TESTIMONY FOR

THE NATIONAL ABORTION RIGHTS ACTION LEAGUE

ON THE NOMINATION OF

ANTHONY M. KENNEDY

TO THE SUPREME COURT OF THE UNITED STATES

PRESENTED TO THE

SENATE JUDICIARY COMMITTEE

BY KATE MICHELMAN

EXECUTIVE DIRECTOR

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National
Abortion Rights
Action League

1101 14th Street, N.W., 5th Floor
Washington, D.C. 20005
202-371-0779

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Mr. Chairman, Members of the Senate Judiciary Committee, it is an honor to present you with the following testimony concerning the nomination of Judge Anthony Kennedy to the United States Supreme Court. I am Kate Michelman, and I present this testimony on behalf of the National Abortion Rights Action League, a grassroots political organization with a state and national membership of over 250,000 women and men. I am NARAL's Executive Director.

The June 26, 1987 resignation of Justice Lewis F. Powell, Jr. left the Supreme Court divided on many critical issues, including the constitutionality of state laws proscribing or limiting women's access to safe and legal abortion. In the almost 15 years since the Roe v. Wade decision, popular acceptance of women's rights has increased dramatically; yet many state legislatures have continued to deny that their female citizens ought to have the right to control their fertility.[1] Therefore, the willingness of the United States Supreme Court to protect women's reproductive liberty remains crucial to the health and independence of American women.

The nomination of Anthony Kennedy -- who believes that modern constitutional jurisprudence has improperly distorted the Founders' original design, and who has shown marked insensitivity to the nuances of gender-based discrimination -- should be unsettling to those concerned with the health and legal status of women in America. Much like Robert Bork, Kennedy aims his criticisms not at social injustice but at modern civil rights law; in his words, "judicial power without rational restraints is simply the exercise of raw will, the arrogance of power."[2] In practice, this rejection of what he calls "judicial activism" has amounted to an abdication of judicial responsibility to protect individual rights. Because for women reproductive freedom is an essential guarantor of all other rights and liberties, the National Abortion Rights Action League finds Anthony Kennedy a

deeply disturbing candidate for the United States Supreme Court.

A. The Constitutional Stakes Remain High

In the thirty-three years since the Brown v. Board of Education decision, a generation has been raised with the inspiration of a Supreme Court devoted to principles of racial equality and respect for individual integrity. And due to the vast improvements in women's legal status, many of us rightfully expect that our government will be rational, fair, and accountable -- that irrespective of our status as female citizens, we will be treated with respect.

The 1973 Roe v. Wade[3] and Doe v. Bolton[4] decisions were among the most significant and symbolic of these improvements. In Roe and Doe, the Supreme Court stated clearly that women's interest in privacy and personal liberty is constitutionally protected and that states may not abridge the traditional common law right to terminate an unwanted pregnancy without violating women's fundamental rights. In the fourteen years since then, in nearly two dozen cases, the Court has systematically reaffirmed that "few decisions are more personal and intimate, more properly private" than those concerning reproduction.[5]

Regaining the legal authority to make conscientious decisions about child-bearing, without fear and without degradation, radically altered the lives of American women. For the ability to control fertility determines whether women can govern their lives; without that power, women spend roughly half their years as slaves to biology and captives of chance. Even when women use the most reliable contraception available, conscientiously, statistics indicate that almost half of them will become pregnant at least once during their reproductive years, without intending to do so and in spite of their best efforts.[6]

And control over reproduction is more than just a matter of biology; it

empowers women with the knowledge that they need not live in fear of another pregnancy, that they have options. Seeing herself less as an incubator and more as an independent, capable person, each woman is free to develop her own sense of identity and self-esteem, and to lead a life of self-determination and dignity.

Often there is a misapprehension that support for reproductive choice, including abortion rights, is selfish, "unnatural," and incompatible with a concern for the well-being of families. In reality, quite the opposite is true. Women are the primary caretakers in our society, and enhancement of the well-being of women is integral to the stability and well-being of their families. Families benefit when women choose to have abortions in order to care adequately for existing children. Families benefit when women choose abortion in order to get education and employment that will allow them to become better providers. Women exercise their reproductive choices in an effort to create the quality family lives that should be possible for all people in our society -- women, men and children equally. They may choose to enlarge their families or not to bear children -- but it is their choice to make.

Because of Roe and Doe, women no longer need to submit to the hazards and terrors of illegal abortions, as history shows they inevitably do when safe and legal abortion services are denied.[7] Thus, both analytically and practically, the right to choose abortion is for women an essential guarantor of all other basic rights and freedoms.

However, our future as a nation devoted to the principle of respect for individual integrity is no longer clear; and for women this is especially frightening. If federal constitutional protection of reproductive decision-making were to be nullified, women could not be secure that state legislatures would respect their reproductive privacy. The states have proven intransigent on the

issue of abortion rights, despite the fact that the vast majority of Americans consistently supports women's privacy.[8]

NARAL's recent study of state abortion laws indicateed that if Roe is overturned, physicians in many states will face criminal abortion statutes with renewed enforceability.[9] Litigation will be necessary in most jurisdictions; in at least half of the states, access to legal abortion will be uncertain. In addition, new restrictive legislation is very likely to be enacted; states will vary substantially in the end, as they did prior to 1973, with many women again suffering the health hazards and cost of interstate travel, and septic abortions.

The array of restrictive laws now on the books leads us to fear that if the Supreme Court grants the states greater authority to limit abortion, the action will be taken as approval of such restrictions and as an invitation to enact them. Those state legislators who have been nominally pro-choice because they tend to favor the status quo may then support a restrictive law because they perceive the new Supreme Court standard as a strong suggestion of what is constitutionally appropriate.

Our basic rights are a matter of principle. They must never be made vulnerable to either the shifting tides of arbitrary public opinion or pork barrel politics. But beyond the fact that it is constitutionally impermissible for the basic rights of any group to be auctioned by a legislature, it is important to note that state legislatures have been and are still peculiarly undemocratic on the subject of women's reproductive rights.

State lawmakers consistently ignore their pro-choice majority constituents. As in the Southern state legislatures following Brown v. Board of Education, state legislative activity is often characterized by hostility to women's rights and a resentment of federal authority. Again like the civil rights struggle of Black

Americans, there has been an organized resistance to women's achievement of basic rights. The strategy of the anti-choice forces has been to sponsor a plethora of restrictive laws, and to flood the courts with legal challenges to Roe v. Wade.[10]

Those who oppose women's right to choose abortion often claim that it was undemocratic for the courts, rather than the legislatures, to have established this rule. In fact, the opposite is true. The history of Connecticut, where the anti-contraception law prompted the Griswold case, illustrates how a majority can fail, despite facially democratic procedures, to influence the legislature when reproductive issues are concerned. The nineteenth-century anti-contraception statute in Connecticut was first targeted for repeal in 1923. Repeal bills were unsuccessful in every session of the legislature for forty years, until finally birth-control proponents lost heart and tried another method -- the courts. Yet Connecticut had one of the lowest birth rates in the nation, indicating widespread use of contraceptives. The resolution of this paradox seems to be that the Catholic Church was powerful enough to threaten reprisals against legislators who were not themselves Catholic.[11] Thus, as late as 1965, Connecticut women had to go to clinics in New York or Rhode Island for contraceptives;[12] and until 1973 they went to New York for legal abortion services, with hazardous delay often resulting from the long-distance travel.[13]

The Founders were wise in not entrusting our liberties to one branch of government only. The system of checks and balances has, on the issue of reproductive privacy, assured that women would not be at the mercy of doctrinaire minorities who may from time to time control the legislative branch of government. The protection of reproductive rights by the Court is an appropriate exercise of their constitutional power.

Judge Kennedy has stated his belief that during the past generation an

"activist" federal judiciary has improperly distorted our constitutional structure. Like Robert Bork, he believes that it is the province of the legislative branch to define the attributes of a "just" society; if citizens find their rights violated by "unjust" laws, that injury should simply spur them to greater participation in the political process.[14] Yet, those who have witnessed with deep sadness and frustration the increasing feminization of poverty and the rejection of the Equal Rights Amendment, as two examples, find such reliance on the legislative process disturbing.

As the Court's 4 - 4 ruling of this past Monday, December 14 in Hartigan v. Zbaraz, regarding Illinois' restrictions on minors seeking abortion services, made clear, the role of the federal courts as protectors of individual rights and liberties is at stake. The Court is similarly split on a variety of other difficult constitutional questions, including remedies for race and sex discrimination, imposition of the death penalty, and the rights of gay people. The nomination of Anthony Kennedy warrants the same careful scrutiny given the rejected Bork nomination.

B. The Reagan Administration's Standards for Judicial Candidates Cause Concern

Careful scrutiny of the Supreme Court nominee is especially important in view of the Reagan Administration's stated goal of politicizing the judicial selection process. President Reagan has twice run for the presidency on a platform that pledged to " . . . work for the appointment of judges . . . who respect traditional family values and the sanctity of innocent human life."[15] From the outset, his administration has made good on that promise -- systematically selecting for the federal bench judges who are loyal to the Reagan social agenda and join his hostility to abortion.

Unlike administrative branch appointments, this purposeful skewing of the federal court system will be a lasting legacy because federal judges are appointed for life. At present, forty-four percent of all current federal judges (333 of 761) are Reagan appointees.[16]

The 1980 and 1984 elections have been falsely cited by the Administration as implying broad public support for Reagan's anti-abortion, anti-family planning policies; polls on reproductive choice consistently show strong public support for the right to choose abortion. Reagan's pledge to remake the Supreme Court was the centerpiece of his 1986 campaign efforts on behalf of Senate Republicans; the voters soundly rejected the candidates and the platform, and transferred control of the Senate back to the Democrats. The Bork confirmation battle showed that Americans overwhelmingly support personal privacy, reproductive choice, and a judiciary that will protect them.

Judge Kennedy stated in his testimony before this committee that he has no "set agenda" with respect to abortion rights. Without questioning his sincerity, NARAL suggests that there may nonetheless be significance in Kennedy's history of pro bono work for the Catholic Church,[17] and the endorsements he has received from such opponents of legalized abortion as Senator Jesse Helms,[18] the National Right to Life Committee and the Pro-Life Action Network. Each Senator should satisfy him or herself regarding Judge Kennedy's intellectual independence from the Justice Department's social agenda before voting on this nomination.

C. Understanding of Kennedy's Judicial Philosophy is Essential

Appointment to the Supreme Court of the United States is not an entitlement, it is a privilege to be conferred only after a demonstration of fitness in the fullest sense of the word. The burden of proof is on the nominee to show that his

judicial philosophy is appropriate for our nation at this time.

Perception of Kennedy as a moderate, compromise candidate must not be allowed to overshadow his actual record. The Bork hearings established that proper discharge of the Senate's duty to "advise and consent" requires a thorough review of the record -- and that takes time. The White House packaged Robert Bork as a moderate; a full 70 days of careful review proved that label wrong.

A United States circuit judge since 1975, Kennedy has ruled in more than 1400 cases, and has written 450 opinions. Generally, these opinions have been brief and narrow; he has carefully limited himself to the facts of the case before him, and has avoided broad statements and commentary. Unlike Robert Bork, his views appear primarily in these opinions -- there are no published articles and few speeches. As a result, again unlike Robert Bork, Kennedy's overall judicial philosophy has not been immediately obvious. To be fair to both Judge Kennedy and the American public, the Senate must take adequate time to analyze Judge Kennedy's work.

Although he has not had occasion to rule directly on questions of abortion, reproductive rights or personal privacy, Judge Kennedy's decisions in other areas do raise questions about how he views constitutional guarantees of equal justice and women's rights. Upon first reading, the language of his rulings in the civil rights area generally appears mild and receptive to claims of discrimination. Frequently, his decisions have turned on procedural issues, and he has avoided speaking harshly about the merits of a case. In rejecting the argument made by a civil rights plaintiff, he has quite often added that alternative reasoning might prove more promising. And, instead of throwing the case out of court, he has frequently sent it back to the trial court for reconsideration.

Yet, his overall record on race and sex discrimination, criminal law, labor, and other areas is quite disturbing. First of all, women and minorities are able

to prove their cases very rarely. In his court, their burden of proof is extremely high, and he often rejects the trial court's factual findings. Second, in certain of his controversial decisions, he explicitly -- and broadly -- bases the result on his view that marketplace economic forces and business practices are presumptively legitimate.[19] Although the current nominee lacks Judge Bork's harsh language, Kennedy's actions may prove comparable to Bork's in too many cases.

Judge Kennedy has avoided disclosing whether or not he believes that Roe v. Wade was correctly decided; his record shows him to be cautious and careful about speaking solely to those issues before him. Nonetheless, he has stated that justices should readily reconsider constitutional cases they believe to have been wrongly decided. Likewise, he has not disclosed whether he would be reluctant to overturn or erode Roe. Erosion could well be just as damaging as overturning Roe: either way, the health and well-being of millions of Americans would be adversely affected.

Moreover, the right to choose abortion does not exist in a constitutional vacuum. The Court is charged with producing a coherent theory of individual rights that applies not only to abortion and contraception, but also -- as only a few examples -- to forced sterilization,[20] state restrictions on marriage,[21] and interference with parental rights.[22] The principles that have vindicated abortion rights in more than a dozen Supreme Court cases also undergird the landmark decisions securing American citizens from arbitrary state interference with private relationships. Supreme Court abandonment of these principles would present the horrifying specter of our crowded, high-technology society stripped of its most elementary protection of personal integrity. It is incumbent upon each Senator to be sure that Judge Kennedy's views on the range of "fundamental" individual rights include adequate protection for the family and personal lives of twentieth century

Americans.

In addition, it must be noted that this area of law has continued to develop at a fast-pace in recent years. We are therefore unable to be reassured by predictions that the Court would hold back from overruling Roe. Without explicitly rejecting the right to privacy, or necessarily disturbing other constitutional principles in the family law area, the Court could effectively nullify women's reproductive autonomy in various ways. For example, the Court could alter the standard of review such that states would face a lesser burden of justification for their anti-abortion laws; alternatively, the Court could find an increased constitutional interest in fetal life, which states would be permitted to protect.

Of these two possibilities, the second is especially threatening to women because it could encourage, or even require, states to favor fetal interests over the interests of adult women in a host of extreme ways. State police power might be employed to ensure that women adhere to whatever medical, dietary, exercise, or scheduling regimes a third party deems in the best interests of a developing embryo or fetus. Recent state court interventions in medical contexts to order treatment that pregnant women patients emphatically do not desire,[23] and state criminal prosecutions for "prenatal child abuse"[24] -- on the grounds that a woman failed to follow her doctor's orders -- show that such concerns are not far-fetched.

Conclusion

The National Abortion Rights Action League wishes to impress upon each Senator the seriousness of their constitutional charge in this judicial confirmation process. Although it inspired the founding of our nation, Anthony Kennedy seems to minimize the importance of ensuring that government respects and guarantees the rights of individuals -- the counterbalancing role that the courts must play.

Given our nation's history of institutionalized injustice, he must be seen -- irrespective of his measured language -- as a reactionary when he champions the majoritarian process of state legislatures.

Although he has readily criticized the role of the courts, Judge Kennedy has concealed his views on particular lines of cases. True judicial conservatives honor precedent except in rare cases where they see no justifiable alternative. It is imperative to know how "conservative" Kennedy would be on the high court.

For women in our society, reproductive self-determination is an essential guarantor of all other freedoms. The National Abortion Rights Action League is deeply concerned that Judge Anthony Kennedy's record shows limited sensitivity to the systemic injustices facing women in our society, and the essential role that the federal courts have played and must continue to play in curbing the excesses of legislative majorities. If Anthony Kennedy were to create a majority that no longer recognizes and protects women's right to make personal decisions about childbearing without coercive state interference, his appointment would place the health and well-being of millions of American women and their families in jeopardy. Before making him an Associate Justice of the Supreme Court, therefore, each Senator must be satisfied that he or she has faithfully discharged the duty owed to the millions of female citizens whose lives and dignity are at stake. NARAL urges each member of the Senate to withhold consent to this nomination unless and until he or she is convinced that Judge Kennedy's commitment to the "rule of law" includes a commitment to equal justice that guarantees female citizens their fundamental rights. The Senate cannot afford to be wrong.

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ENDNOTES

1. See National Abortion Rights Action League, Opposition to Bork: The Case for Women's Liberty (October 1987). This report includes the results of NARAL's nationwide study of state criminal abortion laws. Copies are available from the NARAL Foundation.

2. "What is the Role of the Courts in Constitutional Interpretation?, Aug. 21, 1987, at p. 5 (Comments at the Ninth Circuit Judicial Conference).

3. 410 U.S. 113 (1973).

4. 410 U.S. 179 (1973).

5. Thornburgh v. ACOG, 106 S. Ct. 2169 (1986).

17. Hardin, Mandatory Motherhood at 18 (1974). In the chapter entitled "The Indispensible Backdrop," Hardin states that even birth control pills provide only 99% protection, which allows for half a million unwanted pregnancies each year. Less perfect systems have even greater failure rates, such that 97% perfect systems used properly over thirty years produce only a 60% probability of avoiding unwanted pregnancy.

7. Prior to the decision in Roe v. Wade, the mortality statistics correlated to septic abortions had begun to alarm health care professionals; for resorting to illegal or self-induced abortion is not only a humiliating and emotionally damaging experience for women, it is also dangerous and often fatal. In 1962 nearly 1,600 women were admitted to Harlem Hospital Center, in New York City, for incomplete abortions; 701 women were admitted to the University of Southern California-Los Angeles County Medical Center with septic abortions. In 1965, 20% of pregnancy-related deaths nation-wide were due to illegal or self-induced abortion. Six years prior to the Roe v. Wade decision, in 1967, it is estimated that 829,000 illegal or self-induced abortions occurred nation-wide.

8. Approximately 81% of Americans believe that decisions about abortion and childbearing should be left to the woman and her physician. Marttila & Kiley, Inc., "National Survey of Attitudes Toward the Supreme Court and the Bork Nomination," August 1987.

9. See The Case for Women's Liberty, supra note 1.

10. Memorandum by the American Civil Liberties Union Reproductive Freedom Project reporting on "Reversing Roe v. Wade Through the Courts," an Americans United for Life conference, held on March 31, 1984 in Chicago, Illinois. Copies are available from the NARAL Foundation.

11. C. T. Dienes, Law, Politics and Birth Control at p. 146 (1972).

12. Planned Parenthood League of Connecticut, Scrapbook, pages unnumbered (1983). On file with the National Abortion Rights Action League.

13. Alan Guttmacher Institute, Issue in Brief, "Abortion in the U.S.: Two Centuries of Experience," January 1982.

14. Unenumerated Rights and the Dictates of Judicial Restraint, Speech given at the Canadian Institute for Advanced Legal Studies, The Stanford Lectures, July 24 - Aug. 1, 1986, at p. 3-5, 21.

15. See National Republican Party Platform, 1980 and 1984, copies available from the NARAL Foundation.

16. Wall Street Journal, Dec. 2, 1987, at p. 28.

17. D. Willman, "Church lobbying reported," The Philadelphia Inquirer, Dec. 15, 1987, at 12-A.

18. C. Thomas, "Helms talks to Kennedy," Washington Times, Nov. 23, 1987, at D4.

19. See, e.g., AFSCME v. Washington, 770 F.2d 1401 (1985); Kaiser Engineers v. NLRB, 538 F.2d 379 (1979).

20. See Skinner v. Oklahoma, 316 U.S. 535 (1942)(invalidated the Habitual Criminal Sterilization Act, which provided for compulsory sterilization after conviction of a third felony involving "moral turpitude"; the Court noted that "marriage and procreation are fundamental").

21. Zablocki v. Redhail, 434 U.S. 374 (1978)(struck a law requiring court approval for the remarriage of any person under an obligation to pay child support; freedom to marry is "fundamental" and any state restrictions must undergo the strictest scrutiny); Loving v. Virginia, 388 U.S. 1 (1967) (struck a law against inter-racial marriage because, in violation of the equal protection and due process guarantees of the Fourteenth Amendment, it interfered with the "fundamental freedom" to marry).

22. See Stanley v. Illinois, 405 U.S. 645 (1972)(although not married to the deceased mother, a father had an important interest in the care and companionship of his children and so was entitled at least to a hearing before the state removed them for placement elsewhere); Moore v. City of East Cleveland, 431 U.S. 494 (1977) ("nuclear family" zoning ordinance that prevented a grandmother from living with her two grandsons violated their Fourteenth Amendment due process rights with respect to family privacy and libert

23. See, e.g., In re: A.C., No. 87-609 (D.C. App. Nov. 10, 1987).

24. See, e.g., People of California v. Stewart, No. M508197 (Cal. Mun. Ct. San Diego Cty., filed Sept. 26, 1986).