THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release November 11, 1987

President Reagan announced today that he would nominate Judge Anthony M. Kennedy to be an Associate Justice of the United States Supreme Court. The President believes that Judge Kennedy's distinguished legal career, which includes over a decade of service as a federal appellate judge, makes him eminently qualified to sit on our nation's highest court.

Judge Kennedy, who is 51 years old, was born in Sacramento, California. He received his undergraduate degree at Stanford University in 1958, attending the London School of Economics during his senior year. He received his law degree from Harvard University in 1961. He has also served in the California Army National Guard.

From 1961 to 1963, Judge Kennedy was an associate at the firm of Thelen, Marrin, Johnson & Bridges in San Francisco, California. He then returned to Sacramento to pursue a general litigation, legislative and business practice, first as sole practitioner and then, from 1967 to 1975, as a partner with the firm of Evans, Jackson & Kennedy. Since 1965, he has taught constitutional law part-time at the McGeorge School of Law at the University of the Pacific.

In 1975, President Ford appointed Judge Kennedy to sit on the United States Court of Appeals for the Ninth Circuit, where he now ranks among the most senior active judges on the bench. Judge Kennedy has participated in over fourteen hundred decisions and authored over four hundred opinions, earning a reputation for fairness, open-mindedness and scholarship. He has been an active participant in matters of judicial administration. Judge Kennedy has earned the respect of colleagues of all political persuasions.

Judge Kennedy and his wife Mary reside in his hometown of Sacramento. They have three children, Justin, Gregory and Kristin.

Judge Kennedy represents the best traditions of America's judiciary. The President urges the Senate to accept this nomination in the spirit in which it is being made, and fill the vacancy that continues to handicap the vital work of the Supreme Court.

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The Heritage Foundation

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7 REASONS WHY JUDGE KENNEDY IS CONSERVATIVE
&
SHOULD BE SUPPORTED BY CONSERVATIVES

Lou Cordia, Director-Executive Branch Liaison

[A.] **IDEOLOGICALLY COMPATIBLE**

1) Has significant movement conservative supporters- One of the best ways to access a person's conservative credentials is to find out what movement conservatives know or have worked with him, and endorse him. Regarding Judge Kennedy, conservatives in the White House who have been involved in the judicial selection process, at Justice, conservative attorneys who have clerked for him, and a public interest legal group based in Sacramento which has known him for years---all have endorsed Judge Kennedy as conservative. It is worth noting that HUMAN EVENTS "Kennedy Appears to be Solid Across the Board", NATIONAL REVIEW, George Archibald of the WASHINGTON TIMES, Joe Sobran, and James Kilpatrick have all been with relative degrees supportive of Kennedy (see attached articles).

2) "Votes like Bork, writes like Powell"- Conservatives should look for achieving conservative results. In this vein, let me state that a long-time movement conservative attorney at the White House wholeheartedly agrees with the liberal Alan Dershowitz' often-quoted conclusion on Judge Kennedy.

3) Tough on crime- Kennedy places the rights of victims equal to, or before, the rights of criminals. A law-and-order judge. A pro-prosecution hardliner. Has upheld maximum prison sentences for sex offenders and drug dealers. Has ruled that the death penalty is constitutional.

4) Practices judicial restraint-Kennedy interprets the law; he doesn't legislate it. Believes in government of laws, not of men. Respects our constitutional separation of powers, and would not usurp authority beyond that invested in the judiciary.

[B.] **TECHNICALLY QUALIFIED**

5) Has extensive experience on the bench- Kennedy has served 12 years on the 9th Circuit, participated in over 1400 cases, and authored over 400 opinions. Not that this is a wholehearted endorsement, but he also received the highest rating from the American Bar Association for the Supreme Court.

6) Intellectually sound- Kennedy graduated Phi Beta Kappa from Stanford, from the London School of Economics, and cum laude from Harvard Law.

[C.] **ANOTHER KEY FACTOR**

7) 30 years of a Reagan Justice- Being only 51 years old, Kennedy could serve 30+ years on the Supreme Court. A way to "institutionalize" Reagan reform.

[D.] **REMAINING FUNDAMENTAL QUESTION** and **ANSWER**

Q: Some conservatives ask: "Who's to say that Kennedy will not move left once on the court?" Relating to this fundamental concern are a)where in Kennedy's background is there conservative activism? b)why would Senator Helms first say he would filibuster the Kennedy's nomination, Am. Life Lobby oppose Kennedy, Bruce Fein question Kennedy's conservatism, and Don Feder write a critical piece on Kennedy (see attached article)?; and c)why is there a chorus of liberal, as well as conservative, supporters?

A: We'll simply have to wait and see. But most importantly keep in mind, Bob Bork(the Ollie North-type hero of the conservative legal community) had conservatives questioning his future decisions on the Supreme Court "given Bork's history all over the ideological landscape."

If not Kennedy and not Bork, who can conservatives support for the Supreme Court?

Attachments(13)...also included are White House Talking Points on Kennedy.

President Reagan Taps Kennedy for High Court

In the wake of the Ginsburg nomination's going up in smoke, President Reagan last week turned to 51-year-old Judge Anthony M. Kennedy of the U.S. Court of Appeals for the Ninth Circuit to fill the Powell seat on the Supreme Court. Despite warm comments by some legal experts in the liberal community, Kennedy should not make the left feel all that comfortable.

After graduating Phi Beta Kappa from Stanford and cum laude from Harvard Law, Kennedy went into private practice, where he involved himself in a wide array of legal issues, ranging from tax and business matters to international law. In 1965, he joined the faculty of the McGeorge School of Law at the University of Pacific, where he still teaches constitutional law.

Appointed to the Ninth Circuit by President Gerald Ford in 1975, Kennedy has participated in over 1,400 decisions and authored more than 400 opinions. Nobody can complain that he has left no "paper trail."

While Kennedy may not be considered as outstanding as Judge Robert Bork by many conservatives, his decisions — despite some earlier concerns raised by members of the right-to-life movement—appear to be solid across the board. And the truth is that although Howard Baker preferred him over Douglas Ginsburg, Kennedy is the man that Atty. Gen. Ed Meese has consistently put on the "short list" of jurists that President Reagan has used in picking Supreme Court nominees.

Moreover, in virtually every area of interest to conservatives—from crime, to federalism, to civil rights, to original intent—Kennedy normally winds up on the right, i.e., conservative, side. And he has handed down landmark conservative rulings against comparable worth, the legislative veto and homosexual rights in the military.

In one crucial area of concern for many conservatives — abortion — the Kennedy record is not clear, but those who know him personally believe he is opposed to the practice by inclination and because of his religious outlook (Kennedy is a Roman Catholic).

The National Right-to-Life Committee in Washington last week issued a press release favorably disposed to Kennedy's nomination, and one respected federal judge, closely associated with the pro-life movement, actively backed Kennedy for the High Court post. He is Grover Rees, chief justice of American Samoa, who at one time played a crucial role at Justice in picking the President's conservative court nominees. Moreover, Judge John T. Noonan, a pro-life jurist also on the Ninth Court of Appeals, is known to have been favorable toward Kennedy's candidacy.

Why, then, is there any anxiety about Kennedy among conservative activists? The key reason is that Kennedy, unlike Bork, has never taken a public position on the Supreme Court's pro-abortion decision, *Roe v. Wade*, and there are some who fear, because of his now famous *Beller v. Middendorf* decision, that he could conceivably embrace, full-blown, the controversial "right-to-privacy" doctrine that was used by the High Court in rendering *Roe*.

Kennedy lost out to Ginsburg for the High Court nomination on October 29, partly because some conservatives, including Sen. Jesse Helms (R.-N.C.), were then concerned about the *Beller* decision. In that 1980 case, speaking

JUDGE KENNEDY

for a unanimous three-judge appellate panel, Kennedy actually upheld the constitutionality of Navy regulations mandating the discharge of persons who admittedly engaged in homosexual acts.

Handing down a major victory for the U.S. military, Kennedy stressed that the Navy had reasonable grounds to assume that heterosexual hostility to homosexuals would undermine both morale and discipline, and thus the release of homosexuals from military service was perfectly proper.

In so ruling, however, Kennedy refused to address the question that deeply concerns anti-abortionists: the controversial right-to-privacy doctrine. In view of its incorporation into *Roe v. Wade*, which struck down state anti-abortion laws as unconstitutional, and certain academic commentaries applying this "right" to homosexual conduct as well, said Kennedy, "some kinds of regulation of private consensual homosexual behavior may face substantial challenge. Such cases might require resolution of the question whether there is a right to engage in this conduct in at least some circumstances."

In other words, can the right-to-privacy doctrine, which was used in

(Continued on page 7)

Roe and is championed in some learned academic circles, be used to strike down certain laws against homosexual conduct?

While Kennedy posed the question, he chose not to respond to it, stressing that such a resolution was not required in the Navy case for a variety of reasons, including the fact that there were no criminal penalties involved — the offenders were just dismissed from the service — and that U.S. defense interests fall into a special category of cases which "outweigh whatever heightened solicitude is appropriate for consensual private homosexual conduct." (Kennedy's narrow holding, which insiders suspect was intended in part to help win support from liberal colleagues, was dictated also by strict constructionist legal doctrine.)

Indeed, Justice Rees, having read the case, says the Kennedy decision "provides no support at all for the proposition that Judge Kennedy approves of Court decisions in the privacy area."

Helms himself, who, after meeting with Kennedy last week, says he feels "comfortable about this guy," also says he is no longer concerned about the *Beller* case. Though Helms has not committed himself to vote for Kennedy, he says he is "favorably impressed—I liked his answers and I liked his voluntary comments."

In truth, Kennedy, after 12 years on the Appellate Court, has carved out a record that most conservatives would thoroughly embrace. Consider some of the key cases (as compiled by Justice):

The Exclusionary Rule — Judge Kennedy, dissenting in *United States v. Leon*, a drug-trafficking case, urged that a "good faith" exception to the exclusionary rule be held applicable in cases where police officers act in reasonable reliance on a search warrant that is ultimately found to be invalid by the courts.

"Whatever the merits of the exclusionary rule," wrote Kennedy, "its rigidities become compounded unacceptably when courts presume innocent conduct when the only common sense explanation of it is on-going criminal conduct."

So persuasive was Kennedy's dissent that the Supreme Court eventually reversed the majority opinion, and, in a major constitutional criminal procedure decision adopting a "good faith" exception to the exclusionary rule, agreed with Judge Kennedy's position.

The Death Penalty — Upholding a Nevada death sentence in 1987 (*Neuschafer v. Whitley*), Kennedy wrote: "Neuschafer argues that his sentence was disproportionate, apparently on the premise that the death penalty has not been decreed in other strangulation cases.... Neuschafer committed the crime while in prison and he had been previously convicted of other murders. There is no showing that Neuschafer's sentence was disproportionate to sentences received by other offenders in these circumstances.... There is no valid constitutional or federal objection to the imposition of the capital sentence."

Drug Crackdowns — Writing for a unanimous panel, Judge Kennedy upheld the conviction of a ring of marijuana smugglers running an operation from a coastal ranch in Oregon. The smugglers were unloading marijuana from foreign ships into amphibious vehicles and distributing it from the ranch. Using the same analysis adopted by the Supreme Court six years later in *California v. Cirailo*, Judge Kennedy found that helicopter overflights of the defendant's property for the purpose of gathering evidence of a crime were constitutionally permissible.

Pornography — Writing for a majority of the court sitting en banc, Judge Kennedy reversed the District Court and held that certain pornographic materials seized by federal officers could be admitted into evidence at the defendant's trial on charges relating to the transportation of obscene materials.

Civil Rights — Kennedy concurred in the *Spangler v. Pasadena City Board of Education* finding that there is no constitutional obligation to maintain a particular racial mix in the schools, only to refrain from segregation according to race.

Comparable Worth — In *AFSCME v. Washington State*, Judge Kennedy, overturning a ruling requiring Washington State to pay its male and female employes based on the comparable worth of their jobs, wrote: "Neither law nor logic deems the free market system a suspect enterprise.... We find nothing in the language of Title VII [to the Civil Rights Act] or its legislative history to indicate Congress intended to abrogate fundamental economic principles such as the laws of supply and demand or to prevent employers from competing in the labor market."

Separation of Powers — Ruling in *Chadha v. U.S.* that the one-house legislative veto is unconstitutional, Kennedy wrote: "The statute was enacted for the most humanitarian of considerations. Questions of constitutional power, however, necessarily require us to examine enactments from the standpoint of the framers...."

There may be more to Kennedy than meets the eye, but, as of now, we think that conservatives will wind up enthusiastically supporting him and that the liberals — with National Public Radio, People for the American Way, Teddy Kennedy, et al., leading the charge — will seize on some small past event or decision to crusade for his defeat.

Kennedy depicted as tough but fair in criminal cases

WT p. A4

By George Archibald
THE WASHINGTON TIMES

11-18-87

Supreme Court nominee Anthony M. Kennedy is considered a pro-prosecution hard-liner in criminal cases, but defense lawyers say they are encouraged by his appellate rulings when police act improperly.

Two fellow appeals judges who serve with him in California — Democrat and Republican appointees — told The Washington Times that he won't allow a minor technicality to destroy a case but will intervene even for a notorious criminal when the law requires.

Even a police officer whose department lost a ruling in Judge Kennedy's court sees a positive side.

"I don't think we have much to fear with him on the court," said John J. Cleary, a San Diego criminal lawyer who argued cases before the 9th Circuit appeals judge for almost a decade as a federal public defender.

"I've watched him closely," Mr. Cleary said. "Judge Kennedy approaches criminal cases with a certain amount of openness towards the facts and following precedent, whether case law or statute, even though he may not agree with it."

In a 1986 case involving illegal loansharking and fencing in Las Vegas, Judge Kennedy, with what he called "little enthusiasm," wrote the unanimous opinion of a three-judge panel denying use as evidence 5,000 items of stolen jewelry seized by police under a search warrant that was too vague.

The case, U.S. vs. Spilotro, was called an example of how Judge Kennedy was "forced by the interpretation of the law of the circuit to strike down a search warrant and exclude evidence, even for someone like [Anthony] Spilotro and his bad reputation," said Appeals Judge Arthur L. Alarcon, a Carter appointee to the Ninth Circuit Court of Appeals where he is a colleague of Judge Kennedy's.

"It was bizarre that the law . . . would have given the [police] officers more leeway without a warrant than they had when they were in possession of a warrant," Judge Alarcon said in an interview.

"It was the opposite of what the Supreme Court had tried to do," Judge Alarcon said.

JUDGE KENNEDY ON CRIME

On the "exclusionary rule":

"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 ongoing criminal activity."

— Dissent in U.S. vs. Leon, January 1983

"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 re-examine it altogether . . . 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."

— Dissent in U.S. vs. Harvey, July 1983

On the death sentence:

"There is no valid constitutional or federal objection to the imposition of the capital sentence."

— Decision in Neuschafer vs. Whitley, May 1987

On unlawful police seizures:

"Here the guns were unlawfully seized [by the police] . . . Applying the inevitable discovery doctrine here would, therefore, permit the government to ignore search requirements at any convenient point in the investigation, and would go well beyond the present scope of the doctrine. . . This we decline to do . . . The conviction must be reversed."

— U.S. vs. Boatright, July 1987

On harsh sentences for sex offenders:

"It was stipulated that [the defendant] took the pictures himself and engaged in sex acts with the minors involved. The district judge gave weight to testimony that the young victims of pedophiles may suffer severe psychological and emotional injury, and may become pedophiles themselves . . . The [15-year] sentence was harsh but not improper."

— U.S. vs. Meyer, October 1986

The Washington Times

In an earlier landmark case, U.S. vs. Leon, Judge Kennedy wrote a convincing dissent that persuaded the Supreme Court to modify its controversial exclusionary rule barring evidence collected with a faulty warrant.

In the 1983 dissent, Judge Kennedy refused to go along when his court overturned the conviction of a drug dealer because the search warrant was deemed technically invalid.

He argued that the evidence should be allowed if the officers reasonably believed they acted lawfully. In its later 6-3 ruling, the Supreme Court adopted Judge Kennedy's "good faith" rationale.

"Like most of us, he shares concern about the effects of crime on society," said Judge Alex Kozinski, another 9th Circuit colleague and former clerk to the Supreme Court nominee.

"He is not likely to throw out an otherwise valid conviction on some minor, technical transgression [by the police]. He's very sensible about these things," Judge Kozinski said.

But the 51-year-old jurist also is "very sensitive to the need for the system to play fair with the accused," said Judge Kozinski, a Reagan appointee.

"If he sees some fundamental unfairness that goes either to the way the person was treated, or that goes to the question of guilt or innocence, then he has no hesitation in reversing a conviction and requiring a new trial if that's what's appropriate."

In 1977, writing for the majority, Judge Kennedy reversed a robbery conviction because a co-defendant did not get a separate trial. In another case two years later, saying police lacked "a reasonable suspicion of criminal activity," he threw out evidence of drug-dealing found in an auto search.

In more than 12 years on the appellate court, Judge Kennedy has upheld maximum prison sentences for sex offenders and drug dealers, including a life sentence for a first offender whom Judge Kennedy said continued dealing drugs while he was in jail awaiting trial.

In 1980, he ruled that law enforcement authorities did not need warrants to conduct helicopter flights in search of drug crops, production, and shipment over land or water.

He has ruled that the death penalty is constitutional and, in specific cases, ruled for and against its use.

Last year, writing for a three-judge panel in Vickers vs. Ricketts, Judge Kennedy ruled that Supreme Court precedent required overturning an Arizona death sentence of a prisoner who killed his cellmate, because the trial judge failed to instruct the jury they also had the option of returning a second-degree murder verdict that carried a lesser penalty.

But last May, writing for another three-judge panel in Neuschafer vs. Whitley, he upheld the death penalty for a Nevada prisoner who strangled another inmate while serving a life sentence for raping and killing two teen-agers.

Even police whose procedures have led Judge Kennedy to throw out criminal cases have benefited from his decisions, said Sgt. Chris Buzart of the Paradise, Calif., police department.

In July, writing for a three-judge panel in U.S. vs. Boatright, the Supreme Court nominee overturned a firearms conviction of a drug dealer's brother from Paradise, on grounds that police collected the evidence improperly during a routine probation investigation of the drug dealer.

"We have no opinion whether it is fair or not," Sgt. Buzart said in an interview. "It's a complicated system. We just try to adjust to different circumstances.

"We look for how [such a court ruling] can help us. Our position is to try to train our officers accordingly," Sgt. Buzart said.

As a constitutional law professor with "a good historical perspective," Judge Kennedy works to understand viewpoints and reasoning from all sides of the adversary judicial process, said Clifford E. Tedmon, a Sacramento lawyer who handles criminal cases.

"He's a little conservative, but a very, very fine jurist," said Mr. Tedmon, who was a federal public defender when President Ford appointed Judge Kennedy to the appeals court in 1975.

"I don't think he comes into any case with preconceived ideas. I like to see judges who come in with an open mind, even if I don't win. If they give you a fair shake, that's really all you're entitled to," Mr. Tedmon said.

As an advocate of judicial restraint, Judge Kennedy is not "in the business of legislating" on the bench, Mr. Tedmon said. "I don't see Judge Kennedy as being out there shaking every cage to change society to comport with his own personal view of how the world ought to be," he said.

"The guy's an excellent judge."

JOSEPH SOBRAN

WT 12/1/87 pF3

Apprehensive for the wrong reasons?

Conservatives (including me) have been wary of the new Supreme Court nominee, Anthony Kennedy, for the simple reason that the usual chorus of liberals and leftists has approvingly contrasted him with Tyrannosaurus Bork. But occasionally it happens that this chorus of progressive-minded souls — the Hive, as I call it — lays its blessing on a good man. I believe this is such a case.

Nobody's career should be forever blighted just because he has been spoken well of in the liberal press. He should be entitled to a full and fair defense. Liberal approval may constitute a presumption against him, but a presumption is by definition rebuttable.

Joseph Sobran, a senior editor of National Review, is a nationally syndicated columnist.

Judge Anthony Kennedy

Let's recall that only last year, the Hive was favorably contrasting Robert Bork himself with the current judicial nominees, on grounds that Judge Bork was "distinguished" and "qualified," unlike the contemptible pygmies the president was allegedly serving up. It was an effective tactic, and that was all. But once Judge Bork had served his purpose and was actually nominated, he was transformed into an ogre.

So it has been with Judge Kennedy. As soon as it transpired that President Reagan had passed him up in favor of Douglas Ginsburg, we started hearing that Judge Kennedy was a "moderate," whereas Judge Ginsburg was "another Bork" — it having been established by then that a Bork was a terrible thing to be. And now that Anthony Kennedy himself is actually a nominee, the tune is beginning to change: the National Organization for Women has labeled him Insensitive to Women's Issues.

Is there anything in Judge Kennedy's record that should give us pause? Well, some conservatives cite his opinion in the case of Beller vs. Middendorf, which concerned the Navy's right to expel sailors for sodomy. He upheld the Navy's right to do so. But his conservative critics charge that he upheld the "right to privacy" in his opinion in the case.

Let us look a little closer.

What Judge Kennedy actually said, in the passage in question, was this: that given certain Supreme Court precedents, "we can concede arguendo" — that is, for the sake of argument — "that the reasons which led the court to protect certain private decisions intimately linked with one's personality . . . and family living arrangements beyond the core nuclear family . . . suggest that some kinds of government regulation of private consensual homosexual behavior may face substantial constitutional challenge."

But, he went on, the specific cases in question were not criminal cases: Their scope was much narrower. Nobody was being sent to jail; the Navy was merely trying to lay down a code for its personnel. And it is perfectly appropriate for such a code to be broader than criminal prohibitions.

So he was not endorsing the "right to privacy," but was rather anticipating the argument that might be made from it. In his typical fashion, he tried to keep the argument on a narrow and specific ground and avoid making needlessly broad assertions of unqualified rights. If only Justices Warren, Douglas and Blackmun had been of the same mind, constitutional law wouldn't be in the mess it's in today.

The $64 dollar question is whether Judge Kennedy, as Justice Kennedy, will resist becoming another Harry Blackmun — another heartland conservative who, when he goes to Washington, miraculously "grows" into a liberal, in return for favorable publicity and social acceptance among those who count. There is, unfortunately, no reliable way of predicting.

But in Judge Kennedy's case, the indicators are good. He is an intelligent, cautious, level-headed man who gives the impression of being hard to seduce. That's about all we can ask. He looks like a good bet.

James J. Kilpatrick

Judging Judge Kennedy

WP 12/1/87 [A21

The Senate Judiciary Committee will begin hearings on the nomination of Judge Anthony Kennedy on Dec. 14. If all goes well, the Senate will vote in late January and Kennedy will take his place on the court in time for the oral arguments of Feb. 22. By that time the court will have heard more than half the cases set for argument at this term, but better late than never.

So far, the only influential voice raised against Judge Kennedy is the voice of the National Organization for Women, but witnesses for blacks and for homosexual groups probably will testify in opposition. Their objection is that by his vote in certain cases before the 9th U.S. Circuit, Kennedy has shown an insensitivity to civil rights.

The objection is wholly without merit. During his 12 years on the circuit bench, Kennedy has written more than 400 opinions. Four of these have dealt importantly with the civil rights of minorities. In each instance, Kennedy acted in accordance with well-established precedents.

The leaders of NOW are especially upset by Kennedy's 1985 opinion in the comparable worth case from Washington State. The case arose in 1974 when the state commissioned a study of its employment practices. A consultant looked at 62 job classifications primarily filled by women and 59 classifications predominantly held by men. Then he set up a complex rating system by which each job was to be evaluated. In the end he concluded that scores of positions were of "comparable worth." For example, the job of a laundry operator (female) was comparable to the job of truck driver (male) and therefore should be paid at the same rate.

When the state failed immediately to adopt this novel proposition, a union representing state employees brought suit. A federal district judge held that the state had violated the Civil Rights Act of 1964 by intentionally discriminating against women. The state appealed to the 9th Circuit, where the opinion of the lower court was reversed.

Judge Kennedy, speaking for a unanimous panel, found that the disparities were simply the consequence of the marketplace. The state had not been motivated by sex-based considerations. Absent such evidence, he said, law does not permit federal courts to intervene in a state's system of compensation. Kennedy's opinion was a straightforward restatement of elementary law.

A second case involved the Navy's action in honorably discharging one woman and two men on their own admission of homosexual relations while in service. The three sued separately, charging violation of their civil rights. The sole question before the court was whether a naval regulation prohibiting personnel from engaging in homosexual conduct should be nullified. Said Kennedy:

"In view of the importance of the military's role, the special need for discipline and order in the service, the potential for difficulties arising out of possible close confinement aboard ships or bases for long periods of time, and the possible benefit to recruiting efforts, we conclude that at the present time the regulation represents a reasonable effort to accommodate the needs of the government with the interests of the individual."

Kennedy went out of his way to observe that he and his colleagues were not passing on the wisdom of the Navy's rule. That is not their function. The regulation says that, except in rare instances, homosexuals "cannot be tolerated in a military organization." The rule "is perhaps broader than necessary." In other, nonmilitary contexts, such a rule might infringe constitutional liberties. Nothing in the opinion suggests a callous disregard of the civil rights of homosexuals generally.

In a third case, Kennedy wrote a concurring opinion agreeing that after nine years of desegregation, Pasadena, Calif., was entitled to an end to judicial supervision of its schools. In a fourth he upheld a judgment against a small town in California for discriminating against a Mexican-owned restaurant that sought a liquor license.

A close reading of the four cases persuades me that Kennedy is a careful, methodical, unspectacular jurist. If these cases are the best evidence that liberals can cite against him, they have no case at all.

HERE COMES THE JUDGE

WITH TWO STRIKES against him, President Reagan decided to play it safe: he nominated Anthony Kennedy, a so-called moderate conservative, to fill the vacancy created by Justice Lewis Powell's resignation last July.

Conservatives are understandably uneasy about a nominee voted Most Easy to Confirm. And Kennedy's nomination has gathered some peculiar accolades, including one from Laurence Tribe, the Democrats' pet constitutional scholar. In public, most anti-Bork groups are taking a wait-and-see attitude, but off the record they display a suspicious lack of venom toward the new nominee. "Kennedy is non-ideological," an ACLU staffer told me in explaining why the ACLU may well watch this fight from the sidelines. "Even though he rules against us a lot. He has a much greater respect for precedent [than Bork] and he doesn't subscribe to the original-intent scheme for voiding rights." "I don't have the impression he's an ideologue like Bork," agreed a lobbyist for Planned Parenthood.

Kennedy, appointed to the federal bench by Gerald Ford in 1975, has gained a reputation as a judge of integrity who values collegiality and sticks closely to the facts of a case. "It's like the second coming of Warren Burger," says Mike McDonald of the conservative Washington Legal Foundation. The lukewarm reception Kennedy has met in some right-wing circles comes in part from lingering disappointment over the Bork defeat. Judge Bork was one of the few conservative legal scholars who's become a crossover hit with conservative activists. "I've been waiting to see Bork on the Court since 1975," grouses McDonald. In the current environment, where intellectual pre-eminence is a political liability, it's not surprising that Reagan's new choice is less well known and generates less enthusiasm.

As a lower-court judge, Kennedy has been bound by Supreme Court precedent. So, of course, was Judge Bork, but, unlike Bork's, Kennedy's opinions breathe no hint of hostility toward the long line of Warren Court "activist" decisions usurping local authority on issues like crime, education, and, of course, abortion. "His opinions give no sense that he was intellectually engaged, and therefore repelled, by the received wisdom handed down by the Court," notes McDonald.

The skepticism on the Right, and the premature rejoicing on the Left, center on the decision Judge Kennedy rendered in 1980 in *Beller* v. *Middendorf*. Writing for the majority, Kennedy ruled that the Navy may exclude homosexuals, but said that the right to privacy may confer constitutional protection on gays in other contexts. Ken Cady, a writer for the gay newspaper the *San Francisco Sentinel*, was sufficiently heartened by the rhetoric in *Beller* to claim that Kennedy would probably provide the fifth vote for overturning *Hardwick* v. *Bowers*, the case upholding a Georgia law barring consensual sodomy. "He went out of his way to indicate that a case like *Hardwick* presents an entirely different issue . . ." wrote Cady. "He wouldn't have gone to that trouble if he wasn't trying to tell us something. Apparently Ed Meese and his homophobic allies [who supported Ginsburg over Kennedy] saw it the same way."

Actually, of course, Ed Meese and his Homophobic Allies aren't singing the blues over the nomination of Kennedy, who, after all, was on the Justice Department's short list of Supreme Court nominees. Conservatives in the Administration argue that Kennedy was simply salting his opinion with neutral rhetoric to persuade other, more liberal judges to join him. The language of the opinion supports that interpretation. "We recognize, as we must," Judge Kennedy wrote, "that there is substantial academic comment which argues that the choice to engage in homosexual action is a personal decision, entitled, at least in some instances, to recognition as a fundamental right and to full protection as an aspect of the individual's right to privacy. . . . some kind of government regulation of private consensual homosexual behavior may face substantial constitutional challenges." Given the current convoluted state of constitutional jurisprudence, that's a pretty good bet.

A FEW PRO-LIFE groups are also hot and bothered by the fact that, in *Beller*, Kennedy cites *Roe* v. *Wade* without expressing disapproval of it. American Life League, which frequently attacks other pro-life groups for ideological deviations, has announced it will mount a grassroots campaign against the nomination unless Kennedy publicly promises to overturn *Roe* v. *Wade*. "To have gone this far and end up nominating someone who is a question mark to us is an abdication of the Republican platform and an embarrassment to the President," says Judy Brown, the group's president. Jack Fowler of the Ad Hoc Committee in Defense of Life is less vehement, but still skeptical: "We're not out beating the band [for Kennedy]," he says. "We got our clocks cleaned running out for Ginsburg with no proof." And, breaking with the National Right to Life Committee (which endorses Kennedy), the board of the New Jersey Right to Life Committee passed a formal resolution urging the NRLC "to refrain from any action on behalf of any candidate whose position on abortion is unknown or ambiguous."

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Miss Gallagher is NR's new article editor.

GALLAGHER
(Continued from page 33)

Other pro-life conservatives are more optimistic. "We've cited *Roe* v. *Wade* without disapproval ourselves in briefs for the court if it will help us win the case," says one pro-life lobbyist. "That's just what lawyers do." The consensus among pro-lifers appears to be that Kennedy is a much better choice than Ginsburg. Though Kennedy has been tagged a moderate, his nomination was originally pushed by many strong conservatives in the legal community, including a bevy of his former law clerks, such as Judge Alex Kozinski and former Justice Department official Carolyn Kuhl. *Roe* v. *Wade* is, as Judge Bork said, unconstitutional, and there is a widespread feeling among conservatives that any judge committed to interpreting the text of the Constitution will vote to overturn it. "The choices on the short list ranged from good to very good," says the legal conservative. "The worst you could say about Kennedy is that he's good."

The head-scratching, Right and Left, prompted by Kennedy's nomination reflects the new political realities. Democrats have succeeded in politicizing the tone of the judicial process, but they haven't worked out the mechanical details. How do you determine the ideological reliability of a judge as soft-spoken as Kennedy? Judges aren't yet willing to campaign for office. The information gap is filled by rumor, innuendo, and group affiliation. So I listened to conservatives worry out loud that no candidate supported by the *New York Times* and the *Washington Post* could possibly be worth voting for, while Bork-bashers wondered what Kennedy-supporters like Senator Helms and Senator Hatch know that they haven't yet ferreted out. Lack of information has also led to the spectacle of innocence-by-association, wherein Kennedy gains from being known as Howard Baker's candidate and from having been a Ford (rather than a Reagan) appointee. It also probably doesn't hurt that he was never a featured speaker at a Federalist Society convention.

But the anti-Bork groups that have embraced Kennedy under the assumption that what's bad for Ed Meese can't be all bad may be in for a little surprise. Already some Hispanic groups claim to have noticed Kennedy is "insensitive" to ethnic discrimination, and Alan Dershowitz has denounced Kennedy as a judge who "reasons like Powell but votes like Bork." But it's probably too late for left-wing groups to change their minds on Kennedy even if they want to. Having designated the Bork nomination the litmus test of the decade, they can't very well threaten to sink Democrats who obediently opposed Bork and now want to vote for Kennedy. And the prevailing sentiment on Capitol Hill seems to be to put the battle behind and get on with business. As one pro-life lobbyist told me, "I think the senators, including Joe Biden, want to declare victory and call it a day." And thus concludes the strange tale of how one of the most conservative judges on the Ninth Circuit was declared an honorary liberal and in consequence will probably become the next Associate Justice of the Supreme Court. □

Arlen Specter

Howell Heflin

7 endorse Kennedy; opposition invisible

VT 12/22/87 A5

By Linda Ponce
THE WASHINGTON TIMES

Judge Anthony Kennedy was one vote away last night from assuring Senate Judiciary Committee endorsement for his Supreme Court nomination.

Seven of the committee's 14 members said yesterday they would vote for Judge Kennedy — including five who voted against Judge Robert Bork.

Four others said they were leaning toward voting for Judge Kennedy.

The other three remained undecided and no one has declared opposition, keeping alive the possibility of unanimous approval when the committee votes the nomination out after the Senate recess ends in late January.

Until yesterday, only two senators had declared themselves.

Republican Arlen Specter of Pennsylvania and Democrat Howell Heflin of Alabama, both Bork opponents, announced late last week they favor Judge Kennedy, 51, to succeed Associate Justice Lewis Powell, who retired in June.

The undecideds were Chairman Joseph Biden, Delaware Democrat, and Sens. Edward M. Kennedy, Massachusetts Democrat, and Gordon Humphrey, New Hampshire Republican.

Others committed to vote for the nominee are Democrats Dennis DeConcini of Arizona, Howard Metzenbaum of Ohio and Patrick Leahy of Vermont, and Republicans Orrin Hatch of Utah and Strom Thurmond of South Carolina.

Listing themselves as probably in favor were Republicans Alan Simpson of Wyoming and Charles Grassley of Iowa along with Democrats Robert Byrd of West Virginia and Paul Simon of Illinois.

The undecideds were Chairman Joseph Biden, Delaware Democrat, and Sens. Edward M. Kennedy, Massachusetts Democrat, and Gordon Humphrey, New Hampshire Republican.

Among those speaking out yesterday was Mr. Metzenbaum, an Ohio Democrat who routinely opposes Reagan administration initiatives. He issued a statement calling Judge Kennedy "thoughtful, highly qualified and open-minded in his approach to the law."

Mr. Metzenbaum, who questioned Judge Kennedy about a controversial Hispanic voting rights case during Senate committee hearings last week, said yesterday, "He does not have an ideological agenda to remake the Constitution and he appears to accept fundamental constitutional values which the Supreme Court has long recognized. Under these circumstances, I will support the nomination."

Democrats and Republicans who objected to Judge Bork seem swayed, as is Mr. Metzenbaum, by the impression that Judge Kennedy is a non-ideologue who believes in judicial restraint, respects Supreme Court precedent and is open-minded about applying the Constitution.

Mr. DeConcini said he was looking for a "strong conservative" but not an extremist for the Supreme Court appointment. He described Judge Kennedy as a "conservative in the mainstream," similar to Chief Justice William Rehnquist and Associate Justices Antonin Scalia and Sandra Day O'Connor, all Reagan appointees.

"He's in that same conservative vein, but he is balanced and I think that makes a difference with a lot of Democrats," Mr. DeConcini said of Judge Kennedy shortly after announcing his endorsement from the Senate floor last night.

During the final day of committee hearings on Judge Kennedy's nomination, Mr. Leahy said it was testimony from the nominees themselves — referring to Judges Bork and Kennedy — that most influenced whether they would be confirmed.

"I have not been as moved or impressed by a judicial nominee in a long, long time," Mr. Leahy said then of Judge Kennedy. His staff yesterday reaffirmed his intention to vote for Judge Kennedy, saying he felt "very comfortable" with the nomination.

Affirmative votes from Mr. Simpson and Mr. Grassley also are likely, their staff members said. Uncommitted committee members cautiously left themselves an out in case there are revelations before the panel votes.

Among the undecideds were Mr. Kennedy, a vocal Bork critic, and Mr. Humphrey, who during Judge Kennedy's testimony was obviously dissatisfied with some answers, particularly regarding privacy rights, capital punishment and the Ninth Amendment.

The other undecided vote belongs to Mr. Biden, who led the Senate floor vote against Judge Bork. However, Mr. Biden spoke favorably of Judge Kennedy's flexibility during panel hearings and said afterward, "I see a guy out there who will grow in the job . . . a man whose views are not fixed, who is open to new information, whose instincts are honorable, and as new information is made available to him, is more likely than not to do the right thing.

"I just find him to be, based on all I know, an honorable, decent, concerned conservative."

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THE KENNEDY SURRENDER
By Don Feder

The nomination of Judge Anthony M. Kennedy to the United States Supreme Court is one more marker on the capitulation trail, a course charted by Secretary of Surrender Howard (compromise-at-any-cost) Baker.

Indeed, the entire process of filling the seat vacated by Justice Lewis Powell has been a string of disasters.

It started well enough. In Robert Bork, the administration had a candidate who was superbly qualified -- a brilliant jurist with impeccable credentials, an outstanding scholar with a passionate commitment to original intent.

Bork would have joined Chief Justice William Rehnquist and Associate Justice Antonin Scalia in arguing for a return to the principles of the Founders. His eloquent voice would have bolstered theirs in demanding an end to judicial legislation in the name of constitutional interpretation.

So what does the administration do with this exceptional candidate? First it takes a six-week siesta, leaving the left a clear field to mobilize against him.

Then it puts forth the ludicrous proposition that Bork really isn't a conservative (as if this were a stigma) but is in fact a moderate. The strategy was a double failure. Liberals weren't deceived; conservatives weren't motivated.

Instead, the president should have come out swinging at the first sign of congressional pugnacity. When the Kennedys and Bidens began clamoring that Bork was anti-black, anti-woman, and a threat to church-state separation, the administration should have turned the tables.

Reagan should have responded to these august idiots: No, you are pro-quotas, pro-abortion, anti-prayer, soft on crime, etc. It would have been far better had he slugged it out on the issues, in the arena of public opinion (where the majority assuredly is in our corner).

Having failed miserably with Bork, the Pennsylvania Avenue Pragmatists next determined that the key to success was finding a conservative judge without a "paper trail."

They located same in the person of Douglas Ginsburg. Unfortunately, they also got the negative baggage which frequently accompanies such an individual -- youth, inexperience, and past indiscretions recent enough to cause concern.

Which brings us to the current offering. In Kennedy we have another Sandra Day O'Connor. Reagan wasted his first Supreme Court pick with a symbolic gesture. In so doing, he put a lady on the bench who agrees with him only half the time.

Kennedy appears to be struck from the O'Connor mold: no sweeping judicial philosophy, decisions on a case-by-case basis, undue regard for dangerous precedents, a man who probably will be with the president on crime control, but more often than not on the opposite side on abortion and the other social questions.

It's significant that the liberal media is comparing him to the departed Powell. "Judge Kennedy's judicial opinions, like those of Justice Powell, generally seem to be narrowly crafted to decide specific issues," and are "premised on a scrupulously careful analysis of Supreme Court precedents," the New York Times assures its faithful.

The right concurs. "I think he (Kennedy) would be far more reluctant than Bob Bork to overrule a precedent," says Heritage Foundation legal expert Bruce Fein. Adds Michael McDonald of the Washington Legal Foundation: "It is like the second coming of Warren Burger, and that's nothing for conservatives to get excited about."

The abortionists, gay activists, and civil loonatarians have won.

They have intimidated the administration into nominating a replacement for Powell that they can live with, one who will prove no impediment to their cherished goals.

Reagan also is letting the congressional anti-Bork Brigade off the hook, without gaining anything in return. Republicans no longer can go after the Southern and Western senators, up for reelection next year, who were made so vulnerable by their opposition to the president's first selection. The latter can use their support of this nominee to defuse criticism of their shameful treatment of Bork.

Here then is the vaunted Reagan judicial legacy: timidity, craftsmanship in place of scholarship, a reluctance to rock the boat of humanist rulings -- in brief: a whimper, not a roar.

Distributed by Heritage Features Syndicate

November 25, 1987

WHITE HOUSE TALKING POINTS

JUDGE ANTHONY M. KENNEDY

Qualifications

- Judge Anthony M. Kennedy is an outstanding nominee for the Supreme Court. His impressive career in the law spans the better part of three decades.

- Judge Kennedy received his undergraduate degree in political science from Stanford University in 1958. He attended the London School of Economics during his senior year and was elected to Phi Beta Kappa. In 1961, he graduated from the Harvard Law School.

- Judge Kennedy will bring to the Supreme Court extensive experience as a judge, a private attorney and a teacher of the law.

Appeals Court Judge at Age 38

- Judge Kennedy has served with distinction on the Ninth Circuit Court of Appeals since 1975 and is now among the most senior active judges on that court. He has participated in over 1200 decisions and authored over 400 opinions.

  -- The 9th Circuit defines federal law for an area of the United States that covers almost 1.4 million square miles.

  -- More than 37 million people live in the 9th Circuit's jurisdiction, which includes the states of California, Arizona, Nevada, Oregon, Washington, Idaho, Montana, Alaska and Hawaii.

- Judge Kennedy received a unanimous "Qualified" rating from the American Bar Association when he was nominated for the court at age 38 by President Ford. Judge Kennedy is one of the youngest individuals appointed to the U.S. Court of Appeals in this century.

- In 1975, the Senate unanimously confirmed Judge Kennedy for the position he now holds. His nomination was supported by California's two Senators, John Tunney (who served until 1977) and Alan Cranston -- both Democrats.

> "...[H]e is a diligent person. He is an intelligent person. He is of the very highest moral calibre."
>
> --- Sen. John V. Tunney, 3/18/75
> Confirmation hearing testimony

(Qualifications, continued)

- Judge Kennedy has been unusually effective on a diverse and often divided court. Attorneys who have tried cases in his court -- winners and losers alike -- have praised him as a top-notch judge who treats everyone fairly.

- Often upholding strict sentences for drug traffickers and violent criminals, Judge Kennedy has deservedly earned a reputation as a judge who is tough on crime -- but one who carefully examines the facts to ensure the rights of individuals are protected fully.

Private Attorney

- Judge Kennedy will bring to the Supreme Court almost 15 years experience in private practice.

  -- From 1961 to 1963, he was an associate at a large law firm in San Francisco, California.

  -- When his father died, Judge Kennedy returned to Sacramento to take over his father's law practice. Judge Kennedy was a partner in the firm until his appointment to the 9th Circuit.

- As a private attorney in Sacramento, Judge Kennedy primarily represented small business clients. His diverse client list also included major U.S. corporations as well as individuals whom he represented in criminal cases, in some instances as a public defender. Judge Kennedy was a courtroom lawyer as well, managing a number of complex trials.

Teacher and Role Model

- For more than 20 years, Judge Kennedy has taught constitutional law on a part-time basis at the McGeorge School of Law, University of the Pacific.

- Judge Kennedy has been a role model for the two thousand law students who have taken his constitutional law class over the past two decades.

- With his wife, Mary, Judge Kennedy raised three children in his boyhood home. Sensible, honest and fair-minded, his life and work reflect devotion to traditional American values.

November 20, 1987

WHITE HOUSE TALKING POINTS

JUDGE KENNEDY AND CRIMINAL JUSTICE

- Judge Kennedy has participated in hundreds of criminal law decisions during his tenure on the Ninth Circuit Court of Appeals. "In that time," President Reagan has said, "he's earned a reputation as a courageous, tough, but fair jurist."

- Throughout his career on the bench, Judge Kennedy has faithfully applied the Constitution and the criminal law in a manner that recognized a balance between society's need to protect innocent victims and the procedural rights of defendants.

- Judge Kennedy's decisions reflect his belief that law enforcement activities must be reasonable and that the right of a criminal defendant under the Constitution to receive a fair trial must be protected vigorously.

- However, his judicial decisions likewise reflect his firm committment to vindicating the victims of crime and protecting the rights of society from vicious criminals.

Judge Kennedy's Decisions

- In Judge Kennedy's view, mistakes by law enforcement officers that do not represent willful misconduct and do not affect the fairness of a defendant's trial are not grounds for releasing criminals to renew their war on society. In one of the most important criminal law cases of this decade, the Supreme Court agreed with Judge Kennedy that a "good-faith exception" to the exclusionary rule should be recognized in certain circumstances. Judge Kennedy had argued in a dissenting opinion that evidence in a drug case should not have been suppressed where the police officers had acted in good faith and had reasonably relied upon a search warrant, issued by an impartial magistrate, that was later found to be invalid (U.S. v. Leon, 1983).

- Judge Kennedy has supported the use of the death penalty. In Neuschafer v. Whitley, (1987) an inmate murdered another inmate and was sentenced to death by the state. The murderer sought relief in federal court. When the case first came before Judge Kennedy, he sent it back to the lower court to make sure that a statement by the murderer was properly in evidence in his state trial. When the lower court determined that it was, Judge Kennedy then upheld the imposition of the death sentence.

(Criminal Justice, continued)

- Applying common sense to the law, Judge Kennedy ruled against a criminal defendant's claim that documents sitting on the dashboard of a stolen vehicle were not in plain view (U.S. v. Hillyard, 1982).

Drug Trafficking

- Supreme Court decisions will have a vital impact on the success of the Nation's crusade against illegal drugs. Judge Kennedy has issued a number of rulings that are likely to be critical in our efforts to counter illegal drug trafficking.

- Judge Kennedy has upheld tough sentences against drug dealers. He upheld a life sentence without parole for a drug manufacturer and dealer. Although the conviction was for a first offense, Judge Kennedy noted the defendant had expanded his drug manufacturing operations while free on bail, directed the operation from his jail cell after his bail was revoked, and shown no remorse for his crimes. Judge Kennedy upheld the maximum sentence imposed by the lower court (U.S. v. Stewart, 1987).

- International cooperation is essential in combatting international drug cartels, and in U.S. v. Peterson (1987), Judge Kennedy held that American officials may assume the constitutional validity of the actions of foreign governments cooperating in anti-drug ventures. Judge Kennedy affirmed a conviction obtained on the basis of evidence received from Phillipine narcotics agents with whom American law enforcement officials were acting in a joint anti-drug venture.

Respect for Law Enforcement Officials

- Judicial activists have in the past elevated the rights of criminals over the right and responsibility of society to protect citizens from violent crime. Often this has been the result of unjustified and unrealistic suspicion toward law enforcement officials on the part of judges -- suspicion Judge Kennedy does not share.

- Judge Kennedy's respect for law enforcement officials and his sensible and balanced perspective on the criminal justice process is reflected in his concurring opinion in Darbin v. Nourse (1981). There, he wrote separately to emphasize the narrowness of the holding in the case and commented:

(Criminal Justice, continued)

> "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 ground to challenge the juror for cause."
>
> --- Judge Anthony Kennedy
> Darbin v. Nourse, 664 F.2d 1109 (1981)

Criminal Justice in the Balance

- Criminal cases make up the largest single category of cases heard by the Supreme Court. These cases also have the most immediate impact on our citizens. Supreme Court decisions will determine:

  -- Whether convicted murderers may receive the death penalty (Last term, the constitutionality of the death penalty was sustained by a single vote -- that of Lewis Powell, whose seat Judge Kennedy has been nominated to fill);

  -- Whether the rights of victims will be considered, as well as the rights of accused and convicted criminals; and

  -- Whether court-created rules will help -- or hinder -- the search for truth in criminal trials.

- The Supreme Court's criminal law cases are particularly vital to the poor, women, the aged, and minority groups, who are disproportionately victimized by crime and who have the greatest interest in fair and effective law enforcement. When our criminal justice system fails, these Americans are the first to suffer.

- In October 1987, the Bureau of Justice Statistics reported the rate of violent crime dropped 6.3 percent in 1986. Since 1981, the rate of violent crime has fallen 20 percent. Seven million fewer crimes occurred in 1986 than in the peak crime year of 1981.

- This hard-won progress must be allowed to continue. Nearly one-third of the Supreme Court's time is taken up with matters of criminal justice. Judge Kennedy's nomination presents America with the opportunity to continue our progress in the war against crime.

November 20, 1987

WHITE HOUSE TALKING POINTS

JUDGE KENNEDY AND JUDICIAL RESTRAINT

- Judge Kennedy would interpret the law, not invent it. He believes that the role of the judge in our democratic society is faithfully to apply the law as established under the Constitution and as enacted by the people's elected representatives, not to substitute his own personal preferences as to desirable social policy.

- Judge Kennedy's philosophy of judicial restraint is amply demonstrated in the more than 400 opinions he has authored on the United States Court of Appeals for the Ninth Circuit.

Judges are not Legislators

- Judge Kennedy refused to make new law in the area of comparable worth. He authored a unanimous panel opinion that reversed a finding of sex discrimination against the State of Washington based on a "comparable worth" theory. While observing that "the Washington legislature may have the discretion to enact a comparable worth plan if it chooses to do so," he held that Title VII of the Civil Rights Act did not support a court-imposed comparable worth remedy (AFSCME v. State of Washington, 1985).

- In Schreiber Distributing Co. v. Serv-Well Furniture Co. (1986), the court upheld a plaintiff's right to bring a civil suit under the Racketeer Influenced and Corrupt Organizations (RICO) Act. In a concurring opinion, Judge Kennedy strongly suggested that application of civil RICO to this kind of case improvidently expanded federal power over business in an intrusive and disruptive way, but concluded nonetheless that "we are required to follow where the words of the statute lead."

- Similarly, in U.S. v. Bell (1984), Judge Kennedy's opinion for a unanimous panel noted that a poorly drafted statutory exception to jurisdiction could be remedied only by the Congress and not by the courts.

- Judge Kennedy's scholarly dissent in Oliphant v. Schlie (1976) further demonstrates his commitment to judicial restraint. In that case, a majority of the court concluded that an Indian tribe had jurisdiction over a non-Indian for violations of tribal law on the reservation. Judge Kennedy's contrary view, supported by a thorough analysis of the history and text of the treaties and federal legislation relating to Indian reservations, later prevailed in the Supreme Court.

(Judicial Restraint, continued)

The Power of Government

- As a practitioner of judicial restraint, Judge Kennedy has vigorously enforced provisions of the Constitution that allocate governmental powers and protect individual rights.

- In one of the most important constitutional cases of our time, Chadha v. INS (1980), Judge Kennedy held a provision authorizing a one-house legislative veto to be invalid. In so doing, he properly restricted his analysis to the text and structure of the Constitution. His decision in the case was affirmed in a landmark ruling of the Supreme Court.

- Judge Kennedy's decisions also reflect due regard for the role of states in our Federal system. Dissenting in Ostrofe v. Crocker (1982), he argued that the law of wrongful discharge was a matter of state concern and that Federal antitrust laws were not intended to supercede state regulation of employer-employee relations.

- In CBS v. United States District Court, Judge Kennedy authored a unanimous panel opinion ordering a district court to unseal pre-trial documents sought by CBS relating to the criminal prosecution of John DeLorean's co-defendant. In that opinion he stated: "We begin with the presumption that the public and the press have a right of access to criminal proceedings and documents filed therein."

Style of Decision making

- Rather than draw larger conclusions and reach decisions that affect persons not actually before the court, Judge Kennedy's general approach to judging is to focus on the specific issues presented, to avoid constitutional issues where possible, and to follow precedent.

- For example, in U.S. v. Boatwright (1987), Judge Kennedy's opinion for a unanimous panel reversed a defendant's conviction but declined to give the exclusionary rule the broad reading urged by the parties. Noting that such a reading would go beyond that required by relevant binding precedent, Judge Kennedy formulated a narrower rule for the case at hand -- a rule that would prevent evidence of criminal activity from being excluded unnecessarily in other cases.

JUDGE ANTHONY M. KENNEDY

THE PRESIDENT'S NOMINEE TO THE SUPREME COURT

Overview

- Judge Anthony Kennedy, President Reagan's nominee to the Supreme Court, is an experienced and impartial jurist. His twelve years of service on the U.S. Court of Appeals for the Ninth Circuit, together with his experience in private practice, make him an outstanding nominee to the United States Supreme Court.

- He received his undergraduate degree at Stanford University in 1958 and attended the London School of Economics during his senior year. He received his law degree from Harvard University.

- From 1961 to 1963, Judge Kennedy was an associate at the firm of Thelen, Marrin, Johnson & Bridges in San Francisco, California. From 1963 to 1975, he practiced in Sacramento, first as a sole practitioner and then as a partner with the firm of Evans, Jackson & Kennedy.

- In 1975, President Ford appointed Judge Kennedy to sit on the United States Court of Appeals for the Ninth Circuit, where he now ranks among the most senior active judges on the bench.

  -- Judge Kennedy has participated in over fourteen hundred decisions and authored over four hundred opinions.

  -- Popular with colleagues of all political persuasions, Judge Kennedy has built a reputation for being fair, openminded and scholarly.

- Judge Kennedy's long and outstanding career in the law has demonstrated that he has the experience and wisdom to be a great Justice of the Supreme Court.

WHITE HOUSE TALKING POINTS

Noteworthy Opinions Authored by Judge Anthony Kennedy

- In Chadha v. Immigration and Naturalization Service, Judge Kennedy authored the unanimous opinion holding the legislative veto to be unconstitutional, concluding that it was a "prohibited legislative intrusion upon the Executive and Judicial branches." This decision was later affirmed by the United States Supreme Court.

- In Neuschafer v. Whitley, Judge Kennedy upheld the death sentence of a Nevada prison inmate convicted of strangling another inmate while serving a life-without-parole term for the rapes and murders of two teenagers. He wrote that there was "no valid constitutional or federal objection to the imposition of the capital sentence" on the defendant.

- In United States v. Mostella, Judge Kennedy rejected a challenge to a bank robbery conviction based on the trial judge's alleged undue involvement in questioning witnesses. Judge Kennedy wrote that the Judge's "extensive nonpartisan questioning, without more, does not require reversal."

- In United States v. Cavanagh, Judge Kennedy authored a unanimous opinion upholding the legality of the FBI's electronic surveillance of a former Northrop engineer who had been convicted of attempting to sell secrets about the Stealth bomber program to the Soviet Union.

- In Adamson v. Ricketts, Judge Kennedy dissented from the majority's holding overturning the death penalty for the man who confessed to killing Arizona Republic reporter Don Bolles with a car bomb in 1976. The majority, reversing the conviction, held that Arizona officials violated defendant Adamson's double-jeopardy rights. When Adamson violated the terms of his plea-bargain agreement, by which he was convicted of second-degree murder in exchange for agreeing to testify against his alleged accomplices, Arizona tried him for first degree murder. In a strongly-worded dissent, Judge Kennedy called the majority's holding "artificial" and said that "it gives the defendant a windfall. . .in what should have been a simple case of the making of a bargain and the failure to keep it." The Supreme Court reversed the majority opinion, substantially adopting the reasoning of Judge Kennedy's dissent.

(Noteworthy opinions, continued)

- In United States v. Leon, Judge Kennedy dissented from the majority's holding, which affirmed the suppression of evidence in a drug case and refused to recognize a "good-faith" exception to the exclusionary rule where police officers act in reasonable reliance on a search warrant which, though issued by an impartial magistrate, is later found to be invalid. In a dissent adopted on appeal by the Supreme Court, Judge Kennedy strongly objected to the holding: "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."

- In United States v. Harvey, Judge Kennedy would have granted rehearing of a case where the court had thrown out a man-slaughter conviction because the results of a pre-arrest blood alcohol test had been admitted as evidence. Judge Kennedy noted that the officers involved had acted in good faith and that the defendant's blood had to be tested at once or the alcohol content would have diminished while the officers waited for a warrant.

- In United States v. Sherwin, Judge Kennedy held that pornographic materials seized by federal officers could be admitted into evidence at the defendant's trial on charges relating to transportation of obscene materials.

- In Barker v. Morris, Judge Kennedy held admissible sworn videotaped testimony of a member of the Hell's Angels motorcycle gang who had witnessed other gang members commit two brutal murders. The witness had died prior to trial, and had agreed to give the testimony only when he learned that he was dying. Judge Kennedy's holding that use of such testimony did not violate the Constitution has since been used as a precedent to permit the use of videotaped testimony in cases involving child abuse.

- In American Federation of State, County and Municipal Employees v. State of Washington, Judge Kennedy authored a unanimous panel opinion reversing a district court judge who had found discrimination by Washington State against its female employees on the basis of a "comparable worth" theory. While acknowledging that "the Washington legislature may have the discretion to enact a comparable worth plan if it chooses to do so," the court held that the existing law did not support a court-imposed comparable worth remedy.

(Noteworthy opinions, continued)

- In Fisher v. Reiser, Judge Kennedy authored a majority opinion holding that Nevada's decision to grant cost-of-living increases to workers' compensation beneficiaries who continued to reside in Nevada but not to those who live outside the state did not violate the constitutional rights of out-of-state beneficiaries. "We are reluctant to impose upon states fiscal burdens that are not coterminous either with their taxing power or their general jurisdiction."

- In Beller v. Middendorf, Judge Kennedy authored a unanimous opinion upholding the constitutionality of Navy regulations providing for the discharge of those who engage in homosexual activities. "In view of the importance of the military's role, the special need for discipline and order in the service, the potential for difficulties arising out of possible close confinement aboard ships or bases for long periods of time, and the possible benefit to recruiting efforts, we conclude that at the present time the regulation represents a reasonable effort to accommodate the needs of the government with the interests of the individual."

- In CBS v. United States District Court, Judge Kennedy authored a unanimous panel opinion ordering a district court to unseal pre-trial documents sought by CBS relating to the criminal prosecution of John DeLorean's co-defendant. "We begin with the presumption that the public and the press have a right of access to criminal proceedings and documents filed therein."

- In Koch v. Goldway, Judge Kennedy authored a unanimous opinion dismissing a lawsuit claiming the former mayor of Santa Monica slandered her political opponent by suggesting the opponent was wanted for Nazi war crimes. He concluded the statement was one of opinion, not fact, and could therefore not be the basis for a libel suit. "It is perhaps unfortunate that the legal category of opinion, which sounds, and often is, a dignified classification for the pursuit of honest and fair debate, must also be used to describe statements such as the one at issue here, which, in reality, is nothing more than a vicious slur. The law of defamation teaches, however, that in some instances speech must seek its own refutation without intervention by the courts. In this case, if the mayor chose to get in the gutter, the law simply leaves her there."

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release November 11, 1987

REMARKS BY THE PRESIDENT
UPON NOMINATION OF
JUDGE ANTHONY KENNEDY
AS SUPREME COURT JUSTICE

The Briefing Room

11:30 A.M. EST

THE PRESIDENT: It's not just in fulfillment of my constitutional duty, but with great pride and respect for his many years of public service, that I am today announcing my intention to nominate United States Circuit Judge Anthony Kennedy to be an Associate Justice of the Supreme Court.

Judge Kennedy represents the best tradition of America's judiciary. His career in the law, which has now spanned the better part of three decades, began following his graduation from Stanford University and Harvard Law School.

When he joined a prominent San Francisco law firm later, after the death of his father -- who was himself a well-respected attorney in Sacramento -- Tony Kennedy took over his father's law practice. He devoted himself to a wide range of matters including tax law, estate planning and probate, real estate law, international law and litigation.

In 1965 he began a teaching career on the faculty of the McGeorge School of Law at the University of the Pacific. He has been teaching continuously since that time as a professor of constitutional law.

In 1975 President Ford appointed him to the United States Court of Appeals, where he has established himself as a fair but tough judge who respects the law. During his 12 years on the nation's second highest court, Judge Kennedy has participated in over 1400 decisions and authored over 400 opinions. He's a hard worker and, like Justice Powell, whom he will replace, he is known as a gentleman.

He's popular with colleagues of all political persuasions. And I know that he seems to be popular with many senators of varying political persuasions as well.

I guess by now it's no secret that Judge Kennedy has been on the very shortest of my short lists for some time now. I've interviewed him personally and, at my direction, the FBI, the Department of Justice and the Counsel to the President have concluded very extensive preliminary interviews with him.

Judge Kennedy's record and qualifications have been thoroughly examined. And before I submit his formal nomination to the Senate, a full date -- update of his FBI background investigation will have been completed.

Judge Kennedy is what in -- many in recent weeks have referred to as a true conservative -- one who believes that our constitutional system is one of enumerated powers -- that it is we, the people who have granted certain rights to the government -- not the other way around. And that unless the Constitution grants a power to the federal government, or restricts a state's exercise of that power, it remains with the states or the people.

Those three words, "We, the people," are an all-important reminder of the only legitimate source of the government's authority over its citizens. The preamble of the Constitution, which begins

with these three powerful words, serves also as a reminder that one of the basic purposes underlying our national charter was to ensure domestic tranquility. And that's why the Constitution established a system of criminal justice that not only protects the individual defendants, but that will protect all Americans from crime as well.

Judge Kennedy has participated in hundreds of criminal law decisions during his tenure on the Ninth Circuit Court of Appeals. In that time he's earned a reputation as a courageous, tough, but fair jurist. He's known to his colleagues and to the lawyers who practiced before him as diligent, perceptive, and polite. The hallmark of Judge Kennedy's career has been devotion -- devotion to his family, devotion to his community and his civic responsibility, and devotion to the law.

He's played a major role in keeping our cities and neighborhoods safe from crime. He's that special kind of American who's always been there when we needed leadership. I'm certain he will be a leader on the Supreme Court.

The experience of the last several months has made all of us a bit wiser. I believe the mood and the time is now right for all Americans in this bicentennial year of the Constitution to join together in a bipartisan effort to fulfill our constitutional obligation of restoring the United States Supreme Court to full strength. By selecting Anthony M. Kennedy, a superbly qualified judge whose fitness for the high court has been remarked upon by leaders of the Senate in both parties, I have sought to ensure the success of that effort.

I look forward, and I know Judge Kennedy is looking forward, to prompt hearings conducted in the spirit of cooperation and bipartisanship. I'll do everything in my power as President to assist in that process.

And now I believe that Judge Kennedy has a few words to say.

JUDGE KENNEDY: Thank you, Mr. President. By announcing your intention to nominate me to the Supreme Court of the United States, you confer a singular honor, the highest honor to which any person devoted to the law might aspire. I am most grateful to you. My family, Mary and the children, also express their deep appreciation for your reposing this trust upon us.

When the Senate of the United States receives the nomination, I shall endeavor to the best of my ability to answer all of its questions and to otherwise assist it in the discharge of its constitutional obligation to determine whether to give its advice and full consent to the appointment.

I share with you, Mr. President, and with each member of the Senate an abiding respect for the Supreme Court, for the confirmation process, and for the Constitution of the United States, which we are all sworn to preserve and to protect.

Thank you, Mr. President.

Q Mr. President --

Q Mr. President --

THE PRESIDENT: No -- it's limited, and I think you know that, to two questions -- Helen first and then Terry.

Q Mr. President, throughout this whole process, Senator Hatch says there have been a lot of gutless wonders in the White House. Do you know who they are, who he is referring to, why he would say such a thing since he is such a devoted conservative?

THE PRESIDENT: Helen, when these ceremonies here this morning are over, I'm going to try to find out where he gets his information because, you know something, I haven't been able to find

a gutless wonder in the whole place.

Q Do you know why he was so upset?

THE PRESIDENT: I don't know. I don't know, unless he's been reading the paper too much.

Q Mr. President, you said that Judge Kennedy is popular with people of all political persuasions. What happened to your plan to give the Senate the nominee that they would object to just as much as Judge Bork?

THE PRESIDENT: Maybe it's time that I did answer on that, where that was said and why -- and it was humorously said. I was at a straight party organization affair, a dinner. And when I finished my remarks, which were partisan, a woman, down in front, member there, just called out above all the noise of the room, "What about Judge Bork?" And she got great applause for saying that. And then, the questions came, was I going to give in and try to please certain elements in the Senate? And I made that -- intended to be facetious answer to her. And so, as I say, it was -- sometimes you make a facetious remark and somebody takes it seriously and you wish you'd never said it, and that's one for me.

Q Mr. President --

THE PRESIDENT: I said only two questions now. And I want to -- I want Judge Kennedy's family to come up here.

Q Can't you take some more questions, sir?

THE PRESIDENT: What?

Q Can't you take some more questions?

Q Can't you take one or two more, Mr. President?

Q Just one or two?

THE PRESIDENT: No, because there would be no such thing as just one or two.

Q Judge Kennedy, can we ask you, are you concerned about this intense scrutiny that seems to go to a Supreme Court nominee now?

JUDGE KENNEDY: I'm looking forward to the scrutiny that the Senate should give any nominee in its discharge of its constitutional duty.

Q And you're not concerned about how you stand up, sir?

Q Judge Kennedy, are you worried or upset that you are, in effect, the third choice for this seat?

JUDGE KENNEDY: I'm delighted with this nomination. (Laughter.)

Q Mr. President, why didn't you nominate Judge Kennedy the first time?

MR. FITZWATER: Thank you very much.

Q Well, Marlin --

Q Would you like to answer that, sir?

Q -- to pre-selected reporters.

Q That's a good question, Marlin.

Q Can't the President answer for himself?

Q Do you like where the dollar is --

THE PRESIDENT: I -- all three. We came down to a final three and that all three were so close and so well-qualified, you could have almost thrown a dart going by that decision.

Q Mr. President, do you believe that the Senate Democrats may try to stall this nomination in order to prevent you from being able to fill that seat?

THE PRESIDENT: I'm counting on Pete Wilson here to see that doesn't happen.

Q Mr. President --

Q Did you cave into the liberals, Mr. President? Some conservatives are saying you caved into the liberals, appointing someone who can be confirmed, but not appointing someone who is going to turn the Court around.

THE PRESIDENT: When the day comes that I cave in to the liberals, I will be long-gone from here. (Laughter.)

Q Judge Kennedy, did they ask you if you'd ever smoked marijuana? Judge Kennedy?

Q Did you ever smoke marijuana?

Q Did they ask you?

JUDGE KENNEDY: They asked me that question and the answer was, no, firmly, no.

Q Mr. President, do you think conservatives, sir, will back this nominee? You know, Senator Helms, at one point, is alleged to have said, "No way, Jose," to Judge Kennedy.

THE PRESIDENT: We'll find out about that in the coming days ahead.

Q How can you be confident of the background check by Attorney General Edwin Meese's Justice Department when he blew the last one? (Laughter.)

THE PRESIDENT: He didn't blow the last one. We were talking the last time about a man who had been confirmed and who had been investigated four times for positions in government.

Q Are you going to fire the FBI --

Q Who did blow it?

Q Do you blame Ginsburg for not telling --

Q Mr. President, who do you blame?

THE PRESIDENT: I can't, Andrea.

Q Mr. Meese or Mr. Baker?

Q Do you think the Russians are stalling on an INF agreement, sir? There's a story that -- (laughter) -- there's a story that --

THE PRESIDENT: Bye. (Laughter.)

THE PRESS: Thank you.

END 11:40 A.M. EST

Talking Points On Judge Kennedy Nomination

- Judge Kennedy is an outstanding nominee to the Supreme Court. His twelve years of service on the U.S. Court of Appeals for the Ninth Circuit, together with his experience in private practice, will make him a superb Justice.

  -- He received his undergraduate degree at Stanford University in 1958 and attended the London School of Economic during his senior year. He received his law degree from Harvard University.

  -- From 1961 to 1963, Judge Kennedy was an associate at the firm of Thelin, Marrin, John & Bridge in San Francisco, California. From 1963 to 1975, he practiced in Sacramento, first as a sole practitioner and then as a partner with the firm of Evans, Jackson & Kennedy.

- In 1975, President Ford appointed Judge Kennedy to sit on the United States Court of Appeals for the Ninth Circuit, where he now ranks among the most senior active judges on the bench.

  -- Judge Kennedy has participated in over fourteen hundred decisions and authored over four hundred opinions.

  -- Popular with colleagues of all political persuasions, Judge Kennedy has built a reputation for being fair, openminded and scholarly.

- Judge Kennedy is a strong judicial conservative and a practitioner of judicial restraint. He has a proven commitment to law enforcement, the most important single category of cases heard by the Supreme Court.

Noteworthy Opinions Authored by Judge Anthony Kennedy

- In Chadha v. Immigration and Naturalization Service, Judge Kennedy authored the unanimous opinion holding the legislative veto to be unconstitutional, concluding that it was a "prohibited legislative intrusion upon the Executive and Judicial branches." This decision was later affirmed by the United States Supreme Court.

- In American Federation of State, County and Municipal Employees v. State of Washington, Judge Kennedy authored a unanimous panel opinion reversing a district court judge who had found discrimination by Washington State against its female employees on the basis of a "comparable worth"

theory. "While the Washington legislature may have the discretion to enact a comparable worth plan if it chooses to do so, [the law] does not obligate it to eliminate an economic inequality that it did not create."

- In Fisher v. Reiser, Judge Kennedy authored a majority opinion holding that Nevada's decision to grant cost-of-living increases to workers' compensation beneficiaries who continued to reside in Nevada but not to those who live outside the state did not violate the constitutional rights of out-of-state beneficiaries. "We are reluctant to impose upon states fiscal burdens that are not coterminous either with their taxing power or their general jurisdiction."

- In Beller v. Middendorf, Judge Kennedy authored a unanimous opinion upholding the constitutionality of naval regulations providing for the discharge of those who engage in homosexual activities. "In view of the importance of the military's role, the special need for discipline and order in the service, the potential for difficulties arising out of possible close confinement aboard ships or bases for long periods of time, and the possible benefit to recruiting efforts, we conclude that at the present time the regulation represents a reasonable effort to accommodate the needs of the government with the interests of the individual."

- In Neuschafer v. Whitley, Judge Kennedy authored an opinion upholding the application of the death penalty to a Nevada inmate who had been convicted of murdering a fellow inmate by strangulation. He concluded that there was "no valid constitutional or federal objection to the imposition of the capital sentence" on the defendant.

- In James v. Ball, Judge Kennedy authored a majority opinion holding unconstitutional Arizona statutes providing that voting in elections for directors of agricultural and improvement and power districts was limited to landowners. Applying the one-man one-vote precedent established by the Supreme Court in Reynolds v. Sims, Judge Kennedy concluded that if "the operations of a state entity affect a diverse group of citizens, the franchise cannot be restricted to exclude those who have an interest in the election." This decision was reversed by the Supreme Court upon review.

- In CBS v. United States District Court, Judge Kennedy authored a unanimous panel opinion ordering a district court to unseal pre-trial documents sought by CBS relating to the criminal prosecution of John DeLorean's co-defendant. "We begin with the presumption that the public and the press have a right of access to criminal proceedings and documents filed therein."

- In Koch v. Goldway, Judge Kennedy authored a unanimous opinion dismissing a lawsuit that claimed that the former

mayor of Santa Monica had slandered her political opponent by suggesting that the opponent was wanted for Nazi war crimes. He concluded that the statement was one of opinion, not fact, and could therefore not be the basis for a libel suit. "It is perhaps unfortunate that the legal category of opinion, which sounds, and often is, a dignified classification for the pursuit of honest and fair debate, must also be used to describe statements such as the one at issue here, which, in reality, is nothing more than a vicious slur. The law of defamation teaches, however, that in some instances speech must seek its own refutation without intervention by the courts. In this case, if the mayor chose to get in the gutter, the law simply leaves her there."

- In United States v. Mostella, Judge Kennedy authored a unanimous opinion rejecting a challenge to a conviction for bank robbery. The defendant argued that the trial judge had become unduly involved in questioning witnesses. Judge Kennedy held that a judge's "extensive nonpartisan questioning, without more, does not require reversal."

- In United States v. Cavanagh, Judge Kennedy authored a unanimous opinion upholding the legality of the FBI's electronic surveillance of a former Northrop engineer who was convicted of attempting to sell secrets about the stealth bomber program to the Soviet Union.

CRIMINAL LAW

° Criminal cases make up the largest single category of cases heard by the Supreme Court.

° These cases also have the largest, most immediate impact on ordinary citizens.

- Supreme Court decisions will determine whether convicted murderers may receive the death penalty.

- Supreme Court decisions will determine whether the rights of victims will be considered, as well as the rights of criminals.

- Supreme Court decisions will determine the success or failure of the Nation's war on drugs.

- Supreme Court decisions will determine whether criminal trials will help-or hinder-the search for truth in the courtroom.

° The Supreme Court's criminal law cases are particularly vital to the poor, women, the aged, and minority groups, who are disproportionately victimized by crime, and who have the

greatest interest in fair and effective law enforcement. When our criminal justice system fails--when hardened criminals are set free to prey on the public again--these disadvantaged Americans are the first to suffer.

Criminal Justice in the Balance

° During Judge Bork's nomination criminal justice issues were ignored. It was claimed that these issues were uncontroversial--that there was broad agreement, legally and politically, concerning this area of law. These claims are false.

° This nomination will determine whether we continue the 15-year trend away from Warren Court activism on behalf of criminals and toward a balanced approach rooted in the text of the Constitution.

- Last term the constitutionality of the death penalty was sustained by a single vote--that of Lewis Powell, whose seat Judge Kennedy has been nominated to fill.

- Last term, the Court struck down by one vote a state statute allowing juries in murder cases to hear statements about the impact of the crime on the victim, his family, and the community.
- Within the next year it is virtually certain that challenges to key components of the legislative and executive branch initiatives in the war on drugs will come before the Supreme Court. It is imperative that those challenges be heard by Justices committed to the plain mandate of the Constitution--"to establish Justice, and to ensure domestic Tranquillity."

The President's Nominee

° During his long and distinguished career on the bench Judge Kennedy has reteatedly shown that he will respect the rights of victims of crime, as well as the rights of criminals.

- In Neuschafer v. Whitley, Judge Kennedy upheld the death sentence of a Nevada prison inmate convicted of strangling another inmate. He wrote that there was "no valid constitutional or federal objection to the imposition of the capital sentence" on the defendant.

- In United States v. Mostella, Judge Kennedy rejected a challenge to a bank robbery conviction based on the trial judge's alleged undue involvement in questioning witnesses. Judge Kennedy wrote that the Judge's "extensive nonpartisan questioning, without more, does not require reversal."

- In United States v. Cavanagh, Judge Kennedy upheld the legality of the FBI's electronic surveillance of a former Northrop engineer who had been convicted of attempting to sell secrets about the Stealth bomber program to the Soviet Union.

° At the same time, Judge Kennedy has not hesitated to set aside convictions to protect the constitutional rights of criminals.

° Judge Kennedy has shown that he will continue Justice Powell's insistence on protecting the rights of both victims and criminals.

Talking Points on Judge Kennedy's Comparable Worth Decision:
AFSCME v. State of Washington

- The holding of AFSCME v. State of Washington is very narrow. It does not reject the concept of equal pay for equal work. Rather, Judge Kennedy merely holds "[w]hile the Washington legislature may have the discretion to enact a comparable worth plan if it chooses to do so, Title VII [of the Civil Rights Act] does not obligate it to eliminate an economic inequality that it did not create."

- In writing his opinion, Judge Kennedy was simply following existing Ninth Circuit precedent. In the 1984 case, Spaulding v. University of Washington, a Ninth Circuit panel rejected a suit by members of a nursing facility alleging a sex-based violation of Title VII based upon a theory of comparable worth.

- Nothing in Judge Kennedy's opinion suggests that Title VII does not protect against intentional sex-based wage discrimination, which should be the major concern of women seeking fair and equal treatment.

- Court imposed comparable worth plans are particularly troubling given the difficulty of determining in the abstract whether, for example, plumbers are worth the same salary as nurses, or truck drivers worth the same amount as secretaries. Judges are ill equipped to make these decisions.

- Many believe comparable worth plans will adversely affect women. Unskilled women now earning wages at the bottom of the wage scale may be priced out of jobs. Moreover, artificially raising the wages for jobs that traditionally have belonged to women may discourage them from seeking jobs in fields traditionally occupied by men -- jobs that may prove more challenging or rewarding.