Committee for the Preservation of Civil Rights

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Dear Senate Judiciary Committee Member,

The Committee for the Preservation of Civil Rights is an ad hoc group of persons interested in the nomination of a Justice to the U.S. Supreme Court who will uphold the rule of law, respect the development of civil rights that has occurred in recent decades in the U.S. courts, and who will not decide cases with a slant toward any party. The members of this Committee include lawyers, law professors and community leaders who have been active in observing the U.S. Supreme Court confirmation process, and who believe that the Senate Judiciary Committee inquiry into the qualifications of Judge Robert Bork was a precedent-setting and worthwhile process, establishing a baseline for qualifications of U.S. Supreme Court appointees of any President. While the lessons of the Bork rejection should not be oversimplified, we believe that, at a minimum, it established that people in the U.S.A. want Supreme Court Justices who stand forthrightly in favor of the equal protection guarantee for all persons, especially historically oppressed groups such as women and minorities, who view the First Amendment's guarantees of free speech, association and religious exercise generously, and who take a humane and compassionate view of their role in dispensing justice.

We write this letter because we believe that U.S. Supreme Court nominee Anthony Kennedy has some serious questions to answer about civil rights, the rule of law and the role of the courts in its preservation and advancement. We hope and intend that the questions and problems that we raise in this letter will be taken up in the hearings of the Committee as to Judge Kennedy's qualifications for Supreme Court appointment, which we understand are scheduled to commence on Monday, December 14, 1987.

We also note that, although there has been widespread comparing of Judge Kennedy with Judge Bork, and a pervasive effort to short-circuit full inquiry into Judge Kennedy's qualifications because he is "better than Bork", we believe this is a false issue. Judge Bork is no longer in the Supreme Court picture, and the task currently facing the people and elected representatives of this nation is to determine whether Judge Kennedy should sit on the Supreme Court, in his own right and based upon his own qualifications, neither benefited nor prejudiced by the nation's particular experience with the rejected nominee, Robert Bork.

The Committee for the Preservation of Civil Rights believes that Judge Kennedy has a record of judicial decisions, speeches and personal actions that raises serious questions about Judge Kennedy's ideological patterning in making decisions as a judge, his capacity to impartially hear all sides of the cases presented to him, and his real and operative beliefs as to the function of the courts and the meaning of the rule of law in deciding important questions about civil rights. We have prepared this letter to raise some of those questions, and to provide information to those who have inquired about our views of Judge Kennedy as a U.S. Supreme Court nominee, and about our opinion of the process by which his qualifications should be scrutinized by the U.S. Senate.

INTENTIONAL DISCRIMINATION

Judge Kennedy frequently has ruled in favor of allegedly discriminating entities and persons, often reasoning that the discrimination proved was not intentional, or not obvious enough, or not shown to be based in malice; he shows extreme deference to the status quo, where that status quo operates to discriminate against women and minorities. See, for example, his decisions in AFSCME v. Washington, 770 F.2d 1401 (1985) ("Neither law nor logic deems the free market system a suspect enterprise", where the "free" market pays women less than men for work of equal value); Gerdom v. Continental Airlines, 692 F.2d 602 (1982) (in dissent, Kennedy would permit airline to impose female-only personal appearance requirements to satisfy purported "customer preferences"); White v. Washington Public Power Supply System, 692 F.2d 1286 (1982) (Kennedy offered dictum as to the failure of plaintiff American Indian to prove a "policy" of discrimination by employer); Aranda v. Van Sickle, 600 F.2d 1267 (1979) (where voting system results in demonstrable dilution of the value of Mexican-American votes, restructuring it nonetheless would be an "extreme" remedy).

Judge Kennedy was a member of the Olympic Club until October, 1987, when he resigned, in his own words, to "prevent [his]...membership from becoming an issue" in the Supreme Court confirmation process. He wrote in his application for federal judgeship this year that the Olympic club exclusionary practices were not the result of "ill-will", but might cause "real harm" anyway. Judge Kennedy selected 35 law clerks from 1975-1987 to work with him; none were black, Hispanic or Native American, while 1 was Asian, and 5 were females.

The theme of Judge Kennedy's decisions and actions is that discrimination that does not originate from provable malice is somehow less legally actionable and less harmful than the kind of discrimination that wears an ugly face. Judge Kennedy should be searchingly questioned about whether the laws he is interpreting require the sort of malicious motivation he seems to be requiring. Title VII of the Civil Rights Act is supposed to prohibit employment practices that discriminate in effect, as well

as those that discriminate in intent. Griggs v. Duke Power Co., 401 U.S. 424, 430-432 (1971), a unanimous decision by Chief Justice Burger, established this rule. In his decisions and personal actions about discrimination, is Judge Kennedy following this rule, or applying his own narrower version? Why does Judge Kennedy think "ill will" is important in the policy of the Olympic Club? If the Club's policy was offensive to him, harmful to women and minorities, and possibly unlawful, why did he not resign regardless of his possible Supreme Court appointment?

THE RULE OF LAW AND ACCESS TO THE COURTS

Judge Kennedy has spoken in favor of the idea that the Constitution should be restricted to the intent of its framers, and against the use of courts to resolve "political" questions. (Speech excerpted in NY Times p. 13, 12/1/87.) One outcome of such views is to limit access of "new" (ie. more modern than the founders' ideas and experiences of 200 years ago) claims by oppressed groups. Judge Kennedy himself has written opinions limiting ting such claims. See, for example, his opinions in Ostrofe v. H.S. Crocker Co., Inc., 740 F.2d 739 (1984)(Kennedy dissents from holding that employee had standing to sue under Clayton Act when discharged and boycotted for refusal to participate in bid rigging scheme; Kennedy would limit standing to consumers or competitors, stating that "the antitrust laws were not intended as a balm for all wrongdoing in the business community"), in Spangler v. Pasadena City Board of Education, 611 F.2d 1239 (1979) (in lengthy concurrence, Kennedy rejected standing of group to complain of school resegregation effort, and found "there has been no showing of noncompliance", 611 F.2d at 1243, omitting thirteen instances of noncompliance that were found by trial court), and in TOPIC v. Circle Realty, 532 F.2d 1273 (1976), rejecting the right of black and white famillies together to go to court to challenge racial discrimination by realtors. It is noted that Judge Kennedy's opinion in TOPIC was severely criticized by Justice Powell and others in Gladstone Realtors v. Village of Bellwood (1979), for its lack of authority and its defiance of Supreme Court decisions.

The fixed rule of appellate review of lower court decisions establishes that a trial court's finding of fact will not be reversed unless clearly erroneous. Yet Judge Kennedy reached out to reverse a judgment in favor of a female police officer who had proved discrimination by a preponderance of evidence below, despite the absence of any clear error; he invited and encouraged the defendant city to prove it would not have hired her anyway. Fadhl v. City of San Francisco, 741 F.2d 1163 (1984). This decision does not harmonize well with the rule of law as to when appellate courts are supposed to reverse trial courts.
Is Judge Kennedy willing to undercut the standing and access to courts of minority groups, in the name of avoiding "political" questions and conforming to "original intent"? Is the rule of law a one-way proposition to him, such that where other courts' rulings displease him he will simply reject them?

FREEDOM OF SPEECH FOR WHOM?

While Judge Kennedy has upheld the First Amendment's guarantees of free speech and free press in several cases, such as his rejection of the blatant effort to ban airing of a TV program containing clearly protected expression, Goldblum v. NBC, 584 F.2d 904 (1978), he has not protected free speech in a number of less traditional or less obvious cases. See, for example, his dissenting opinion in Lynn v. Sheet Metal Workers International Association, 804 F.2d 1472 (1986), where he would have upheld a discharge of a union official whom Kennedy agreed was being "penalize[d]...for his exercise of protected rights", because Kennedy would distinguish penalizing a union official from penalizing a union member, in terms of the danger to "continued democratic governance" of the union of such penalties, and see his opinion upholding a suspension of a public employee for commenting on a matter after being told not to do so by the employer. Kotwica v. City of Tucson, 801 F.2d 1182 (1986).

Such decisions by Judge Kennedy raise the question: For whom will the benefits of the First Amendment flow under Judge Kennedy's interpretation of the Constitution at the Supreme Court level? Does Judge Kennedy fully appreciate the cost to employees of being disciplined and terminated for engaging in free speech?

COMPASSIONATE JUSTICE?

Along with the pattern of rulings against women and racial minorities identified above, Judge Kennedy has ruled consistently against the assertions of right of other severely oppressed minority groups. See, for example, his decisions and votes in gay rights cases: Sullivan v. INS, 772 F.2d 609 (1986)(upholding deportation of gay Australian who proved that he would be outcast and defiled if sent to Australia); Beller v. Middendorf, 632 F.2d 788 (1980)(authorizing Navy to discharge gay and lesbian members per se, without regard to their service records, in part because of military service people who 'despise/detest homosexuality' and resulting hostility toward homosexuality in military service, 632 F. 2d at 811); Singer v. U.S. Civil Service Commission, 530 F.2d 247 (1978), vacated, 429 U.S. 1034 (1977)(Kennedy joined opinion permitting discharge of EEOC employee for being gay and for protected free speech, despite Civil Service Commission rule banning such discharges). The harsh real-life results of these types of decisions for whole classes of human beings are not mitigated by the politeness of Judge Kennedy's language in stripping them of rights.

We expect that some of the most important civil and constitutional rights questions of the next decades may concern the rights of other oppressed groups, such as gay people, disabled people, impoverished people. Along with the survival of affirmative action and procreative choice, Judge Kennedy may well

be called upon to decide, for instances, about the constitutionality of AIDS quarantine, about the legality of municipal transportation systems that provide no access to disabled persons, and about the constitutional implications of sexuallly explicit speech in public school education programs designed to curb child abuse. Is Judge Kennedy going to decide these cases with an ideological slant toward "conservative" views of the minorities involved in such cases, so that historical and continuing discrimination against these groups is immunized against Supreme Court review? What will Judge Kennedy, who has a record of ruling against claimants of discrimination in many cases today, be most likely to do with the civil rights questions of tomorrow?

CONCLUSIONS

In light of the serious questions that Judge Kennedy's record raises, the Committee for the Preservation of Civil Rights recommends as follows:

1. The U.S. Senate Judiciary Committee hearing as to Judge Kennedy's qualifications should be as searching and as open as possible. The high standards for inquiry set in the Bork hearing should not be lowered in favor of a quick appointment of Judge Kennedy to the Supreme Court.

2. The particular questions raised by Judge Kennedy's decisions, such as those articulated in this statement, should be asked by the Senate Judiciary Committee. The people of this nation are entitled to have Judge Kennedy be examined as closely and carefully on his views, and on his apparent ideological slant toward government and against claimants of discrimination, as Judge Bork was examined.

3. Public views of Judge Kennedy's qualifications should be solicited from the millions of persons who have, by their correspondence with the Senate, shown an interest in the filling of this Supreme Court vacancy by a just nominee. Senators should be encouraged to hear from their constituents about this nominee, and the public should be provided with the information and time necessary to make its views known.

From the information currently available, the Committee for the Preservation of Civil Rights has profound reservations about the nomination of Anthony Kennedy to the U.S. Supreme Court. We request and hope that the U.S. Senate Judiciary Committee will take these reservations fully into account, and that it will conduct the sort of meaningful inquiry into the background, qualifications and relevant attitudes of this nominee, Judge Anthony Kennedy, that the people of this nation deserve.

We thank you for listening to our concerns. We join in sending this letter as members of the Committee for the Preservation of Civil Rights.

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