understand that neither the Immigration and Naturalization Service nor the Bureau of Indian affairs "inspire confidence", he refuses to do very much about their errors. Villena v. INS, 622 F.2d 1352 (9th Cir. 1980). His position is that review of deportation proceedings should be quite narrow, that the courts should give deference to administrative proceedings and be primarily concerned with rules and procedures and not individual cases.

LABOR

His rulings in the labor area are particularly egregious. His greatest number of dissents are from decisions enforcing union rights. For example, when union members lobbied congress to protect their jobs from foreign competition, a position contrary to that of the company's, he dissented from a decision upholding an unfair labor practice against the company for disciplining the employees. Kaiser Engineers v. National Labor Relations Board, 538 F.2d 1379 (9th Cir. 1976).

PRISONERS

In United States v. Goveia, 704 F.2d 1116 (9th Cir. 1983), Judge Kennedy joined a dissent from a ruling holding that prisoners had a right to counsel when they had been placed in administrative detention when the detention was due to a pending investigation or trial.

ENVIRONMENT

In Libby Rod and Gun Club v. Poteat, 594 F.2d 742 (9th Cir. 1979), the court found that Congress did not authorize the building of a dam which would have caused environmental damage. Judge Kennedy dissented and found that congressional appropriations were sufficient to authorize the dam and that a specific authorizing statute was not necessary. This ruling has implications in other than environmental areas. For example, a

frequent claim by administrations is that congressional funding is the equivalent of a declaration of war under the Constitution. Apparently, Judge Kennedy would agree with this reasoning.

INDIVIDUAL RIGHTS CASES

Judge Kennedy appears to have little compassion for the individual asserting his or her rights and rarely favors "the little guy." He often finds technical grounds for getting rid of such cases.

In EEOC v. Alioto Fish Co., Ltd., 623 F.2d 86 (9th Cir. 1980), he authored an opinion upholding the dismissal of an employment discrimination case because the EEOC did not file its law suit until 62 months after the employee filed her charges against the employer with the EEOC. The fact that the employee had no control over an EEOC office that was being gutted by the Reagan Administration did not prevent her from being penalized because of the EEOC's dereliction of its duties.

In another case, Koucky v. Department of the Navy, 820 F.2d 300 (9th Cir. 1987), the Court of Appeals, again in an opinion authored by Judge Kennedy, threw out a lawsuit against the Department of the Navy by a handicapped former naval employee because the lawsuit named the "Department of the Navy" as a defendant when it should have named the "Secretary of the Navy." Furthermore, the Kennedy court would not allow the claimant to amend his pleadings, deciding instead to

adhere to a rigid thirty day time bar. As a result, the plaintiff was not allowed to litigate his case.

In yet another civil rights case, a Native American woman succeeded in winning a $161,000 award in an employment discrimination case from a trial court. Apparently convinced that the amount awarded was not sufficient to cover compensatory and punitive damages, back pay, and attorney's fees, she appealed to the Court of Appeals. Focusing entirely on the arguments of the employer. Kennedy wrote an opinion for the Court overturning the monetary award and ordering the plaintiff to try her case anew. Thus, in her quest to obtain more justice, the plaintiff was deprived of all justice. See, White v. Washington Public Power Supply System, 792 F.2d 1286 (9th Cir. 1982).

The issue is not whether Judge Kennedy is as bad as Judge Bork. Rather, it is whether we want a Supreme Court and Supreme Court Justice that will build on the civil rights and civil liberties gains of the past years. We at the Center for Constitutional Rights do. We feel that Judge Kennedy will not move us forward; we are fearful he will move us backward.

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