

REVISED TESTIMONY

STATEMENT OF LARRY D. THOMPSON
BEFORE UNITED STATES SENATE JUDICIARY COMMITTEE
ON THE NOMINATION OF ANTHONY M. KENNEDY

Mr. Chairman, distinguished members of the Committee, my name is Larry Thompson. I am a partner in the law firm of King and Spalding in Atlanta, Georgia. From 1982 to 1986 I was U.S. Attorney for the Northern District of Georgia.

I would like to begin by thanking you for the opportunity to appear today before you. It is a very great honor to testify before this distinguished Committee on behalf of the nomination of Judge Anthony M. Kennedy to the United States Supreme Court.

I would like to concentrate on the area of greatest concern to me as a former federal prosecutor--law enforcement. For the vast majority of American people, the courts are by far and away the most important aspect of our administration of justice. People care about the courts because legal decisions on criminal justice issues affect them most. Nothing has a more direct and profound effect on them, their families, their neighborhoods and communities than crime and the fear of crime.

For society as a whole, the stakes are also enormous. The future of our young people, our cities, and our poor and disadvantaged is quite literally in the balance. Every year, billions of dollars and thousands of lives are lost in what we call the "war on crime"--but what might perhaps better be called the war that crime wages on us.

We as a society have come to realize this threat. The President and the Congress have worked together to strengthen our criminal law enforcement in such areas as drug abuse, organized crime, and white-collar crime. As a former federal prosecutor, I can tell you that laws such as the Comprehensive Crime Control Act of 1984 are now playing an important role in this fight.

While much of law enforcement involves the state court systems, the role of federal courts is very important. No matter how good the laws you pass here, they must be enforced in federal court. And the United States Supreme Court plays the most important role of all. Approximately a third of its caseload is criminal. Its word is essentially final on federal statutes and on the constitutional constraints on both state and federal law enforcement.

In recent years, some federal court decisions, including some rendered by the Supreme Court, have in my view missed the mark on criminal justice issues and have displayed a lack of understanding of the realities and difficulties of effective and fair law enforcement. This lack of understanding can upset the balance in our criminal justice system between the rights of the accused and the rights of law abiding citizens.

For example, a few years ago, in Florida v. Rover, a majority of the Supreme Court affirmed a lower court decision which allowed evidence of drugs found in a drug courier's suitcase to be suppressed, in my view, on exceedingly technical grounds. That decision was handed down during my tenure as United States Attorney, and I had to administer its mandate in the context of

increased drug trafficking at Atlanta's Hartsfield Airport, the nation's largest. In Royer, members of the smuggling detail of the Dade County police had detained on suspicion of transporting narcotics a very nervous-looking man with two heavy suitcases at the Miami airport. Among many other telling details, they had just observed him buy his ticket to New York under an assumed name, paying from a large roll of small-denomination bills. They had asked him to accompany them to a nearby room adjacent to the main concourse, to get away from the flow of business at the airport. Once there they had asked him to consent to a search of the luggage. Without replying, he got out a key to one suitcase and unlocked it, revealing marijuana. When he had explained that he couldn't open the other suitcase, he consented to the police prying it open. All told, 65 pounds of marijuana were found. The entire episode had lasted about fifteen minutes.

The majority held that the defendant's questioning in the adjacent room converted the encounter into an unlawful detention and tainted his consent to the search of his luggage. Justice Rehnquist had this to say about the events:

"The opinion...betrays a mind-set more useful to those who officiate at shuffleboard games, primarily concerned with which particular square the disc has landed on, than to those who are seeking to administer a system of justice whose twin purposes are the conviction of the guilty and the vindication of the innocent...Analyzed simply in terms of its 'reasonableness,' as that term is used in the Fourth Amendment, the conduct of the investigating officers toward

Royer would pass muster with virtually all thoughtful, civilized persons not overly steeped in the mysteries of this Court's Fourth Amendment jurisprudence...Would it have been more 'reasonable' to interrogate [the defendant] about the contents of his suitcases, and to seek his permission to open the suitcases when they were retrieved, in the busy main concourse of the Miami Airport...? If the room had been large and spacious, rather than small, if it had possessed three chairs rather than two, would the officers' conduct have been made reasonable by these facts? . . . All of this in my mind adds up to little more than saying that if my aunt were a man, she would be my uncle. The officers might have taken different steps than they did to investigate Royer, but the same may be said of virtually every investigative encounter that has more than one step to it."

Justice Blackmun had this to say about the police officers' encounter with the drug courier:

"In my view the police conduct in this case was minimally intrusive. . . . The special need for flexibility in recovering illicit drug couriers is hardly debatable. . . . In light of the extraordinary and well-documented difficulty of identifying drug couriers, the minimal intrusion in this case, based on particularized suspicion, was eminently reasonable."

As a former federal prosecutor, I admit that I sympathize with these points of view. The burden placed on effective law enforcement by seemingly hypertechnical rulings turning on sizes

of rooms and shapes of parcels is incalculable. It is not simply that the obviously guilty individual defendants go free. Equally serious is the burden placed on future police conduct by the complete absence of predictability or reasonableness in some areas of criminal law. It seems that we are sometimes requiring policemen and other law enforcement officials in the field to know what judges themselves do not yet know, and indeed cannot agree upon.

I have reviewed several of Judge Kennedy's major criminal law cases and speeches, and I feel confident as a result that he understands this perspective, and is deeply committed to a criminal justice system that is fair to both defendants and society.

Judge Kennedy has shown that he understands the magnitude of the problems we face. In 1984 he stated that "[t]he constitutional order is under tremendous attack by criminal conspiracies that operate and profit from sale of illegal drugs...Hundreds of millions of dollars from illegal drug transactions are surging through the economy...[These] [i]llegal profits can unravel the social fabric through corruption. Millions of dollars in cash are now available to bribe law enforcement officers, legislators, and judges." He urged his audience to help "make our public aware of the physical dangers of drug use and of the danger to the body politic from corruption by drug profits. Neither can be tolerated in a free society."

Judge Kennedy's decisions clearly show his understanding of criminal law realities. In Darbin v. Nourse, for example, he

made it clear that he does not accept any 'moral equivalence' between law enforcement officers and criminals:

"Were a juror to announce that most law officers, by reason of their profession and their oath, are trustworthy and honest, but that similar respect cannot be accorded to prisoners, I should be gratified, not shocked. Those principles are consistent with a responsible citizenship and are not a grounds to challenge the juror for cause." Darbin v. Nourse, 664 F.2d 1109 (9th Cir. 1981).

Judge Kennedy again showed this understanding of realities in the celebrated case of United States v. Leon. In that case, the United States Supreme Court created a new "good faith" exception to the exclusionary rule, where law officers rely in good faith on a search warrant that later is judged illegal. The Court decided this case assuming arguendo that the warrant in Leon was legally defective, because that issue had not been appealed or argued. Judge Kennedy's dissenting opinion below did not rest on a good faith exception, because--as the Supreme Court recognized in its opinion--a lower court judge was not well placed to create a major new doctrine. Instead, he argued that the warrant was valid: "The affidavit for the search warrant sets forth the details of a police investigation conducted with care, diligence, and good faith....One does not have to read many cases involving illegal drug traffic before it becomes clear exactly what was going on at the residences described by the officer's affidavit....Whatever the merits of the exclusionary rule, its rigidities become compounded unacceptably when courts presume

innocent conduct when the only common sense explanation for it is on-going criminal activity."

I think this opinion epitomizes Judge Kennedy's practicality and realism. I also think it is impressive that one of the Supreme Court dissenters in Leon, Justice Stevens, would have remanded that case to Judge Kennedy's court because he thought that that court would now agree with Judge Kennedy's "strong dissent" in light of intervening Supreme Court precedent. 468 U.S. at 961.

In conclusion, Mr. Chairman, I want simply to say that my admittedly limited knowledge of Judge Kennedy's record has led me to conclude that he would be a truly outstanding Justice of the Supreme Court. I believe that his outlook on criminal law is fundamentally in tune with the developing consensus on the Court and in society, and that he will help safeguard and advance our recent progress in the war on crime.