From the office of

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STATEMENT OF SENATOR ORRIN HATCH

THE NOMINATION OF JUDGE ANTHONY KENNEDY

Mr. Chairman. It is indeed an honor to welcome an individual who is eminently qualified to serve in the nation's premier judicial office. Fourteen years as a practicing attorney, twenty years as a professor of constitutional law, and more than twelve years on the circuit court that defines federal law for nine states and 37 million people have prepared Judge Anthony Kennedy well for the trust placed in him by President Ronald Reagan. Indeed as this hearing progresses, I think President Reagan's trust will soon be shared by the people of the United States.

As we all know, it would be difficult to find an aspect of American life that has not been touched by the Supreme Court. In approximately the time that Judge Kennedy has served on the Ninth Circuit, a President has resigned, the world's largest telecommunications company has disintegrated, rules for criminal trials have changed, and even a town's ability to display a creche during the holiday season have been established — all because nine individuals have found enduring principles in the Constitution.

But as we well know, it has recently become an issue whether the Supreme Court must find the principles for its decisions in the Constitution. Some legal scholars and even some judges have contended that judges need not base their decisions on the words of the Constitution. Instead they contend that judges may go outside the Constitution to decide cases on the basis of the judges' understanding of human dignity or some other vague and undefined principle. The problem with this argument is that it permits unelected judges to override the democratic laws created by the people without constitutional justification. For example, judges have overturned the capital punishment laws of 34 states even though the Constitution itself mentions the death penalty. This is known generally as judicial activism. In my mind, judges who take upon themselves to overrule the peoples' laws without clear warrant from the Constitution overstep their authority.

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Of course, not all judges are so bold. Most judges practice judicial restraint, which is another way of saying they refrain from using extraconstitutional principles to decide cases. The reason for judicial restraint is stated well by one distinguished jurist: "The imperatives of judicial restraint spring from the Constitution itself, not from a particular judicial theory. The Constitution was written with care and deliberation, not by accident. Its draftsmen were men skilled in the art and science of constitution writing... The constitutional text and its immediate implications, traceable by some historical link to the ideas of the Framers, must govern judges. Marbury v. Madison states the rule: 'It is apparent that the Framers of the Constitution contemplated that instrument as a rule for the government of the courts, as well as the legislature.'" This eminent jurist with profound respect for the Constitution is none other than Judge Anthony Kennedy in an address to the Canadian Institute for Advanced Legal Studies more than a year ago.

To those who classify judges who practice judicial restraint as conservative, Judge Kennedy has the best response. As he stated, judicial restraint is neither conservative or liberal, but a requirement of the Constitution and a natural predicate for the doctrine of judicial review.

Judge Kennedy is a champion of judicial restraint. It is easy to understand why he has won President Reagan's trust. And it is easy to understand why he will win the trust of the American people as well. After all, he will let the people govern themselves and refrain from imposing his own predipositions from the bench. If the people legislate a death penalty, for example, he will apply it because the Constitution is clearly no bar.

I could say many more laudatory things about this excellent American — he is a wonderful family man, he has a profound determination to fight crime with appropriate legal tools, he has devoted much of his life to education and teaching, and so forth — but perhaps the highest compliment a judge can receive is that he knows ours is a government of laws, not of men. Judge Kennedy deserves that compliment and more. He is a model of appropriate judicial restraint and will serve to remind our other judges of their duty to uphold the Constitution as written.

I look forward, Judge Kennedy, to your appearance before this committee and your continued service to our nation.

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