Leadership Conference on Civil Rights

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STATEMENT OF BENJAMIN L. HOOKS, LCCR CHAIRPERSON, AND RALPH G. NEAS, LCCR EXECUTIVE DIRECTOR, REGARDING THE CONFIRMATION HEARINGS OF JUDGE ANTHONY KENNEDY

On the eve of the confirmation hearings of Judge Anthony Kennedy, President Reagan's nominee to the United States Supreme Court, the Leadership Conference on Civil Rights is concerned that the Senate fulfill its constitutionally mandated "advice and consent" role with the same care and thoroughness that marked its consideration of the Administration's first nominee to fill the vacancy created by the resignation of Justice Lewis Powell in June 1987. While the Leadership Conference has not taken a position on Judge Kennedy's nomination, we believe that his record raises concerns that require a close examination of the nominee's judicial philosophy before passing on his fitness to take a lifetime seat on the nation's highest court. In light of the haste in which the Senate Judiciary Committee has moved to hold hearings on this nomination, we are especially concerned that the process not be completed before all the relevant issues have been addressed and all interested parties have had adequate opportunity to have their views heard by the Committee.

The fact that six months have passed since Justice Powell's resignation is not a reason to rush the process, but rather the exact reason to assure that it is thorough. With the departure of a Justice who was universally recognized as the "swing vote" on critical constitutional issues of civil rights and individual liberties, the Supreme Court is closely divided on many constitutional issues of great importance to our society. The potential impact of the person selected to fill this vacancy has been recognized by members of the Senate, Administration officials and the public alike. The impact of the President's third choice will be no less than that of his first or second, and the high standards set in the first confirmation hearings must be met again.

In considering the nominee's judicial philosophy, close scrutiny must be given to his view of precedent and the role played by stare decisis in the deliberations of the Supreme Court. Nothing in Judge Kennedy's Ninth Circuit opinions or his pronouncements outside the court gives any indication of how he views the role of a Supreme Court Justice. Judge Kennedy's judicial philosophy cannot be fully ascertained by studying his cases, numerous as they may be, because as a lower court judge, he is bound to adhere to precedents set by the Supreme Court.

While we have not completed our review of his record, we are troubled by Judge Kennedy's views as expressed in a number of his judicial decisions involving issues of civil rights and women's rights. In cases involving voting rights, access to the courts to challenge housing discrimination, equal educational opportunity, and equal employment opportunity, Judge Kennedy has written or joined in opinions (1) imposing onerous requirements on persons claiming to be the victims of discrimination in order to establish violations of the Constitution or civil rights laws or (2) placing curbs on the remedies needed to redress fully discrimination that had already been established.[1]

Judge Kennedy's restrictive interpretations of rights and remedies in his judicial opinions are reinforced by some of his other public statements, e.g., his response to the Judiciary Committee on the question of his membership in private clubs stating that invidious discrimination may be limited to practices "intended to impose stigma on ... persons." Such a statement raises questions about whether the nominee has an accurate understanding of the history of deep rooted discrimination in this country, its persistent effects and the measures that the Congress and the courts have determined to be necessary to eliminate the vestiges of discrimination and provide opportunity to people who previously have been denied it.

Further, it should be noted that members of the Leadership Conference have concerns about other aspects of the nominee's record, including cases involving the rights of working people and trade unions. All of these issues warrant careful questioning of the nominee by members of the Committee, and answers that are less than complete and candid should not be acceptable.

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1 Cases that are of particular concern to us include Aranda v. Van Sickle, 600 F.2d (9th Cir. 1979); Topic v. Circle Realty, 532 F.2d 1273 (9th Cir. 1976); Spangler v. Pasadena City Bd. of Education, 611 F.2d 1239; AFSCME v. State of Washington, 770 F.2d 1401 (9th Cir. 1987); Gerdom v. Continental Airlines, Inc., 692 F.2d 602 (9th Cir. 1982) (en banc).

In addition to our substantive concerns about the nominee's views, the Leadership Conference has previously expressed our dismay with the choice of the hearing date. This is the shortest period between the nomination and start of the hearings for any of this President's nominees. In this short space of time, we have not completed our review of Judge Kennedy's entire record and we doubt whether Senators can feel fully prepared to discuss Judge Kennedy's judicial opinions numbering over 400, his many speeches, and the background of his active law and lobbying practice.

It is still unclear whether Senators have at their disposal all the relevant information with which to prepare for the hearings. In particular, assertions by the Justice Department that there were no communications between Judge Kennedy and the Administration regarding his judicial philosophy on issues or subjects that could come before the Supreme Court lack credibility, especially in light of the open political jockeying that took place before the Ginsburg and Kennedy nominations.

Even if the preparation time were adequate, in the hectic period just before adjournment, competing demands for the time and attention of Senators are likely to prevent at least some of the members of the Committee from giving these hearings their full, careful and sustained attention. For these reasons we call on the Committee not to foreclose the possibility of convening further hearings after the recess as necessary to complete its review and to hear testimony from interested parties.

The hearings held by the Judiciary Committee on the Bork nomination set a standard worthy of emulation in all future Supreme Court nominations. Those hearings helped educate all of us about the rights and responsibilities under our Constitution. They provided an appropriate inquiry into the nominee's belief in the role of the Supreme Court in safeguarding fundamental rights and liberties, without in any way intruding on the independence of the Judiciary. These functions must be served in Judge Kennedy's case as well. Full hearings would inform the Committee, the American public, and, not least, the nominee himself about the matters that underlie the great issues that come before the Court.

In our view the Committee can make an important contribution by continuing to follow the extraordinary high standard of fairness and thoroughness it established in the Bork nomination. It must create a complete record by which the Senate and the American public can decide whether Judge Kennedy has a commitment to equal justice under the law and whether he understands the role of the courts in protecting civil rights and individual liberties. It is on that record that the Leadership Conference must rely to complete our evaluation of the Kennedy nomination.

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