STATEMENT OF

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BEFORE THE

UNITED STATES SENATE COMMITTEE ON THE JUDICIARY

REGARDING

THE NOMINATION OF JUDGE ANTHONY KENNEDY

TO BE ASSOCIATE JUSTICE OF THE U.S. SUPREME COURT

DECEMBER 17, 1987

Mr. Chairman and distinguished members of the Committee, I am honored to testify today on behalf of the National Association of Criminal Defense Lawyers regarding the nomination of Ninth Circuit Judge Anthony Kennedy to be an Associate Justice of the U.S. Supreme Court.

NACDL is the only national bar association devoted solely to maintaining a fair balance between the power of the state and the rights of individuals in criminal cases, and to the independence and expertise of the criminal defense bar.

Immediately after President Reagan announced his intention to nominate Judge Kennedy, we canvassed our members who practice in the Ninth Circuit, for information about the nominee and his qualifications. At the same time, a committee of NACDL experts in major substantive areas of criminal law began an in-depth review of some 120 opinions Judge Kennedy has written or joined

in involving criminal justice issues. I am here today to present our findings to the Committee.

SUMMARY

In the area of criminal law, Judge Kennedy may be characterized as a moderate conservative. He approaches cases with a general presumption that the government is correct, but appears to entertain all arguments fairly and with an open mind.

Perhaps the most striking difference between him and the Administration's first nominee for this vacancy, Judge Robert Bork, is the apparent lack of any broad ideological bias or agenda. Although he has displayed an occasional eagerness to discount as "harmless error" some serious procedural lapses by the government against unsympathetic defendants, he appears generally able to treat procedural issues on their own merits, to analyze and decide them separately from issues of guilt or innocence, with appreciation for their importance in assuring a fair trial and safeguarding vital individual rights. During his tenure on the Ninth Circuit, he has reversed 30 percent of the criminal convictions he has reviewed, compared with a national average of 12 percent.

The strongest common thread among Judge Kennedy's opinions and among comments from attorneys who have argued before him is that he seeks the narrowest possible resolution of the issues, confining his rulings to the facts of the case and relying heavily upon precedent. He is, in other words, a sincere and credible proponent of "judicial restraint," in stark contrast to

the unrestrained, politically driven activism of Judge Bork. The caution and restraint with which he crafts his rulings may account for the fact that, in 90 percent of his opinions, there is no dissent, a higher rate of unanimity than for most of his colleagues.

His opinions display a commendable breadth of understanding of some fairly sophisticated criminal law issues. They are generally thorough, well-researched, and accurate and fair in their descriptions of controlling law and precedent.

On a personal level, criminal defense attorneys--both those who have argued before him in the Ninth Circuit and those who have studied under him at the McGeorge School of Law--give him very high marks for honesty, integrity, professionalism, cordiality, and fairness.

Viewed in the context of Justice Powell's record on criminal law issues, there is no clear indication that Judge Kennedy will shift the "balance" of the Court, either to the right or to the left. Areas of similarity include a general "tough but fair" approach to criminal cases, as well as substantive positions on major issues such as the death penalty and the exclusionary rule.

SPECIFIC AREAS

Fourth Amendment: There has been much attention given to Judge Kennedy's views on the issue of a "good faith" exception to the exclusionary rule. I must point out that, contrary to common public perception, Judge Kennedy did not create, or even endorse, the good faith exception in his dissent in U.S. v. Leon, no. 82-

1093 (January 19, 1983) (per curiam, unpublished).

In that case, the government did indeed ask the Ninth Circuit to recognize an exception to the exclusionary rule where the police relied in good faith upon a warrant later determined to be invalid. The court declined this invitation, and Judge Kennedy wrote a very brief dissent--where he did not find it necessary to discuss any notion of an exception to the exclusionary rule, because he found the search warrant valid. Explaining his disagreement with the majority on the question of whether the warrant was supported by adequate probable cause, he indicated that he would have given more weight than did the majority to the conclusion of experienced narcotics officers that certain patterns of behavior which might be viewed as innocuous were in fact drug related, stating that "whatever the merits of the exclusionary rule, its rigidities become unacceptably compounded when the courts presume innocent conduct when the only common sense explanation for it is on-going criminal activity." In reversing the Ninth Circuit (468 U.S. 897), the Supreme Court adopted the government's position, not Judge Kennedy's.

He did, however, address the good faith issue in another case. In U.S. v. Harvey, he suggested that, since the purpose of the exclusionary rule is to deter improper police conduct, the "rule is torn from its pragmatic mooring [if it is invoked where the police officer] acted not only in good faith but also with probable cause under exigent circumstances." 711 F.2d 144 (1983) (Kennedy dissenting from a denial of a rehearing en banc). He

has reiterated this "pragmatic" view of the exclusionary rule in his testimony at these hearings on Monday, adding, at the same time, that the current system "works much better than most people give it credit for."

Overall, he has supported suppression in 7 of 26 opinions where the issue was squarely reached, including a few particularly vigorous opinions in cases where he perceived an extreme police violation of the security and privacy interests protected by the Fourth Amendment.

Most notable is his dissent in U.S. v. Penn, 647 F.2d 876 (1980), where he said it was "pernicious" and "dangerous as precedent" for the police to have offered the defendant's 5-year-old son $5 to tell them where in the back yard his mother buried some heroin, stating that "indifference to personal liberty is but the precursor ot the state's hostility to it."

In another case, he ordered the suppression of heroin discovered through a warrantless rectal search, even though there was more than adequate probable cause to believe that the defendant was carrying heroin in his rectum as he came across the U.S. border. Kennedy criticized the search as unnecessarily intrusive, and expressed a desire to protect the privacy rights of innocent persons against such searches. U.S. v. Cameron, 538 F. 2d 254 (1976).

Generally, he appears to appreciate the value of the exclusionary rule in enforcing the Fourth Amendment--as long as it remains "workable"--and to support the Leon good faith exception (like Justice Powell). He may, however, be amenable to

some further trimming of the areas where the exclusionary rule is applicable.

Governmental misconduct: In general, where questions of prosecutorial or police misconduct are raised, Judge Kennedy tends to come down on the government's side in all but the most egregious cases.

For example, in one bank robbery case, Judge Kennedy held that the government's use of an informer to supply the getaway car, to supply money for the disguises, and buy drinks at meetings with the defendants did not rise to the level of entrapment. U.S. v. Dearmore, 672 F.2d 738 (1982).

And in a case charging defendants with possession of dynamite, he wrote that it was harmless error for the government to destroy the dynamite because there was no safe place to store it, as long there was some reliable secondary evidence to prove that the material destroyed actually was dynamite. U.S. v. Loud Hawk, 628 F.2d 1139 (1979) (Kennedy concurring). Despite the serious risks of abuse by government agents seeking to cover up bungled handling of evidence, Judge Kennedy expressed confidence that the courts would be able to weed out the occasional case of government bad faith.

On the other hand, he wrote a strong opinion condemning police excesses in McKenzie v. Lamb, 738 F.2d 1005 (1984). In that case, police officers recruited entertainer Wayne Newton to help them catch two men suspected of selling stolen turquoise jewelry. Even though the set-up failed to confirm their

suspicions, the undercover officers staged a dramatic, brutal arrest, during which they were asked for identification, and one officer respond by pressing the barrel of his gun between the suspect's eyes and saying, "that's about all [the identification] you need." The men turned out to be completely innocent. Judge Kennedy approved their civil rights action against the police, calling the police conduct "outrageous and unjustifiable."

And in a drug case, he joined in a dissent by Judge Hufstedler lashing out at the government's payment of a $350 "reward" for a "successful investigation" by an informant, a Mexican day laborer whose annual income was $400, citing "the risk of trapping not merely an unwary criminal but sometimes an unwary innocent as well." U.S. v. Hart, 546 F.2d 798 (1976).

Death penalty: As Judge Kennedy noted on Monday, he has never committed himself on the constitutionality of the death penalty. He has, however, written four opinions in death penalty cases, coming down on the defendant's side in two of them, on solid procedural grounds, evidencing a tendency to err on the side of granting relief in close cases.

Even assuming that his silence on the death penalty itself may be taken as approval of it, he would be no different from Justice Powell, who dissented from the Supreme Court's 1972 anti-death penalty ruling in Furman v. Georgia, 408 U.S. 238, and who sided with the Court majority in approving the new post-Furman crop of death penalty statutes in 1976.

Right to counsel: Judge Kennedy's record here is mixed. In one case involving an IRS summons to an attorney for fee information to be used against the attorney's client, he proved himself sensitive to important right-to-counsel issues by endorsing the theory that fee information should be protected by the attorney-client privilege where disclosure would implicate the client in the very criminal activity for which the advice was sought--a theory criticized by some conservative courts and commentators. U.S. v. Hodge and Zweig, 548 F.2d 1347 (1977).

But joining in a dissent in a prisoner rights case, he endorsed the position that the Sixth Amendment right to counsel should never attach before indictment, even where the prisoner was being punished beyond the administratively-allowable maximum for a new crime he was suspected of committing while in prison. U.S. v. Gouveia, 704 F.2d 1116 (1983). The dissent said the denial of counsel would cause no harm because "suspects are amply protected by the 'ethical responsibility' of the prosecutor and due process standards."

This notion is fundamentally at odds with the Sixth Amendment right to counsel and the functioning of the adversary system of criminal justice. It is ludicrous to suggest that a suspect, completely and indefinitely cut off from counsel, family, friends, and even other prisoners, can expect to have his rights "amply" represented by his sworn adversary. If the Framers had expected that the prosecutor could fairly serve as the guardian of the rights of the accused, they would have seen no need for the Sixth Amendment.

However, Judge Kennedy's joinder in this opinion may, viewed charitably, be attributable to judicial restraint on a novel legal question. In addition, the offending language, although showing an extraordinary lack of sensitivity to the right to counsel, was mere obiter dictum, not directly authored by him.

Confrontation clause: Of all the constitutional rights affecting criminal cases, this is the one that Judge Kennedy has been the most sensitive to, particularly where the trial judge has restricted the defendant's right of cross-examination.

However, in a very recent case, he ruled that the trial judge had properly disallowed certain cross-examination, because the defendant had already had an opportunity for "substantial" other cross-examination. Bright v. Shimoda, 819 F.2d 227 (1987). The dissenting judge vigorously criticized this attitude that the defendant had suffered no harm because he had already received "most" of the cross-examination he was entitled to, accusing Kennedy of "sacrificing individuals' rights in the name of judicial efficiency, or, to put it less politely, judicial expediency."

Miranda warnings: In the cases Judge Kennedy has decided involving Miranda warnings, he has taken a balanced approach, and has expressed no obvious hostility to the requirement for the warnings, indicating acceptance of them in one case by stating that they have become "central for law enforcement in every jurisdiction." U.S. v. Scharf, 608 F.2d 323 (1979). At these

hearings, however, he has said that the Miranda warnings are, like the exclusionary rule, "pragmatic" rules, which "if they are not working, should be changed."

State-of-mind standards: Judge Kennedy has shown himself to be a stickler for accurate jury instructions as to the level of intent required by statute. Twice he has reversed convictions where "willful blindness" instructions were given to the jury under statutes containing the stricter "knowingly" standard. U.S. v. Jewell, 532 F.2d 697 (1976); U.S. v. Pacific Hide and Fur, 768 F.2d 1096 (1985). One reassuring aspect of these two cases is that his rulings were not affected by any "white collar/blue collar" distinctions--i.e., by the fact that the defendant in one case was a drug dealer (Jewell), and in the other, a landfill operator charged under the Toxic Substances Control Act (Pacific Hide).

He condemned other, similarly flawed intent instructions, and reversed convictions, in U.S. v. Jones, 681 F.2d 610 (1982), and U.S. v. Erskine, 588 F.2d 721 (1978).

NACDL'S POSITION

In terms of experience, temperament and integrity, Judge Kennedy appears to be well qualified.

In terms the substance of his judicial rulings on criminal issues during his twelve years of service on the U.S. Court of Appeals for the Ninth Circuit, his views overall--although unabashedly conservative--appear to be well within the

"mainstream" of American jurisprudential thought.

Because of serious substantive misgivings, however, NACDL is unable to lend its affirmative support to the nomination. In the Fourth Amendment area, for example, NACDL has long condemned the notion of a good faith exception to the exclusionary rule. The Constitution unequivocally protects the right of the people to be free from unreasonable searches and seizures, and requires warrants supported by probable cause; it suggests nothing about exceptions for well-intentioned constitutional violations by judicial or law enforcement officers. NACDL believes that the courts should be less concerned with the exclusionary rule's "pragmatic moorings," and more concerned with its constitutional essence.

We similarly challenge his "pragmatic" approach to the Miranda ruling. To our urgent plea that its constitutional compulsion not be forgotten, we would add a note that the Miranda warnings are of greatest value to society's underclasses. When an Edwin Meese or an Ivan Boesky comes under investigation, he does not benefit from the warnings; he already knows his rights. The true value of the warnings is to give substance to constitutional protections for the uneducated and unsophisticated individual, and no other device can do this so well.

Another fundamental concern of NACDL's is Judge Kennedy's apparent presumption that law enforcement officers as a class are generally more wise, more credible, and more trustworthy than anyone else, particularly persons accused of crime. This mindset is reflected in opinions such as Leon, Gouveia, various

prosecutorial misconduct decisions, and Darbin v. Nourse, 664 F.2d 1109 (1981)--where he said he would be "gratified" rather than "shocked" to hear a prospective juror announce that law enforcement officers are generally more trustworthy and honest than prisoners. We do not think it appropriate for a judge to find bias so gratifying; it is the job of the judge, the magistrate, and the jury to maintain scrupulous impartiality, to cut through all preconceptions and stereotypes, to consider only the evidence formally presented.

Moreover, NACDL is deeply concerned about the possibility of a broader insensitivity to individual rights, as suggested by Judge Kennedy's approach to issues of gender discrimination. This problem is evidenced both in his opinions--such as AFSCME v. Washington, 770 F.2d 1401 (1987) (rejecting comparative worth approach to sex discrimination in employment cases under Title VII), and U.S. v. Gerdom v. Continental Airlines, 692 F.2d 602 (1982) (allowing "weight discrimination" against female airline flight attendants)--and in his long history of membership in private clubs which discriminate against women and minorities.

Nevertheless, in its entire 28-year history, NACDL has opposed only one federal court nomination--that of Robert Bork--and the doubts about Judge Kennedy's commitment to individual liberties are infinitessimal compared to those surrounding the Bork nomination.

For all these reasons, NACDL cannot support, but does not oppose, the nomination of Judge Kennedy to the Supreme Court.