STATEMENT OF DEWEY STOKES
BEFORE THE SENATE JUDICIARY COMMITTEE
ON THE NOMINATION OF ANTHONY M. KENNEDY
TO THE SUPREME COURT OF THE UNITED STATES

Good afternoon. Mr. Chairman, members of the Committee, I am Dewey Stokes, National President of the Fraternal Order of Police. The Fraternal Order of Police is the largest member organization of professional law enforcement personnel in the United States. Our organization is comprised of local lodges belonging to State lodges which, in turn, belong to the Grand Lodge, of which I am National President. I am also President of my local lodge (No. 9), Columbus, Ohio. The Fraternal Order of Police consists of almost 200,000 members including municipal police officers, state troopers, sheriff's deputies, federal law enforcement officers, and virtually every other form of law enforcement officers in the United States.

Our organization's purpose, as stated in our Constitution is:

> To support and defend the Constitution of the United States; to inculcate loyalty and allegiance to the United States of America; [and] to promote and foster the enforcement of law and order . . .

This is consonant with the preamble to our nation's Consitution in its reference "to insure domestic tranquility." Our membership consists of devoted men and women of all races, colors and national origins who share these common goals, and we are very grateful to be afforded this opportunity to appear before your distinguished panel to participate in this historic and constitutional process.

Mr. Chairman, I appear before this distinguished Committee today to express the support of the Fraternal Order of Police for the nomination of Judge Anthony M. Kennedy to become an Associate Justice of the United States Supreme Court. The Fraternal Order of Police is vitally interested in the appointment of a jurist with a sophisticated yet common sense understanding of and respect for our criminal justice system. We believe that Judge Kennedy is such an individual and I would like to take this opportunity to provide the Committee with some of our bases for our belief.

As you know, the Supreme Court spends nearly one-third of its time determining matters of criminal justice. Therefore, it is essential that a nominee's position on such issues be reviewed when considering his appointment to the Court. During his tenure on the Ninth Circuit Court of Appeals, Judge Kennedy has participated in hundreds of criminal law decisions. Such experience will enable him to add principled reasoning and insight into cases appearing before the Supreme Court.

Judge Kennedy is keenly aware of the severe toll that crime exacts upon its victims. In a recent speech delivered before the Sixth South Pacific Judicial Conference,[1] Judge Kennedy stressed that a crime victim suffers enormous psychological trauma and that the criminal justice system is often insensitive to the victim's needs. Daily, members of the Fraternal Order of Police work with victims of crime. We firmly

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[1]March 3-5, 1987.

believe that the system is never more insensitive to those victims than when a criminal goes free because a court has interpreted a defendant's constitutional rights in an overly expansive, hyper-technical way.

Judge Kennedy's decisions reflect his compassion toward victims of crime. He has repeatedly refused to engage in overly broad interpretations of the rights afforded criminal defendants by the Constitution. Judge Kennedy interprets the Constitution narrowly and applies its principles to the precise issues before him. The result is a reasoned, pragmatic decision that goes no further than necessary to dispose of the case at hand.

Judge Kennedy consistently applies this disciplined approach to all aspects of the criminal law. For example, Judge Kennedy is very cautious about allowing a defendant to invoke the Exclusionary Rule to prevent probative evidence from reaching the jury. He has written,

> If the exclusionary rule becomes an end in itself and the courts do not apply it in a sensible and predictable way, then one approach is to reexamine it altogether. We do not have that authority, but we do have the commission and the obligation to confine the rule to the purposes for which it was announced.
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> In this case the exclusionary rule seems to have acquired such independent force that it operates without reference to any improper conduct by the police. The rule is torn from its pragmatic mooring, for a premise of the decision is that the officer acted not only in good faith but also with probable cause under exigent circumstances."[2]

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[2]United States v. Harvey, 711 F.2d 144 (9th Cir. 1983), (Kennedy, J., dissenting).

In United States v. Leon,[3] a majority of the court found that a search warrant was not supported by probable cause and therefore excluded all evidence discovered in the search. The majority found the warrant to be invalid because information contained in the underlying affidavit was stale (over five months old). In his dissenting opinion, Judge Kennedy reasoned that although the initial information contained in the affidavit was five months old, the defendant had been observed in a continuing course of suspicious conduct which validated that information. Judge Kennedy found that the original information plus the continuing conduct, when considered as a whole, constituted probable cause. He would have allowed evidence discovered in the search to be admitted in the trial.

The purpose of the Exclusionary Rule is to deter improper police behavior.[4] Judge Kennedy recognized that there was no improper police behavior in Leon. The officers relied, in good faith, on a search warrant that was later held invalid. Judge Kennedy wisely refused to apply the Exclusionary Rule under such circumstances. The legal basis for his decision was strict adherence to controlling precedent, thus leading to the conclusion that probable cause existed. On review, the Supreme Court also recognized that the Exclusionary Rule should not apply where the officers had relied on the warrant in good faith. In a

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[3]No. 82-1093 (9th Cir. Jan. 19, 1983), rev'd, 468 U.S. 897 (1984).

[4]Harvey, 711 F.2d at 144.

landmark decision, the Supreme Court reversed the Ninth Circuit and created a new, "good faith exception" to the Rule.[5]

Judge Kennedy also exhibits principled reasoning and respect for precedent in determining the scope of Fourth Amendment protection. In United States v. Sherwin[6], the Court considered whether the defendant's Fourth Amendment rights were violated when FBI agents took possession of allegedly obscene materials prior to obtaining a search warrant. In that case, a trucking terminal received a shipment of 17 cartons, several of which were damaged. Pursuant to company regulations the terminal manager inventoried the contents of the damaged cartons. These contents appeared to be obscene, so the manager notified the FBI. When the FBI agents arrived, the manager voluntarily gave them copies of two of the books to take to the United State's attorney and the books were then used as a basis for obtaining a search warrant.

The defendant claimed his Fourth Amendment rights had been violated and sought to have the evidence seized excluded at his trial. The District Court suppressed the evidence. Judge Kennedy, writing for the majority, reversed the District Court and held that the defendant's rights were not violated. He concluded that the manager's inventorying of the cartons did not constitute a search by a government official (state action). He

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[5]The government did not appeal the issue of whether probable cause existed, so the Court based its decision on the assumption that probable cause did not exist.

[6]539 F.2d 1 (9th Cir. 1976).

also found that the manager's consensual transfer of the books to the FBI agents did not constitute a seizure. Because there was no search and seizure, the Fourth Amendment did not properly apply, and the evidence was admissible.

Such a decision protects the rights granted to a defendant by the Constitution. It does not however, unnecessarily expand the Constitution to afford protection against searches by private individuals. Legally sound decisions such as this are important to law enforcement officials, because they allow officers to take advantage of evidence discovered and presented to them by private citizens. Furthermore, such decisions prevent defendants from abusing the criminal justice system by attempting to exclude critical evidence obtained in a manner that caused them no harm other than to be caught in the commission of a crime.

On the issue of a defendant's Sixth Amendment right to confront witnesses, Judge Kennedy again authored a reasonable, common sense opinion that will greatly aid the prosecution of criminals. Barker v. Morris[7] involved two brutal murders committed by members of the Hell's Angels motorcycle group. Months after the crimes had been committed, a member of the group who had participated in the murders contacted the police. He described the murders and led police to the site where the bodies were hidden. This informant was dying of throat cancer and was expected to live only several weeks. Based on the information he

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[7]761 F.2d 1396 (9th Cir. 1985), cert. denied, 474 U.S. 1063 (1986).

provided, three other members of the group were indicted and the informant testified against two of the defendants at their preliminary hearing. The third man was absent from the hearing because he had not yet been apprehended. Due to the informant's impending death, his preliminary hearing testimony was videotaped.

The informant died before the third man was apprehended and brought to trial. Judge Kennedy allowed the use of the prior videotaped testimony in the third man's trial even though the defendant had not been present at the preliminary hearing to cross-examine the informant. Judge Kennedy found that the Sixth Amendment Confrontation Clause had not been violated because the videotaped testimony had substantial and specific guarantees of trustworthiness and reliability. This decision prevented a brutal murderer from being released just because he was fortunate enough to have evaded apprehension until the informant died.

Judge Kennedy has also authored well-reasoned decisions in the areas of the Fifth Amendment protection from double jeopardy[8] and the Seventh Amendment right to a jury trial in a civil rights action.[9] In addition, Judge Kennedy has been willing to uphold severe punishment when a defendant's criminal

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[8] Adamson v. Ricketts, 789 F.2d (9th Cir. 1986) (Kennedy, J., dissenting), rev'd, ___ U.S. ___, 107 S.Ct. 2860 (1987).

[9] Darbin v. Nourse, 664 F.2d 1109 (9th Cir. 1981).

behavior so warrants. For example, in United States v. Stewart,[10] Judge Kennedy justifiably upheld a life sentence without bail against a drug dealer. The dealer had shown utter disregard for the law by expanding his drug sales operation while out on bail. In Neuschafer v. Whitley,[11] Judge Kennedy upheld a death sentence where it was clearly authorized by statute and all questions regarding admissibility of evidence had been correctly resolved by the lower courts.

Although Judge Kennedy is tough on criminals, he strives to do justice. His experience as a private attorney includes representing defendants in criminal actions, sometimes acting as a public defender. This background enables Judge Kennedy to exhibit "compassion, warmth, sensitivity and an unyielding insistence on justice", which are the attributes he considers every good judge to possess.[12]

Furthermore, because of Judge Kennedy's reasoned analyses, which includes strict adherence to precedent, his decisions often result in a finding in favor of the defendant. Where police officers clearly commit an illegal search, Judge Kennedy will not allow the resulting evidence to be introduced at trial even if it means the prosecution cannot obtain a convic-

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[10] 820 F.2d 1107 (9th Cir. 1987), cert. denied, ___ U.S. ___, 108 S.Ct. 192 (1987).

[11] 816 F.2d 1390 (9th Cir. 1987).

[12] N.Y. Times, Dec. 2, 1987.

tion. United States v. Boatwright.[13] Judge Kennedy is even willing to author a dissent in favor of a defendant when he believes the majority is interpreting a mens rea requirement too broadly. United States v. Jewell.[14]

Judge Kennedy has authorized over 400 decisions. Among those opinions are decisions that have been adverse to virtually every interest group of which we are aware. Judge Kennedy's decisions, however, are predicated upon the law as it is required to be applied. Therefore, his opinions are not skewed in favor of any particular interest group. Judge Kennedy has decided cases in favor of criminal defendants yet we believe that his decisions are fair. Judge Kennedy has decided cases in favor of plaintiffs suing police officers,[15] yet we believe his decisions are sound. Over the course of a career as extensive as Judge Kennedy's, he has undoubtedly been required to decide cases adversely to almost every interest group (including law enforcement). We believe, however, that Judge Kennedy's decisions are notable only in their adherence to the law, controlling precedent and the Constitution as written.

Judge Kennedy's background as an attorney in private practice, as a professor of Constitutional Law, and as a Judge on the Ninth Circuit Court of Appeals, has certainly provided him with the skills necessary to be an outstanding Supreme Court

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[13] 822 F.2d 862 (9th Cir. 1987).

[14] 532 F.2d 697 (9th Cir. 1976), cert. denied, 426 U.S. 951 (1976).

[15] McKenzie v. Lamb, 738 F.2d 1005 (9th Cir. 1984).

Justice. He is well-equipped to handle the numerous and sensitive criminal law issues facing the Supreme Court. His decisions in the criminal justice area faithfully adhere to precedent, address only the precise issues facing the court, exhibit a well-reasoned and common sense analysis of the law and facts, and end with a just result. Judge Kennedy has consistently and unceasingly served justice as a public servant. The Fraternal Order of Police strongly believes he will continue serving in an exemplary manner as an Associate Justice of the United States Supreme Court, and we therefore urge that his nomination be approved.

Thank you very much.