

I CANNOT AGREE WITH ALL OF JUDGE KENNEDY'S OPINIONS. IN A FEW CASES -- SUCH AS HIS EXPANSIVE DISCUSSION OF SUBSTANTIVE DUE PROCESS IN THE CASE OF BELLER V. MIDDENDORF -- HE HAS SEEMED TO STRAY SOMEWHAT FROM THE PRINCIPLE OF JUDICIAL RESTRAINT WHICH HE USUALLY FOLLOWS. BUT EVEN IN THAT CASE HE REACHED THE CORRECT RESULT, AS LATER CONFIRMED BY THE SUPREME COURT'S DECISION IN BOWERS V. HARDWICK.

ON THE WHOLE, HIS JUDICIAL RECORD IS EXEMPLARY AND SOUND. ANY ATTEMPT TO SUGGEST THAT JUDGE KENNEDY IS NOT WITHIN THE SO-CALLED "MAINSTREAM" IS IMPLAUSIBLE. EVEN THOSE OF HIS OPINIONS WHICH MAY BE CRITICIZED BY HOSTILE WITNESSES -- SUCH AS HIS COMPARABLE WORTH OPINION AND HIS DECISION UPHOLDING THE NAVY'S RIGHT TO DISCHARGE HOMOSEXUALS IN THE BELLER CASE -- ARE CONSISTENT WITH RESULTS REACHED BY NUMEROUS OTHER FEDERAL APPEALS COURTS.

THE TEST FOR ME, THOUGH, IS NOT WHETHER HE IS WITHIN SOME SELECTIVE NOTION OF THE "MAINSTREAM"; IT IS WHETHER HE IS FAITHFUL TO THE CONSTITUTION AND THE LIMITS OF THE JUDICIAL ROLE.

FROM WHAT I'VE SEEN AND READ SO FAR, JUDGE KENNEDY SHOULD PASS THAT MORE IMPORTANT TEST. I HOPE HIS TESTIMONY AND HIS ANSWERS TO MY COLLEAGUES' QUESTIONS WILL REENFORCE THAT BELIEF.

The CHAIRMAN. Thank you, Senator.

The Senator from Ohio.

Senator METZENBAUM. Following Senator Humphrey's lead, Senator Simon asked me to put his statement in the record as well.

The CHAIRMAN. I am sure they will be compatible. Without objection, both will be entered.

[The statement of Senator Simon follows:]

## Opening Statement of Senator Simon

Judge Kennedy, I would like to welcome you and your family this morning.

If you are confirmed as the next Associate Justice of the Supreme Court, you will be asked to decide some of the most sensitive and controversial issues of American life. The Supreme Court has a special role in making good the promise of liberty in our Constitution. The words that say it best have been carved across the entrance to the Court itself: "Equal Justice Under Law." That is what the Supreme Court represents, and so should every Justice of that Court.

Unlike most of my colleagues on the Committee, I am not a lawyer, so I will not be asking about technical legal rules or doctrines. My concern is this basic one--will Judge Kennedy be fair? Will he be sensitive to individual rights? Will he safeguard the constitutional protections of all Americans? Will he pay particular regard to the rights of women, to the rights of minorities, sometimes ignored in our nation's history? Will he represent "Equal Justice Under Law"?

I want a nominee who is open-minded, not a man with a mission; a judge who will listen carefully to every argument and decide on the basis of law, not philosophy. I want a Supreme Court Justice who understands and applies not only the letter of the Constitution, but its spirit as well. These are the qualities I looked for in Judge Bork, and they are the criteria I will apply to any Supreme Court nominee.

Judge Kennedy, I have reviewed your record on the federal bench and I see some very positive signs. But I do have some concerns, and some questions. I look forward to your testimony.