



Leadership Conference on Civil Rights

2027 Massachusetts Ave. N.W.
Washington D.C. 20036
202/667-1780

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Statement of the Leadership Conference on Civil Rights on the Nomination of Judge Anthony Kennedy to the Supreme Court of the United States

January 21, 1988

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The Leadership Conference on Civil Rights (LCCR), a coalition of 185 national organizations representing minorities, labor, women, the major religious groups, disabled persons, and older Americans, files this statement on the nomination of Judge Anthony Kennedy to the Supreme Court for the record of the Senate Judiciary Committee.

The Leadership Conference takes no position on whether the Committee should recommend the Senate consent to the nomination. The LCCR operates through consensus and there is not a consensus on his nomination. However, what is shared is a broad concern about both the Committee's process and the nominee's perceptions in one area. We write briefly, therefore, on these two matters.

1. As set out in a December 11, 1987 Statement of Benjamin L. Hooks, Chairperson, and Ralph G. Neas, Executive Director, the Leadership Conference believes that:

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." (Statement, copy attached, p. 3.)

* Deceased

"Equality In a Free, Plural, Democratic Society"

It continues to be our view that the December hearing was ill-timed both in following too soon after the nomination for full preparation and in attempting what is in nature an essentially probing and thoughtful process at a time of maximum distraction, pressure, and fatigue -- the concluding days of a congressional session. Many Committee members manifestly sought to do justice by the task before them. But true discussion and the development of lines of inquiry were victims of the calendar and the clock. Thus, for example, many important questions were put to the nominee in writing, following the hearings. This meant no opportunity for follow-up questions, once the nominee had responded, and this is particularly unfortunate since those responses contained some especially pertinent comments that should have been explored further.

For example, a question from Senator Simon (Q. 10) sought to ascertain the role Judge Kennedy feels "custom and tradition" should play in reviewing sex discrimination cases. In his response, Judge Kennedy said that "custom and tradition could [not] form the basis for legitimate employment criteria if those criteria were used as a pretext to discriminate on the basis of sex." This response raises several questions. The introduction of the notion of "pretext" suggests that under Title VII as in several other areas of the law, Judge Kennedy is wedded to the notion that intent to discriminate must be established before a violation can be found -- a notion that, as the Supreme Court has made clear in Griggs and subsequent cases, has no place in Title VII. Further, the implication of Judge Kennedy's answer is that there are circumstances under which weight requirements for flight attendants, all of whom are women, could be justified as nondiscriminatory and "legitimate," i.e. serving a business necessity. But he does not explain what those circumstances are and it is hard to conceive what they might be. The ability to question the nominee in person on these and other important issues might have yielded answers that would be of material assistance to Senators in voting on his nomination.

Moreover, statements by Chairman Biden and other Senators on the concluding afternoon of the hearing evidencing real concern about the nominee's depth of understanding of the situation of disadvantaged minorities, and women in this country were statements that should have been heard by the nominee and to which his response should have been solicited in a live face-to-face situation -- but that was precluded by the imminent ending of the Session and the Committee's inability to reconvene at the start of the new year. The "advice" component of the Committee's role vis-a-vis nominations entails advice not only to the President but also to the nominee before it as to the Committee members' understanding of the present nature of the society and the nature, scope and flavor of the problems in the society that will inevitably come before the nominee, embodied in the particulars of cases, if he is confirmed.

By way of illustration, many of the reservations held by civil rights organizations about the nominee stem from the crabbed construction that Judge Kennedy has given to civil rights statutes in such cases as TOPIC and Gerdam. One may hope that exposure to the views and questioning of members of the Judiciary Committee has given Judge Kennedy a better

understanding of the broad remedial purposes that Congress seeks to accomplish through these laws.

If more opportunity for dialogue had been provided, Senators might have received greater assurance that Judge Kennedy appreciates the needs that gave rise to the civil rights laws and is prepared to give practical content to his statement that "civil rights statutes should not be interpreted in a grudging, timorous or unrealistic way to defeat congressional intent or to delay remedies necessary to afford full protection of the law to persons deprived of their rights." (Answer to Q. 8 of Senator Simon).

2. As indicated in the earlier statement of Messrs. Hooks and Neas (Statement attached, p. 2), and in the preceding paragraphs of this statement, the Leadership Conference is troubled by views and the constricted approach manifested in Judge Kennedy's opinions in a number of cases involving civil rights and women's rights. We will not unnecessarily add to the record by elaborating on the disturbing aspects of the cases noted in that statement (p. 2, n. 1) which have been discussed extensively in testimony before the Committee by member organizations of the Leadership Conference and others -- cases concerning fair housing litigation, school desegregation, voting rights, and gender discrimination in employment. Rather, we would here simply associate ourselves with the eloquent statement of the President of one of our member organizations, and the Vice Chairperson of the Leadership Conference, Antonia Hernandez of the Mexican American Legal Defense and Education Fund (MALDEF), in her appearance before the Committee. We do not suggest that Judge Kennedy has a purpose to limit the rights and opportunities of minorities or of women. What we fear is that he lacks a full perception of their situation - the world as it looks from the perspective of a woman or of a person of color and as it acts upon them, the impact of barriers they face because they are dark-skinned or otherwise different from the majority, or because they are females seeking to live in equality with males.

The Leadership Conference agrees with Judge Kennedy that the "highest duty of a judge is to use the full extent of his or her power where a minority group or even a single person is being denied the rights and protections of the Constitution." (Answer to Q. 4 of Senator Simon.) For a judge to perform this "highest duty", s/he must have the capacity to understand the situation of someone whose background and circumstances are very different from the judge's own, and this capacity must be unimpeded not only by intentional or active bias, but by "indifference" or "insensitivity" (to use Judge Kennedy's words in response to a question from Senator Levin). Nothing less can assure that a Court whose membership includes Judge Kennedy will continue to perform its essential role of safeguarding fundamental rights and liberties.