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Bcc: Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO])

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----- June 03, 2003

UNFAIR TREATMENT?

Kuhl Epitomizes 'Mainstream' of Appropriate Conduct for Judiciary

Forum Column

By John C. Eastman

Stellar credentials and a "well-qualified" rating from the American Bar Association, its highest, following her nomination to the 9th U.S. Circuit Court of Appeals should have made the road to confirmation an easy one for Judge Carolyn Kuhl.

But the path since Kuhl's nomination June 22, 2001 - two years ago - has been anything but easy. Indeed, for 21 months, she was not even given the courtesy of a hearing by the Senate Judiciary Committee, and a month after she finally did receive a hearing April 1, 2003, her nomination was "reported out" to the Senate floor on only the barest, 10-9 vote, with not a single Democrat siding with what Sen. Patrick Leahy, D-Vt., once called the "gold standard" of the ABA's well-qualified rating.

Her credentials are impeccable. Bachelor's degree in chemistry from Princeton, graduated cum laude. Law degree from Duke, graduated with distinction, inducted into the prestigious Order of the Coif, served as an editor of the Duke Law Journal. Law clerk in California on the 9th Circuit with then judge, now Supreme Court justice, Anthony Kennedy. High-ranking official at the U.S. Department of Justice, served as deputy solicitor general, deputy assistant attorney general and special assistant to the attorney general. Partner in one of Los Angeles' most prestigious firms, Munger, Tolles & Olson. Eight years of service as a judge on the Los Angeles Superior Court, in both the criminal and civil divisions.

And she's a woman, which means she accomplished all this at a time when women were just beginning to break through the glass ceiling that had for far too long limited opportunities for women in the legal profession.

So why all the opposition? Some self-proclaimed "women's groups" have apparently decided that this impeccably well-qualified woman is ... anti-woman! She might even, they fear, have conservative leanings.

There are three key pieces of "evidence" in this frontal assault on Kuhl. First, while a young, 29-year-old attorney at the Department of Justice with no policy-making authority, Kuhl helped urge the attorney general to reverse an Internal Revenue Service policy denying tax-exempt status to Bob Jones University.

She did so on two grounds, neither of which had anything to do with defending the university's racial policies. She believed that Congress, not an administrative agency like the IRS, ought to be making such determinations. She also was concerned lest the IRS use its power to define "public policy" to deprive tax-exempt status to all-girls schools (such as the high school Kuhl herself had attended) or all-women colleges.

Harvard Law professor Laurence Tribe, in a 1984 letter to Attorney General William French Smith, praised the quality of the brief submitted by the Department of Justice in the case. Tribe noted that he "thought it was a powerful and, in most respects, entirely compelling legal document."

Second, while serving on the Los Angeles Superior Court, Kuhl dismissed one of several counts in a case brought by a woman alleging the tort of intrusion after her doctor, while conducting a breast exam, had invited into the examining room a pharmaceutical company representative who was observing the doctor's work as part of his participation in an oncology mentorship program designed to improve care for breast-cancer patients.

Kuhl ruled that the remaining counts could proceed to trial, and the case ultimately settled with the plaintiff receiving an undisclosed sum.

Her ruling dismissing the intrusion count was well-grounded in existing precedent of the state Supreme Court, which had held that the tort of intrusion encompassed only unconsented-to physical intrusion.

Although her decision dismissing the intrusion count was reversed on appeal, state Court of Appeal Justice Paul Turner, who wrote the appellate opinion in the case, has acknowledged that "a strong argument can be made that [Kuhl] correctly assessed the competing societal interests the California Supreme Court requires all jurists in this state to weigh in determining whether the tort of intrusion has occurred."

Finally, Kuhl had a limited role in the drafting of the brief filed by acting Solicitor General Charles Fried in *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986), in which Fried, acting on behalf of President Reagan, urged the Supreme Court to overturn *Roe v. Wade*. Her name appears third on the brief, though, so abortion rights groups have attributed the position to her.

Most troubling about this attack on Kuhl is the disparity of treatment it represents. Charles Fried, whose name appears first on the brief, has acknowledged that he wrote the "overrule-Roe part of the brief" himself. Yet Fried's nomination as solicitor general later that year was approved unanimously by the Senate Judiciary Committee. He was confirmed by the full Senate by a voice vote, without debate, by several of the same Democrats opposing Kuhl, including Sens. Joseph Biden, D-Del., Edward Kennedy, D-Mass. and Leahy.

Moreover, the initial draft of the brief was written by John Rogers, whose name appears second on the brief, yet Rogers is sitting as judge on the 6th Circuit. Rogers was not even questioned about his role in the case during his confirmation hearing. He was approved by the Judiciary Committee and confirmed by the full Senate on a voice vote.

What are we to make of this opposition to Kuhl? For some reason, the confirmation bar seems higher for her than for other, equally qualified male nominees. Perhaps it is no surprise that a woman jurist who is not lock step in line with the abortion-on-demand policies of the National Abortion Rights Action League would not get its support - although Kuhl has vowed that she is "fully committed to following the precedent established by [Roe v. Wade] and would do so fairly and properly."

But it is somewhat surprising that Sen. Dianne Feinstein, D.-Calif., would go along - the same Feinstein who first was elected in the 1992 "year of the woman" with a campaign message of sending more women to the men's club of the U.S. Senate.

Or that Sen. Barbara Boxer, D.-Calif., elected that same year with a similar campaign message, would not at least support a vote on this extremely well-qualified woman nominee.

Is this the same Boxer who just nine months before Kuhl was nominated held a press conference decrying the "shameful way that women nominees to the federal judiciary were being treated" by the Senate and who had vigorously contended for years that every judicial nominee should receive an up or down vote?

"Whether the delays are on the Republican side or the Democrat side," she said in 1998, "let these names come up, let us have debate, let us vote."

Boxer finds Kuhl to be "outside the mainstream." Yet the overwhelming consensus among people who actually know her is just the opposite.

Two years ago, Vilma Martinez, former director of the Mexican American Legal Defense and Educational Fund and lifelong Democrat, wrote of Kuhl, "I consider her mainstream. ... She's careful and she's thoughtful. She's been an excellent Superior Court judge, and I think she will be an excellent 9th Circuit judge."

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With such impeccable credentials and widespread testament to a demonstrably stellar judicial temperament by litigators of every political persuasion, including leading environmental, trial and civil rights attorneys - traditional Democrat allies all - Kuhl epitomizes the "mainstream" of appropriate judicial conduct.

The real question for Boxer and Feinstein is whether they will listen to such longtime allies and permit a vote on this well-qualified nominee from their home state or whether they will heed the slanders being propounded by the National Abortion Rights Action League and erect a new glass ceiling against any woman nominee who does not fully support the most extreme of the group's positions.

John C. Eastman teaches constitutional law at Chapman University School of Law and is the director of the Claremont Institute Center for Constitutional Jurisprudence.

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June 03, 2003

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