Federation of Women Lawyers' Judicial Screening Panel
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STATEMENT OF

FEDERATION OF WOMEN LAWYERS' JUDICIAL SCREENING PANEL

WOMEN'S LEGAL DEFENSE FUND

EQUAL RIGHTS ADVOCATES

ON THE NOMINATION OF

ANTHONY M. KENNEDY

Committee on the Judiciary
United States Senate

January 25, 1988

This testimony on the nomination of Anthony M. Kennedy is submitted on behalf of the Federation of Women Lawyers' Judicial Screening Panel, a nationwide network of women attorneys and law professors which, since 1979, has been investigating and evaluating nominees to the federal judiciary on the basis of their demonstrated commitment to equal justice; and on behalf of the Women's Legal Defense Fund and Equal Rights Advocates, civil rights organizations engaged in litigation, public education and counseling with the goal of securing equal rights for women. These groups share a deep concern that the federal judiciary, and particularly the Supreme Court, remain as the guarantor of constitutional rights in the struggle for equal justice under law.

With the confirmation hearings of Robert Bork, the Senate Judiciary Committee set an exemplary standard, establishing the Senate as an equal partner in the confirmation of federal judges and giving vitality to the process of fulfilling its constitutional duty to advise and consent. The arduous but intellectually rigorous hearings established beyond any doubt a broad national consensus that the Supreme Court properly plays a vital role in protecting the rights and liberties of all of us, and that any aspiring Justice of the Court must show a commitment to maintaining that special role. It is in that spirit that we submit these comments on the nomination of Anthony M. Kennedy.

Our deep concerns about Judge Kennedy's qualifications for the Supreme Court are centered upon the question of whether he has demonstrated a commitment to equal justice, either in his role as a judge or in other facets of his life. In particular, two distinct aspects of Judge Kennedy's record give rise to our doubts about his commitment to equal justice, and we shall explore each of them briefly.

I. Judge Kennedy's Judicial Record

In his twelve years on the bench, Judge Kennedy has decided numerous cases involving the civil rights of minorities and women. Overwhelmingly, he has rejected their claims -- often blocking access to the court house itself, by denying that they have standing to sue. Of course, there will be times in the careers of federal judges when they are constrained by the law from ruling as their hearts might dictate. However, the consistency with which Judge Kennedy rules against these claims, and the unduly technical grounds on which he does so, must give us pause when scrutinizing his judicial record.

His decisions in the area of sex discrimination in employment seem to fly in the face of well-established Supreme Court precedent. These cases involve "facial" sex discrimination policies, pursuant to which women and men were admittedly treated differently. While the Supreme Court has consistently held that such policies are discriminatory under

Title VII of the 1964 Civil Rights Act, Judge Kennedy does not recognize this. Instead, he seems to go out of his way to find an excuse for the discriminatory policy, or a flaw in the plaintiff's case.

For example, in Gerdom v. Continental Airlines, 692 F.2d 602 (9th Cir. 1982), the airline imposed a maximum weight requirement for its "flight hostesses," while men with similar duties had no such constraint. The majority of the en banc panel held that the hostesses suspended or terminated because of the weight restriction had obviously suffered unlawful sex discrimination, and the Court granted them summary judgment. Judge Kennedy, however, joined a remarkable dissent, which reasoned that the airline's justification for its facially discriminatory policy -- customer preference for thin and attractive women -- created a disputed issue of fact which required a trial on the merits.

In a similar vein, Judge Kennedy reversed and remanded White v. Washington Public Power Supply System, 692 F.2d 1256 (9th Cir. 1982), where there were admissions that the plaintiff, a Native American woman, was discriminated against in hiring and promotion on the basis of her sex, as well as other strong statistical and factual evidence of bias. Finding that the trial court had incorrectly allocated the burden of proof, Judge Kennedy remanded the case, despite the overwhelming evidence of sex-based discrimination which clearly would have sustained plaintiff's burden, even as corrected.

The opinion totally failed to consider the supervisor's admission that he wanted a man for the job. See also Fadhl v. Police Department, 741 F.2d 1163 (9th Cir. 1984), where the compelling evidence of gender discrimination included statements by Fadhl's superviors that she was "too much like a woman," and "very ladylike," which "may cause problems." Nevertheless, Judge Kennedy reversed and remanded the Title VII judgment and award, ostensibly because of a minor factual error by the trial court.[1/]

In perhaps the most famous of Judge Kennedy's sex discrimination opinions, AFSCME v. State of Washington, 770 F.2d 1401 (9th Cir. 1985), he sounds another theme which seems to pervade his attitude toward civil rights litigation: his self-imposed requirement of discriminatory intent or ill will. AFSCME, the "comparable worth" case, presented an historical pattern of gender-based job segregation and resultant wage discrimination. Nonetheless, Judge Kennedy required, inter alia, a "discriminatory motive" before he would find a Title VII violation. His stringent intent requirement is not grounded in Supreme Court precedent; on the contrary, if it were applied, it would effectively vitiate many landmark Supreme Court cases articulating the

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1/ For an excellent discussion of these and other cases, please see the "Statement of Susan Deller Ross" on behalf of the NOW Legal Defense and Education Fund, dated December 15, 1987.

proper standards for adjudicating sex discrimination claims. This is because classifications which distinguish on the basis of gender are usually enacted for reasons of administrative convenience or the protection of women, rarely out of malice or a desire to stigmatize women.

Even in cases of racial discrimination, where there is no pretense of "benefiting" the injured class, many claims fail to meet Judge Kennedy's intent test. For example, in both Aranda v. Van Sickle, 600 F.2d 1267 (9th Cir. 1979), and Spangler v. Pasadena Board of Education, 611 F.2d 1239 (1979), he concurred in the panel's judgment, finding that the defendants did not intend to discriminate. In Aranda, an at-large city council districting plan utilized numerous devices, including the location of polling places in the homes of white voters, which predictably discouraged Hispanics from voting and had produced only three Hispanic electoral victories in over 50 years. In Spangler, recently-elected members of the Pasadena school board, which had been cited for non-complaince with a court-ordered desegregation plan on 13 occasions, expressed their intent to revoke the plan when the court terminated its jurisdiction and thereby allow the school population to reflect the (segregated) residential housing patterns.[2/] Even assuming arguendo that the

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2/ See "Statement of Antonia Hernandez" on behalf of the Mexican American Legal Defense and Educational Fund (December 16, 1987), for a detailed analysis of these cases.

law required a finding of intent to discriminate before granting the claims of civil rights plaintiffs in such cases, the intent was evident from the extensive factual records presented in these cases. However, as stated above, no such requirement is imposed by the law. Judge Kennedy's crabbed view of the remedial scope of the civil rights statutes is deeply troubling to all of us who depend upon the Supreme Court to vindicate the rights of women and minorities.

During his confirmation hearings, Judge Kennedy repeatedly attempted to reassure members of the Judiciary Committee that he would respect Supreme Court precedent on civil rights issues. We submit that his pledge to follow precedent is not enough; Judge Kennedy must commit himself to interpreting the civil rights laws generously. His past record provides little concrete evidence of his inclination to do so.

II. Judge Kennedy's Club Memberships

Perhaps even more revealing of Judge Kennedy's tenuous commitment to equal justice is his longstanding membership, terminated just recently, in several discriminatory private clubs. We say "more revealing" because, while a federal appeals court judge's decisions are to some extent circumscribed by principles of law and precedent, his association with such clubs is a matter of complete freedom of choice. In Judge Kennedy's case, his membership in these clubs and

his acquiescence in their policies are evidence of extreme insensitivity to the rights of women and minorities. Judge Kennedy joined the clubs while still a young man and long before his appointment to the federal bench.[3/] However, he retained his membership in two of them, the Olympic Club and the Del Paso Country Club, until the eve of his nomination to the Supreme Court. Whatever motivated his eleventh-hour resignations, he continued to belong to these organizations during an extended period when controversy swirled around the issue of private clubs.

Most importantly, the rules of the United States Judicial Conference (adopted in 1981) and the American Bar Association's Code of Judicial Conduct (adopted in 1984) made it clear that a federal judge's membership in clubs which invidiously discriminate was inappropriate. Unfortunately, the meaning of the term "invidious discrimination" is not defined in these documents, and its vagueness has been an oft-cited loophole, particularly for those who claim that male-only membership policies are, by definition, not invidious. Judge Kennedy suggested that he subscribed to this view, when, in answer to the Senate Judiciary Committee's questionnaire, he stated that his clubs did not invidiously discriminate because invidious discrimination is "intended

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3/ For a complete chronology of Judge Kennedy's club memberships, please refer to the attached Appendix A.

to impose a stigma" on the excluded group.[4/] (However, he also admitted in the same questionnaire that he was not involved in the decision to limit membership and was therefore not competent to articulate the reasons for it. See pp. 47-49.)

Judge Kennedy's answers to Senator Kennedy's questions at his confirmation hearings cloud the issue further. First, he reiterated the position articulated in his questionnaire: "In my view, none of these clubs practiced invidious discrimination." (Transcript of Proceedings, December 14, 1987, p. 140) However, he subsequently admitted, as to the Sutter Club, where everyone knew that he was a federal judge, "that it was inappropriate for me to belong" (Tr., December 14, p. 142), and he resigned in 1980. Thus, he indicates some sensitivity to the appearance of bias at that time -- but not enough.

In an apparent attempt to justify his continued membership in the Olympic Club, where he was more anonymous, he cited a California "rule" requiring "judges [to] remain in those clubs and attempt to change their policies and resign

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4/ Questionnaire, p. 50. One is reminded of Judge Kennedy's recurrent imposition of an intent requirement on the law in cases of discrimination on the basis of race or sex. This pattern reflects a fundamental misunderstanding of the realities of sex discrimination, in particular, which, more often than not, stems from outmoded notions of chivalry and protectionism rather than hostility or ill-will.

only when it becomes clear that those attempts are unavailing." (Tr., December 14, p. 143) The origins of this "rule" are unclear. The only California rule we have discovered on the subject was promulgated in 1986 and is similar to, though stronger than, the ABA Code of Judicial Conduct in prohibiting such club memberships.[5/] Furthermore, there is no record of Judge Kennedy's "attempts" to change the Olympic Club's policies until August of 1987, twelve years after his appointment to the U.S. Court of Appeals for the Ninth Circuit!

We are somewhat heartened by Judge Kennedy's belated acknowledgment that discrimination can be invidious even without ill-will or hostility:

> [I]t is clear to me that if a discriminatory barrier exists for too long, if it is visible, if it is hurtful, and if it is condoned, that the person who condones it can be charged with invidious discrimination. I would concede that. (Tr., December 15, p. 118)

We fervently hope that Judge Kennedy's words signal a new commitment to sensitivity on his part. However, it must be said that he sat for twelve years, adjudicating -- and usually rejecting -- the claims of American citizens that they had been denied their rights because of sex or race discrimination, while he remained a member of two

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5/ A copy of Canon 2 of the California Code of Judicial Conduct is attached as Appendix B.

organizations practicing flagrant sex and/or race discrimination. Surely we must question whether Judge Kennedy has the requisite understanding of the meaning of discrimination for a Supreme Court Justice.

III. Conclusion

Finally, in reviewing the record of Judge Kennedy and his confirmation hearings, we are struck by just how little we know about his views on many of the great issues of our recent past, issues which are destined to come before the Supreme Court again in the near future. It is not too late to require Judge Kennedy to clarify his views on the law of discrimination, for example, and whether he is indeed committed to equal justice under law. His approach to Roe v. Wade, stated in answer to a question by Senator Heflin (Tr., December 14, p. 211), is even more opaque. Rather than articulating his views on the right to abortion or its basis in the Constitution, he chose instead to focus upon stare decisis, and particularly its limited applicability to constitutional litigation. His response to this legitimate line of inquiry truly raises more questions than it answers.

We are left with serious concerns about Judge Kennedy's commitment to equal justice. Despite all of his recent verbal promises, the long history of his actions speak far louder than his comforting words. Our profound doubts cannot simply be assuaged by more abstractions. We must receive

genuine assurances that Judge Kennedy understands the vital role of the Supreme Court in guaranteeing our civil rights and liberties and that he will vigorously and aggressively enforce our rights under the law. The stakes are too high for the American people to be satisfied with anything less.

APPENDIX A

JUDGE KENNEDY AND PRIVATE CLUBS

1962	Kennedy joins Olympic Club. (Bylaws restrict membership to "white males.")
1963	Kennedy becomes "full member" of Del Paso Country Club (had been a junior member since 1958). Though not a written policy, Del Paso has no black and few women members.
Dec. 10, 1963	Kennedy joins Sutter Club. The club excludes women and has few minority members.
Feb. 23, 1967	Board of Olympic Club unanimously votes to retain "whites only" policy.
Jan., 1968	Olympic Club drops "whites only" language while retaining "males only" language.
March, 1975	Kennedy appointed to the U.S. Court of Appeals for the Ninth Circuit by President Ford.
1978	American Bar Association adopts policy that no ABA functions be held in clubs which exclude women or minorities.
Sept. 11, 1979	Senator Strom Thurmond writes letter to judicial nominee from Sixth Circuit on behalf of Senate Judiciary Committee, stating that " ... it is inadvisable for a nominee ... to belong to a social club that engages in invidious discrimination."
March, 1980	U.S. Judicial Conference adopts principle "that it is inappropriate for a judge to hold membership in an organization which practices invidious discrimination." Subsequently asks ABA Ethics Committee opinion on the matter. (Judge Kennedy was a member of the committee which recommended adoption of this principle by the Judicial Conference.)
Sept., 1980	Kennedy resigns from Sutter Club.
March, 1981	U.S. Judicial Conference passes resolution that the commentary to the Code of Judicial Conduct be amended to state that "it is inappropriate for a judge to hold membership in any organization that practices invidious discrimination."

Spring, 1983 — ABA Ethics Committee submits amendment to Canon 2 of Code of Judicial Conduct for vote at August meeting, but subsequently withdraws it. Amendment undergoes revision over ensuing months.

July, 1984 — U.S. Supreme Court decides Roberts v. United States Jaycees, holding that the Minnesota Human Rights Law required U.S. Jaycees to admit women members.

August, 1984 — ABA Commentary adopted by House of Delegates:

It is inappropriate for a judge to hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin. Membership of a judge in an organization that practices invidious discrimination may give rise to perceptions by minorities, women, and others, that the judge's impartiality is impaired. Whether an organization practices invidious discrimination is often a complex question to which judges should be sensitive. The answer cannot be determined from a mere examination of an organization's current membership rolls but rather depends on the history of the organization's selection of members and other relevant factors. Ultimately, each judge must determine in the judge's own conscience whether an organization of which the judge is a member practices invidious discrimination.

Sept. 15, 1986 — With extensive press coverage, California amends its Code of Judicial Conduct, Canon 2 to state:

It is inappropriate for a judge to hold membership in an organization, excluding religious organizations, that practices invidious discrimination on the basis of race, sex, religion or national origin.

May 4, 1987 — U.S. Supreme Court decides Rotary Club case. Justice Powell writes the opinion for a unanimous Court, holding that the California Public Accommodations Law bars male-only service clubs from excluding women from membership.

June 26, 1987	Amid substantial publicity about Olympic Club's membership policies, San Francisco City Attorney warns club that its policies violate California civil rights laws.
August 7, 1987	Kennedy writes urging Olympic Club to change its male-only policy (alludes to another conversation during prior week on the same subject).
Oct. 7, 1987	Olympic Club membership votes overwhelmingly to keep women out.
Oct. 22, 1987	Judge Kennedy resigns from Del Paso Country Club.
Oct. 23, 1987	Bork defeated in Senate.
Oct. 27, 1987	Kennedy resigns from Olympic Club. Department of Justice asks him to fly to Washington.
Oct. 29, 1987	Ginsburg nominated.
Nov. 2, 1987	San Francisco City Attorney sues Olympic Club for violations of California civil rights statutes.
Nov. 7, 1987	Ginsburg nomination withdrawn.
Nov. 11, 1987	Kennedy nominated.

APPENDIX B

TEXT OF AMENDMENT TO CANON 2
CALIFORNIA CODE OF JUDICIAL CONDUCT

(Adopted September 15, 1986)

"It is inappropriate for a judge to hold membership in any organization, excluding religious organizations, that practices invidious discrimination on the basis of race, sex, religion or national origin."

California Commentary

"Membership in an organization that practices invidious discrimination may give rise to perceptions by minorities, women and others, that the judge's impartiality is impaired. Whether an organization practices invidious discrimination is often a complex question to which judges should be sensitive. The answer cannot be determined from a mere examination of an organization's current membership rolls, but rather depends on the history of the organization's selection of members and other relevant factors."