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Nominee as a teacher: 'The best'

Peers call him bright, thoughtful

By Tony Mauro
USA TODAY

2000, 1980, an avid swimmer and a spellbinding teacher, Anthony Kennedy would be the Supreme Court's youngest member at 51 — edging Antonin Scalia by a few months.

He also might be the court's best teacher, winning high praise for a constitutional law course he has taught at University of the Pacific's McGeorge School of Law since 1965.

Kennedy has brought children to his class to spark their interest in the Constitution, and during the bicentennial this year, dressed up as James Madison to answer questions. An annual lecture he gives on President Franklin Roosevelt's plan to pack the Supreme Court plays to a packed house.

"The best professor I ever had in college or law school. He was very impressive," said former student Pat O'Hara, now a municipal judge in Visalia, Calif.

Anthony Kennedy at a glance

Age: 51
Post: Justice of the Supreme Court
Education: Harvard University, Harvard Law School, 1961.
Career: Private practice, 1963-1975, including lobbying for liquor distillers and opticians. Teacher at McGeorge School of Law, Sacramento, Calif.
Family: Married to the late Mary Davis, 3 children.
Philosophy: Moderately conservative.
Confirmation: Not expected to complete Senate hearings and assume a seat before Jan. 1.



By Ron Edwards. AP

KENNEDY: Nominee's wife is a third-grade teacher.

"He's absolutely delightful, very pleasant and has a good sense of humor," said John Ryan, associate dean of the law school. "He enjoys people."

If confirmed, he'll have to move from the house he grew up in, in Sacramento. He returned there in 1963 to take over his late father's law practice. His wife, Mary, is a third-grade teacher.

Like most Sacramento lawyers, Kennedy did some lobbying on the side, helping then-Gov. Ronald Reagan draft a tax-reduction initiative that failed at the polls in 1973.

In 1975, President Ford ap-

pointed him to the 9th U.S. Circuit Court of Appeals, which sits mainly in San Francisco. He works out of chambers in Sacramento, but commutes.

As a judge, he has a reputation like that of Lewis Powell, the man he'd replace — both are described as gracious, friendly and hard working.

"He has strong views and he expresses them, but he's not bristly," said former Democratic Cabinet official Shirley Hufstедler, who opposed Robert Bork and sat on the same court as Kennedy. "He asks penetrating questions, but he doesn't browbeat lawyers be-

fore him."

University of Pittsburgh law Professor Arthur Hellman, a former Kennedy colleague, said: "He's very bright and thoughtful. I don't think he's a knee-jerk anything."

The one known law review article by Kennedy is unlikely to cause trouble — it's a treatise on Irish law.

Contributing: Miles Shuper, Jake Henshaw and Dan Montgomery

File:
FMB:
Talking Points
on Justice Kennedy
and Traditional
Values

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Lawyer, not Ideologue

By Rita Ciolli
Newsday Washington Bureau

Washington — Retreating from his effort to radically reshape the Supreme Court, President Ronald Reagan has chosen a judicial conservative with no apparent ideological agenda. Anthony Kennedy's approach to the law most closely resembles that of Lewis Powell, the centrist justice he would replace.

"He's a lawyer. He's not a theoretician, not an academic," said Judge Alex Kozinski of Pasadena, who sits with Kennedy on the Ninth Circuit Court of Appeals in California. "What he doesn't have is some grand theoretical scheme into which everything has to fit," said Kozinski, a longtime friend.

"He had no ideology and was not making law to suit his politics," said Robert Rothstein, a Beverly Hills attorney who once served Kennedy as a law clerk. "I never really knew what his political views were, although I believe him to be a conservative."

Unlike Robert Bork, Reagan's first nominee, Kennedy has not made sweeping attacks on Supreme Court rulings or espoused a rigid theory of law to be imposed on the cases before him. While he has a considerable record to review, having authored opinions in more than 400 cases during his 12 years on the federal bench, little of it seems provocative.

And, while personal revelations un-

Judge Kennedy's Opinions

Some of the opinions Kennedy has written on the Ninth Circuit Court of Appeals



Comparable worth. Rejected a lawsuit contending that Washington State paid lower salaries for jobs held predominantly by women than for jobs held predominantly by men. Kennedy said such a disparity does not necessarily violate a federal law banning sex discrimination in employment. (1985)

Homosexuality. Upheld a Navy policy of automatically discharging sailors who engage in homosexual conduct. Kennedy said that while homosexuality may be constitutionally protected in other contexts, the needs of the military had extra weight. He specifically declined to say whether the policy was wise. (1980)

Exclusionary rule. Dissented from a majority opinion saying that evidence seized in good faith under a search warrant later found to be invalid is inadmissible. The majority opinion was reversed by the Supreme Court. (1983)

Death penalty. Dissented, in the case of slain Arizona newspaper reporter Don Bolles, from a majority opinion saying a defendant could not be sentenced to death because he was tried for first-degree murder after violating a plea-bargain agreement in the same case. The Supreme Court reversed the majority opinion. (1986) Also, earlier this year, upheld the death sentence of a convicted Nevada murderer who claimed his death sentence was disproportionate to the penalties received by other killers. (1987)

School desegregation. Ruled in a case involving court-ordered desegregation that there is no constitutional obligation to maintain a particular racial mix in schools, only to refrain from segregation according to race. (1979)

Presidential powers. Declared invalid a statute that allowed either house of Congress to cancel an administrative action by the president. Kennedy said it unconstitutionally limited presidential powers. He was upheld by the Supreme Court. (1980)

Newsday / Linda Fleury

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dermined Reagan's second nominee, Douglas Ginsburg, friends of Kennedy said he could survive the intense confirmation scrutiny.

"If he can't get through, then they can't confirm anyone," said James D. Garibaldi, the dean of Sacramento lobbyists, who has known Kennedy almost from birth.

Garibaldi and other associates of Kennedy in his hometown describe him as foremost a person devoted to his family — his wife, Mary, a schoolteacher, and their three children — and to carrying on the tradition of his parents to be active in community affairs. Each of five persons interviewed mentioned how deeply affected Kennedy seemed by the death in 1981 of his 39-year-old brother, Timothy, who drowned while surfing in Hawaii on his honeymoon.

Before being named to the bench by President Gerald Ford in 1975, Kennedy, a lawyer and part-time Sacramento lobbyist, was not active in partisan politics. His only political activity came in the early 1970s when he was the principal draftsman of a tax-reduction initiative championed by then-Gov. Ronald Reagan. It lost in a special election held in 1973.

Kennedy's guiding philosophy seems to be that of judicial restraint, which in theory is politically neither conservative nor liberal. It means a judge should act very narrowly, defer to the legislature and not try to enact social policy.

"Interest groups might disagree with the results in his cases but I don't think anyone can find fault with the reasoning, logic or analysis," said John Ryan, associate dean of the McGeorge School of Law, where Kennedy has taught constitutional law for 22 years.

Kennedy is not considered a brilliant legal talent and even some of his supporters don't think he will become a dominating force on a sharply divided court.

"He will not be a leader," said James McClellan of the Center for Judicial Studies, a staunchly conservative legal research group. "His approach seems to be ad hoc."

"He going to be with us 85 percent of the time, comparable to Sandra Day O'Connor," said McClellan. "He could turn out to be a surprise. That is our problem. We would like to be a little more sure. When we were dealing with Bork, we were sure we knew how he would act as a judge."

Other conservative legal groups predict that Kennedy will vote 75 percent of the time with the court's rightist block, more frequently than Powell did. He is not expected, as Powell did, to provide liberals with their crucial fifth vote in cases involving such controversial issues as affirmative action, criminal justice and possibly abortion.

An example of Kennedy's judicial restraint approach came in a 1980 decision upholding the dismissal of three homosexuals from the Navy. "Upholding the challenged regulations as constitutional is distinct from a statement that they are wise," wrote Kennedy. In the ruling, Kennedy left open the legal argument that homosexuals might have a constitutional right to privacy. In discussing the right of privacy, he cited as precedent the Supreme Court's 1973 *Roe v. Wade* decision establishing a woman's right to abortion.

His approach is in marked contrast to that of Bork, who also decided a case involving the firing of gays in the Navy. Bork used the case to denounce homosexual behavior and said flatly that the Constitution does not protect private consensual acts by homosexuals. Bork also went on at length attacking the legitimacy of the *Roe v. Wade* case.

Kennedy's failure to criticize *Roe v. Wade* has made conservatives, such as Sen. Jesse Helms (R-N.C.) and some antiabortion groups concerned about how he would rule in related cases. But abortion-rights groups aren't so sure that it means he is on their side either.

"We don't see him going in there

with a vendetta against *Roe*, although he might uphold some state restrictions," said one lawyer evaluating Kennedy's record for a group that supports abortion. She declined to be identified until the group takes a formal position on the nomination.

Kennedy's case-by-case approach has sometimes caused contradictory results in areas such as civil liberties, criminal justice and women's rights.

Most of his rulings in criminal cases have upheld the power of law enforcement agencies. However, he has reversed convictions if he finds the police went too far and violated a suspect's rights.

In a 1983 dissent, Kennedy refused to go along with a ruling that overturned the conviction of a drug dealer because the search warrant the police used was later found to be technically invalid. Since the police acted in good faith, he argued that exceptions should be made for such searches. A year later, in a major exception to the Fourth Amendment, the Supreme Court adopted Kennedy's reasoning and reinstated the conviction.

He is best known for two rulings on important national issues. In 1980, he wrote an opinion striking down the legislative veto by one house of Congress, saying that such power can only be exercised by both houses acting together. His ruling was later upheld by the U.S. Supreme Court.

In a closely watched case, Kennedy reversed a lower court ruling that had validated the concept of "comparable worth," requiring Washington State to give male and female employees the same pay for jobs that required similar skills.

Kennedy is known for his sense of humor. In September, on the 200th anniversary of the Constitution, Kennedy surprised the students in his evening class by dressing as James Madison. Wearing a rented costume and wig, the judge gave a firsthand account of the difficulties of satisfying everyone at the Constitutional Convention.

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muse that "if the case wouldn't write that way, maybe the result was wrong."

Former students of Kennedy's at the McGeorge School of Law in Sacramento report that he spent much class time discussing privacy cases. He gave some the impression that, unlike Bork, he does recognize a constitutionally protected right to privacy. But he seemed sympathetic when a student once argued that *Roe vs. Wade*, the 1973 abortion-right decision, was a political compromise, not solidly based on constitutional principles.

Kennedy has not given any hint whether he would uphold or reverse the decision if given the chance (which is certain to come: *Roe* was reaffirmed in 1986 by only 5 to 4, with Powell casting the deciding vote). Stanford Law Professor Jack

Friedenthal predicts, "He would start with the fact that it has been decided. I strongly suspect he would never have voted for it in the first place, but part of judicial restraint is the question of whether a person is going to reverse a Supreme Court decision that is now part of the fabric of society." Even if it is not reversed, however, *Roe* could be modified. Like Justice Sandra Day O'Connor, Kennedy could end up as a swing vote, helping to refine the boundaries of the right to abortion, based on changing medical and social circumstances.

As might be expected, Kennedy's case-by-case approach stirs neither great enthusiasm nor dead-end opposition in the Senate. Jesse Helms, North Carolina's conservative curmudgeon, once growled, "No way, José," at the prospect of Kenne-

dy's nomination. But last week he allowed that Kennedy might make a "fine" Justice. Liberals are mostly being noncommittal, but they will have trouble taking back their comments during the Bork fight, when some identified Kennedy as the type of conservative they could accept. Harvard Law Professor Laurence Tribe, who helped lead the opposition against Bork, describes Kennedy as "decent instead of dogmatic, sensitive instead of strident." Those may not be the qualities of a legal groundbreaker, but they are far from the worst qualifications for judging the most explosive issues in American life, all of which sooner or later wind up before the Supreme Court. —By George J. Church. Reported by David Beckwith and Anne Constable/Washington

The Judge Next Door

It was high noon on Sunday in Edwin Meese's small, elegant office on the fifth floor of the Justice Department. In armchairs that faced one another sat Meese, Howard Baker and a clutch of lieutenants. In their midst was Anthony Kennedy, a potential Supreme Court nominee, who had been flown to Washington on an Air Force jet from Sacramento the evening before, carrying only a small overnight bag. The interrogation ran through 21 pages of single-spaced questions. Was your wife pregnant when you married? No. Have you ever visited a massage parlor? No. Have you seen other women since you were married? No. Have you ever participated in group sex? No. Have you ever used cocaine? No. Hashish? No. Acid? No. Marijuana? No. Heroin? No. Have you ever bought pornography? Yes. His startled questioners were silent. "I bought several hard-core books and magazines for use in my constitutional-law class," Kennedy explained. Everyone laughed.

After almost four hours, Kennedy had proved what he told his questioners at the outset: "You're going to have a boring afternoon." So delightfully boring, in fact, that they decided not to repeat the process with anyone else. After Kennedy left, said one participant, "everybody looked at each other and said, 'Why go any further?'"

In Anthony McLeod Kennedy, 51, the Administration seems to have found a nominee with no lurking quirky qualities. "When we were growing up, if any of us were going to do something naughty, Tony would go home," recalls Lawyer John Hamlyn, a childhood friend who now lives four doors away. Indeed, the beardless and bespectacled Kennedy has a life story

that sounds as if it were directed by Frank Capra. Married in 1963 to Mary Davis, an elementary schoolteacher with whom he has three children, Kennedy has stuck to his roots. He was born and raised in Sacramento, and he lives in the same white colonial house on a curving, tree-shaded street that his lawyer father built half a century ago. He graduated from Stanford University, spent a year at the London School of Economics and earned his law degree from Harvard in

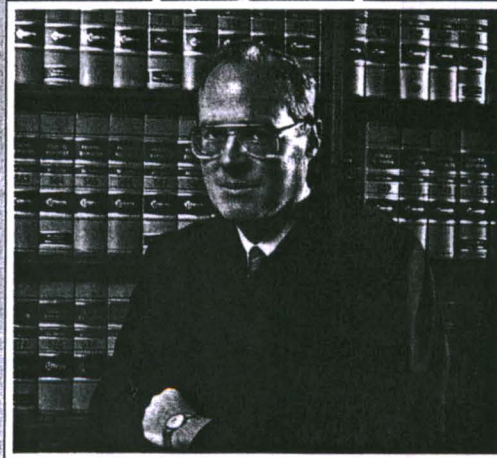
1961. He has remained particularly loyal to Stanford: all three of his children—Justin, 23, Gregory, 21, and Kristin, 19—have attended.

His father was one of Sacramento's most colorful lobbyists, a glad-handing, shoulder-rubbing wheeler-dealer. Upon his father's death in 1963, Kennedy left a lucrative San Francisco practice and returned to Sacramento to straighten out affairs and eventually take over the practice. Though the younger Kennedy kept clients like Schenley liquor distillers and the state's association of opticians, he mainly provided legal advice and drafted legislation. In testifying before the legislature on constitutional issues, Kennedy came to the attention of California Governor Ronald Reagan and his executive assistant Ed Meese. In 1973 they asked him to write a tax-limitation referendum, Proposition 1, which was a complicated and unsuccessful precursor of the controversial Proposition 13.

Since Gerald Ford appointed him to the Ninth Circuit in 1975, Kennedy has made a habit of lunching two or three times a week with his clerks, which makes him unusually accessible for a judge of his standing. Moreover, they all seem to like him. For 22 years, he has spent one evening a week teaching at the McGeorge School of Law in Sacramento. A former student, now an A.C.L.U. lobbyist, notes, "I was impressed that he took the time to teach night students. I considered it something of a public service." This past September, to celebrate the Constitution's bicentennial, he walked into class wearing a long coat and powdered wig. Gordon Schaber, the school's dean, cites Kennedy's self-deprecating wit and calls him the "judge next door."

His office is next door too, only about three miles from his house in Sacramento, where he feels most

comfortable, and he has been known to describe the Ninth Circuit's vast San Francisco office as a "baroque, Victorian, neoclassic, Renaissance, modern structure near the Greyhound station." Reagan's new appointee says he is pleased with his nomination. If Kennedy is confirmed, however, it will mean disruption in an orderly life. He'll have to leave Sacramento. —By Amy Wilentz. Reported by David Beckwith and Anne Constable/Washington



The nominee as Cub Scout, top, and judge

REAGAN NOMINATES ANTHONY KENNEDY TO SUPREME COURT

PRESIDENT CONCILIATORY

Some Conservatives Angered by Choice of Judge, Whom They Think Too Liberal

By LINDA GREENHOUSE

Special to The New York Times

WASHINGTON, Nov. 11 — President Reagan, stung by the failure of two nominations to the Supreme Court in the last three weeks, today nominated Judge Anthony M. Kennedy and expressed the hope that he could be confirmed quickly in a spirit of bipartisan cooperation.

Mr. Reagan emphasized that Judge Kennedy "seems to be popular with many senators of varying political persuasions."

"The experience of the last several months has made all of us a bit wiser," he said. [Transcript, page B10.]

Mr. Reagan's tone today was in marked contrast to the sharply partisan terms in which he presented his previous nominee, Judge Douglas H. Ginsburg, two weeks ago. Then the President called the Senate's rejection of his first nominee, Judge Robert H. Bork, a "disservice to the Court and to the nation" and said that "the American people will know what's up" if the Senate did not act quickly.

The nomination of Judge Ginsburg never got to the Senate. Instead, the nominee withdrew in the controversy after his disclosure that he had used marijuana once as a student in the 1960's and several times in the 1970's while a professor at Harvard Law School.

'Delighted' to Be Picked

Judge Kennedy, in his brief appearance before White House reporters today, was asked whether he was "upset that you are, in effect, the third choice for this seat?"

"I'm delighted with this nomination," he replied with a slight smile. To the question whether he had ever smoked marijuana, he answered, "No, firmly no."

Senators from both parties said they would reserve judgment and examine the new nominee's record closely. But beneath the studiously noncommittal responses was a general expectation that Judge Kennedy would be confirmed, as well as collective relief that another bruising battle could probably be avoided.

Biden Pledges Cooperation

Key Democrats said that confirmation hearings would almost certainly not begin until January.

The chairman of the Senate Judiciary Committee, Senator Joseph R. Biden Jr., said: "I'm glad the President has made his choice. We will get the process under way and move as rapidly as is prudent. We want to conduct the committee's review with both thoroughness and dispatch."

Judge Kennedy, a 51-year-old Harvard Law School graduate, was named in 1975 to the United States Court of Appeals for the Ninth Circuit, which covers California and several other Western states.

In writing nearly 500 opinions, he has earned a reputation as a careful judge of basically conservative leanings who approaches legal problems case by case and has apparently never evinced a desire to change the modern course of constitutional law. Some scholars who have studied his record say his approach is similar to that of Justice Lewis F. Powell Jr., whose retirement last June created the vacancy on the Supreme Court. Justice Powell was a nonideological conservative who often cast the deciding vote on the sharply polarized Court.

Was on Earlier List

By contrast, President Reagan's first choice, Judge Bork, whom the Senate rejected last month by a vote of 58 to 42, is an acerbic critic of many recent trends in the law. The public learned little of the views of the next choice, Judge Ginsburg, who withdrew on Saturday. After Judge Bork's defeat, Mr. Reagan was on the verge of choosing Judge Kennedy when Attorney General Edwin Meese 3d prevailed on him to pick the 41-year-old Judge Ginsburg instead.

Judge Kennedy's name was on a list of 13 potential nominees that Howard H. Baker Jr., the President's chief of staff, presented to Senate leaders after Judge Bork's defeat. While the Democrats objected to some names on the list, including that of Judge Ginsburg, they raised no objection to Judge Kennedy. Some conservative Republicans objected that Judge Kennedy was not conservative enough, but the prospect of serious opposition from the right faded this week as Judge Kennedy's nomination appeared all but inevitable.

"I doubt that any conservatives are going to oppose him," Senator Orrin G. Hatch, a Utah Republican who on Monday excoriated the White House for not standing by Judge Ginsburg's nomination, said today.

The President's tone is conciliatory.

In turning this time to a consensus nominee, President Reagan was yielding to a political reality that includes Democratic control of the Senate and his own weakened powers as he enters his last year in office.

Some Conservatives Bitter

The moment was a bitter one for a number of conservatives, both on and off Capitol Hill. They viewed Mr. Reagan as abandoning one of the principal goals of his Presidency, that of changing the direction of the Supreme Court.

"There's been a basic compromise of principle that's not satisfying to me," Senator Charles E. Grassley, an Iowa Republican, said Tuesday as word circulated that Judge Kennedy's nomination was virtually assured. "But I suppose I'm resigned. There's a practical aspect."

Asked by a reporter whether President Reagan had a choice at this point other than compromise, Senator Grassley, a member of the Judiciary Committee, stared for a moment and replied: "If I were President of the United States, I think I'd figure one out."

Richard A. Viguerie, a conservative political consultant, said in an interview that the mood among conservatives was one of "total anger and frustration." He called the Kennedy nomination "a total surrender to the left" that he said sent a signal to President Reagan's adversaries, "whether in the Kremlin or in Congress, that if they just wait long enough, Ronald Reagan will bend or break."

'Battle Fatigue' a Factor

Other conservative leaders struck a more fatalistic note. "There isn't another Bob Bork out there, and we knew that all along," said Daniel Casey, president of the American Conservative Union. "When the dust settles, people will regard this as a good choice. All of our information says he's a pretty solid conservative." Furthermore, Mr. Casey said: "There's institutional battle fatigue involved here."

From the liberal end of the political

Cont'd

spectrum, there was a striking difference between the reception Judge Kennedy received today, muted though it was, and the warning notes that greeted Judge Bork and Judge Ginsburg. Senator Edward M. Kennedy, who led a harsh attack on Judge Bork and described Judge Ginsburg as "Judge Bork without the paper trail," said today that he was interested in studying the new nominee's lengthy judicial record. "I look forward to the hearings and to meeting Judge Kennedy," the Massachusetts Democrat said.

Laurence H. Tribe, the Harvard Law School professor and a liberal who has been a close adviser to Senator Biden, said in an interview that his initial impressions of Judge Kennedy were "very favorable."

"His opinions are more sensitive than strident," Mr. Tribe said. "He replaces the dogmatism of Robert Bork with a sense of decency and moderation."

Some Views Are Unknown

But despite Judge Kennedy's voluminous record, little has been gleaned so far about his views on key issues on which the Supreme Court is closely divided. These include abortion, affirmative action, and the relationship between church and state.

Senators said they expected Judge Kennedy to be asked to comment in detail on his judicial philosophy and views on specific constitutional issues at his confirmation hearings.

Senator Patrick J. Leahy of Vermont, a Democratic member of the Judiciary Committee, said he expected the hearings to be "substantive," adding that he planned to concentrate his own questioning on the areas of free speech, religion, privacy and law enforcement.

Senator Arlen Specter of Pennsylvania, the only Republican on the committee to vote against Judge Bork, said: "At first blush, Judge Kennedy looks good, but the Judiciary Committee will have to check out his qualifications very carefully, as the Constitution requires."

The nominee himself, asked at the news conference whether he was "concerned about this intense scrutiny that seems to go to a Supreme Court nominee now," replied, "I'm looking forward to this scrutiny that the Senate should give any nominee in the discharge of its constitutional duty."

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cian. He has an overall theory of the law and the Constitution, and he tries to fit cases into that theory. Tony Kennedy is much more in the mold of Lewis Powell. He is a conservative and an advocate of judicial restraint, but these are simply overall principles. He takes cases one by one."

One striking example of the difference: in separate cases, Bork and Kennedy both ruled that the Navy could dismiss homosexuals from the service, but for very different reasons. Bork took the occasion to attack a long line of Supreme Court decisions reading into the Constitution a right to privacy. Kennedy, in contrast, noted that homosexuality "might be constitutionally protected activity in some other contexts," but not in the Navy, which has a special need to maintain order among men forced into close contact with one another. He added that the regulations requiring discharge of homosexuals, though not unconstitutional given the situation, were nonetheless "harsh" and not necessarily "wise."

In another celebrated case, Kennedy slowed but did not stop the movement to require equal pay for women and men performing jobs believed to be of "comparable worth." The background: a study of Washington State's employees found that pay for jobs filled mostly by women averaged 20% less than wages for different jobs requiring supposedly comparable skills that were held mainly by men. A federal judge held that this constituted illegal sex discrimination and awarded damages estimated as high as \$1 billion to female workers.

No, said Kennedy, writing for a unanimous three-judge panel of the appeals

court. There was no proof that the gap in pay scales reflected discrimination rather than the play of market forces. Federal civil rights legislation is not "intended to abrogate fundamental economic principles such as the law of supply and demand" and thus "does not obligate [the state] to eliminate an economic inequality which it did not create."

Nonetheless, Kennedy's opinion did not slam the door on comparable worth. He left open the possibility that in a different case—and several are pending in other states—a different set of facts might establish that unequal pay scales did indeed result from discrimination and were thus illegal. Says Winn Newman, an attorney for the union that lost the Washington case: "His decision went to the facts. The open question is what facts constitute a basis for a court to infer that the reason for disparity was discrimination."

About a fourth of all Kennedy's opinions concern matters of criminal procedure, and in those cases he has generally taken a law-and-order line. For example, he upheld the death penalty for a Nevada convict, already jailed for murder, who committed another murder in prison. But Kennedy has shown sensitivity to the plight of individuals, something that critics found lacking in Bork. One case arose after police discovered drugs on an immigrant crossing the Mexican border by subjecting the man to a body-cavity search. "I remember him agonizing over that," says Kozinski. The suspect was clearly guilty, but Kennedy "felt he had

been treated way below the standards for a civilized society." So he joined in overturning the conviction.

In First Amendment cases, Kennedy's opinions have pleased the press. In 1978, for example, a plaintiff who had been convicted in an insurance scandal demanded to see film of a show NBC was preparing on the case, arguing that it might inflame public opinion and jeopardize his chances of parole. A lower court ordered NBC to surrender the film, but Kennedy struck down the ruling as being "aimed toward prepublication censorship." Said the judge: "It is a fundamental principle of the First Amendment that the press may not be required to justify or defend what it prints or says until after the expression has taken place."

Kennedy's case-by-case approach means that it is hard to make sweeping generalizations about how he would rule on the great legal issues facing the Supreme Court: affirmative action, Government involvement with religion, abortion and privacy rights. Says Deputy Solicitor General Donald Ayers, who argued several cases before Kennedy: "I always had the sense that he approaches each case with no predilection about who will be the winners or losers." Kozinski asserts that Kennedy sometimes is open to change even after reaching a preliminary decision. When clerks had trouble framing an opinion according to the judge's instructions, says Kozinski, Kennedy would

Introducing two losers and a potential winner: Bork in July; Ginsburg three weeks ago; Anthony Kennedy and family last Wednesday



Federal Judge Anthony Kennedy Selected for Supreme Court Seat

Continued From Page 3

(Judge Kennedy) to be a thoughtful, moderate conservative, not a zealous ideologue, but someone who is respectful of constitutional principles." He, too, said it is "premature to draw any final conclusions."

A Sacramento native, Judge Kennedy received a degree from Stanford University and studied at the London School of Economics before graduating from Harvard Law School with honors in 1961.

After a brief stint with a San Francisco law firm, he returned to Sacramento in 1963 to pick up the law practice of his father, who died that year. The practice, later merged with those of two other lawyers, involved a range of legal advice and litigation for a variety of clients and included some lobbying for corporations, including Capitol Records Inc., now a unit of Thorn EMI PLC, and Schenley Industries Inc., now a unit of Rapid-American Corp.

White House officials say that they and the Federal Bureau of Investigation have looked extensively at Judge Kennedy's record as a lobbyist and have turned up nothing controversial.

Mr. Kennedy first came to the attention of then-Gov. Reagan when he helped draft a constitutional amendment limiting California state taxes and spending. Voters rejected the plan in 1973, but two years later Gov. Reagan urged President Ford to appoint Mr. Kennedy to the federal appeals court based in San Francisco.

Friends say Judge Kennedy is an intense, soft-spoken man with a wry sense of humor who is dedicated to his family. He and his wife, Mary, a third-grade teacher, have a son Justin, 23, a Stanford graduate now working in real estate; a son Gregory, 22, and daughter Kristin, 19, both Stanford students. His friends say he is a practicing Catholic, an avid reader, and a sometime golfer and tennis player. Judge Kennedy dresses conservatively, is trim and stands more than six feet tall.

Despite a serious manner in the courtroom, he is best known at McGeorge Law School for occasional theatrical flourishes at his Monday night classes. To celebrate the Constitution's bicentennial, he arrived a few weeks ago in powdered wig, ruffled shirt and Colonial coat to portray James Madison and lecture on the problems of drafting the Constitution. In other years, he has received ovations from standing-room only classes for his portrayal of President Franklin Roosevelt urging support for packing the Supreme Court. Students say he has a limitless memory for constitutional law and rarely uses notes or a textbook in class.

When he was passed over by President Reagan in favor of Judge Ginsburg, Judge Kennedy's students planned last Monday to hang a banner in the classroom saying, "You'll always be supreme to us." But they never got to display the message; Judge Kennedy was called to Washington again.

On the bench, Judge Kennedy "adheres

to precedents; he's not a judicial activist," says a former partner, state court Judge Hugh Evans. Also, in his reluctance to expand the rights of criminal defendants and suspects, he fits the definition of what President Reagan wants—a Supreme Court nominee committed to law and order.

Some of his more important decisions may become a focus of controversy. In 1985, he rejected women's claims that Washington state must give male and female workers equal pay for jobs that are different but have "comparable worth." He wrote a 1983 dissent, which the Supreme Court followed to a degree, urging relaxation of the constitutional rule that illegally obtained evidence must be excluded from criminal trials. In 1979, he wrote that the Pasadena, Calif., school system had satisfied a desegregation order and wasn't required to continue efforts to keep racial balance.

In a 1980 case with which the Supreme Court agreed, he struck down the "legislative veto" by which either house of Congress could disapprove by a simple majority an action by the executive branch. And conservatives want to ask Judge Kennedy about a 1980 ruling that, although it upheld the Navy's discharge of homosexuals, suggested that some homosexual conduct is entitled to constitutional protection.

Conservative on bench, Kennedy is called 'Mr. Clean' with flair for teaching

By Lyle Denniston
Washington Bureau of The Sun

WASHINGTON — Anthony McLeod Kennedy, President Reagan's new choice for the Supreme Court, is a family man who leads a traditional life, has a traditional view of the law and — a friend said — "really is a Mr. Clean."

His reputation as a judge is that of a staid conservative who writes narrow, carefully crafted opinions — and does so with visible self-assurance but without flair.

But his reputation as a constitutional law teacher is that of a stirring storyteller who can rouse the class to applause — and who may, on rare occasion, show up in costume. "What I remember most," said a former student, "is the way he made the stuff interesting."

For the past 22 years, he has mixed his career as a part-time, night-school law teacher first with his role as a lawyer-lobbyist and, since 1975, with his role as a judge — often in the minority — on one of the nation's most liberal courts, the 9th U.S. Circuit Court of Appeals.

Up close, he does not fit the image of a glad-handing lobbyist, his friends say, because he was never that type of person. He was described by one associate as "genuinely warm, a very modest and mild-mannered person. There is not a trace of arrogance to him whatsoever."

Moreover, said that friend, he "is the opposite of a social butterfly. He will not make the social scene in Washington."

When he became a federal judge, it is said, he severed a lot of his social ties. Now, he plays golf mainly with his wife and children. "He is close to his family and a few old family friends," said one of those, who added: "He is a classic all-American, an exemplar of traditional American values."

Judge Kennedy reads heavily, with a particular fondness for constitutional history, and has been said to regard a treatise on the law as a pleasant diversion for a Saturday morning.

There is already a tendency in Washington to suggest that as a justice, Mr. Kennedy would provide a "swing" vote when the other justices were closely divided, much in the fashion of the man he would replace, retired Justice Lewis F. Powell Jr.

But Washington, Judge Kennedy's close acquaintances say, may be surprised.

Said one: "He is a conservative, rather than a moderate conservative. He is definitely one of the conservative judges on the 9th Circuit. He is not in any way a moderate or a 'swing' judge."

In the 12 years since President Gerald R. Ford appointed him to the federal bench in California, Mr. Kennedy has written close to 500 opinions and taken part in some 1,400 rulings. But, said a man who has worked with the judge, "I can't point to one opinion in which he lays out his philosophy. . . . He is a practitioner of judicial restraint, in the classical sense. He doesn't use his opinions as a kind of vehicle for broad, ideological pronouncements of what the law ought to be."

Rather, it is said by those who know his work well, he takes the law as he finds it in the precedents, applies those to the lawsuits before him, one case at a time, and moves on to the next dispute.

Those who studied constitutional law under Judge Kennedy at the University of the Pacific's McGeorge School of Law in Sacramento say it was usually not possible to detect the judge's personal view about which decisions were right or wrong.

"He did not attempt to inculcate in the students an ideological bent," said an ex-student who now works in a legal office for the state of California. "I am some kind of a liberal, and I didn't feel I was cheated. He simply gave us a very close analysis of the cases."

Because of his general reputation as a conservative, Judge Kennedy may be pressed closely before the Senate Judiciary Committee to give his personal assessment of major Supreme Court rulings — particularly on civil rights. He has vowed to answer all questions.

Already, several civil rights organizations have found among his opinions on the appeals court a number they find objectionable, and senators will be fed possible questions about those. Conservative groups also have been less than completely enthusiastic about what they have read in his judicial work; he may be pressed from that side, too.

At this point, it appears that some controversy could arise in three main areas:

□ First, his opinions as a judge.

He has been criticized by liberals and civil rights activists for a ruling in 1985 permitting the state of Washington to continue paying its female employees lower wages than male employees because the women had been placed in traditionally low-paying jobs; a 1976 ruling barring a community volunteer group's members from suing real estate salesmen to stop them from steering black home-buyers to particular neighborhoods, and a 1983 decision (later upheld by the Supreme Court) allowing the use of criminal evidence that police obtained illegally when carrying out a defective search warrant.

On the other hand, he has been criticized by conservatives for a 1980 ruling upholding the Navy's authority to discharge homosexuals. The criticism is based upon Judge Kennedy's seemingly favorable citation of the Supreme Court's 1973 abortion decision as supporting a right of privacy in sexual matters. Despite that citation, the judge concluded that the Navy regulation did not violate the right of privacy of homosexual sailors.

□ Second, his lobbying activities.

Upon the death of Judge Kennedy's father, a powerful lobbyist in Sacramento, the younger Kennedy took over his lobbying activities, representing the liquor industry, the phonograph recording industry and a group of opticians before state agencies and the legislature.

His activities, which associates have described as more legal than legislative, will be combed to see if he was an advocate of controversial legislation.

□ Third, his former membership in private clubs.

Judge Kennedy recently resigned from the Olympic Club in San Francisco, which has been in a dispute with the city because it bars women and blacks as members. He had been a member of that club for almost 25 years.

In addition, Judge Kennedy probably is going to be examined on the nature of his ties to Attorney General Edwin W. Meese III.

Kennedy: A centrist like Powell

By Aaron Epstein
Inquirer Washington Bureau

WASHINGTON — His colleagues describe Anthony M. Kennedy, President Reagan's new choice to replace centrist Justice Lewis F. Powell Jr., as a Powell without a Southern accent.

In personality, style and approach to the law, they say Kennedy resembles Powell, the gentle Virginian who was the least predictable of the Supreme Court justices for more than 15 years and who cast the pivotal vote in a series of 5-4 decisions on the court's most sensitive, contentious issues.

Kennedy, like Powell, is a bright, restrained, pragmatic conservative who, during his 11 years on the federal appeals bench in California, wrote carefully crafted opinions that were tailored to the facts at hand, respected the relevant precedents and made sure that proper procedures were scrupulously followed.

More judicial technician than legal philosopher, Kennedy declined to reach out to make sweeping pronouncements in the manner of Judge Robert H. Bork, the controversial theoretician of the right whose bid for the Powell seat was rejected last month by a 58-42 Senate vote.

Somewhere among Kennedy's hundreds of rulings, there probably is at least one to please or displease any interest group. In short, Kennedy could become the unpredictable swing vote that Powell was.

"He's a person in the mold of Justice Powell in that he looks at each case as an individual process," said Gordon Schaber, dean of the University of the Pacific's McGeorge School of Law in Sacramento, Calif., where Kennedy has been a popular part-time teacher of constitutional law for more than 20 years.

"My sense is that the senators thought Judge Bork was too much of an ideologue, too divorced from the practical consequences of his be-

liefs," said San Francisco lawyer Kevin Kelso, who clerked for Kennedy from 1978 to 1980. "Judge Kennedy is not like that. He has a more practical sense of the world and is not solely concerned with theory. He's similar to Justice Powell in that sense."

The difference between Bork and Kennedy may be seen in the way both judges treated the same issue: the question of the constitutionality of regulations barring homosexuals from serving in the Navy.

Bork, a federal appeals judge here who had long criticized the Supreme Court's finding of a general, unwritten right of privacy in the Constitution, drew the broad conclusion that there was no constitutional protection for voluntary homosexual conduct.

Kennedy also upheld the Navy's dismissal of three gay sailors with good service records. But, in an opinion that has provoked opposition to him from Sen. Jesse Helms (R., N.C.) and some other conservatives, Kennedy wrote that the Navy rule was "a harsh one." And he cited *Roe vs. Wade*, the Supreme Court's landmark 1973 decision upholding abortions, as authority for a right of privacy that could protect homosexuals in some non-military situations.

"It should be plain from our opinion," Kennedy wrote, "that the constitutionality of the regulations stems from the needs of the military ... and from the unique accommodation between military demands and what might be constitutionally protected activity in other contexts."

He was also careful to point out that "upholding the challenged regulations as constitutional is distinct from a statement that they are wise."

If there is some grumbling on the right, there is also some grouching on the left.

"He has decided many cases against civil rights plaintiffs — and that's disturbing," said Leslie Prohl, an attorney for the liberal Alliance for Justice. In one such case, Kennedy ruled that housing discrimination "testers," who asserted that real estate agents had steered minority customers away from white neighborhoods, had no standing to sue.

Labor unions and feminist groups were disappointed by Kennedy's rejection of the concept of comparable worth in a 1985 case. His opinion overturned a sex discrimination ruling that gave 15,000 women working for Washington state up to \$1 billion in pay raises. The women argued that they were paid less than men for performing jobs requiring comparable skills.

Kennedy concluded that federal civil rights laws did not require equal pay for male-dominated and female-dominated jobs unless there was evidence of a discriminatory motive for pay disparities, which he attributed to market forces.

Congress does not intend to abrogate fundamental economic principles such as the laws of supply and demand or to prevent employers from competing in the labor market," Kennedy wrote.

It was a decision, said Judith Lichtman, executive director of the Women's Legal Defense Fund, that showed a "lack of sensitivity to wage discrimination suffered by women in the United States."

A tough-on-crime jurist, Kennedy usually has ruled for police and prosecutors. He upheld death sentences, and this year approved a sentence of life without possibility of parole for a 47-year-old drug offender with no prior criminal record. The sentence was harsh, Kennedy conceded, but he noted that the defendant had continued his drug operations while free on bail and in jail "displayed no remorse for his crimes."

He argued in a 1983 dissent to allow the use of evidence obtained in an illegal search by police who reasonably believed they acted lawfully. A year later, the Supreme Court agreed with Kennedy, 6-3.

On the other hand, Kennedy sometimes cracked down on the police or prosecutors when he believed they acted outrageously or breached important procedural safeguards. In 1977 he reversed a robbery conviction because a co-defendant did not get a separate trial. In 1979 he threw out evidence from an auto search, saying that the police lacked "a reasonable suspicion of criminal activity."

Former students in his constitutional law classes described him as a

gangling, almost shy, man who challenged them to question the rationale of Supreme Court rulings and to perceive trends in the law.

"He's not real flashy, but the students still love him," said Ronald B. Robie, a student in Kennedy's class two decades ago and now a Superior Court judge in Sacramento. "I don't remember him making any policy judgments in class. He wasn't taking sides. He doesn't see it as his mission to promote a particular philosophy. He's not a person with an agenda."

McGeorge professor Charles Kelso whose two sons and daughter-in-law clerked for Kennedy, laconically explained why the 51-year-old Sacramento jurist should fare better than Bork: "He's like me — a conservative but not a reactionary."

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... HAS NO RECORD
of Controversy, Is
Called 'Almost Prissy'

By WILLIAM OVEREND
and LEO C. WOLINSKY,
Times Staff Writers

Anthony M. Kennedy—described as a "straight arrow" and "almost prissy" by other members of the U.S. 9th Circuit Court of Appeals—astonished a group of Sacramento law students recently by giving a lecture in a powdered wig and three-cornered hat.

Kennedy, who teaches constitutional law at McGeorge School of Law, was observing the bicentennial of the U.S. Constitution by pretending to be James Madison, one of the authors of the Federalist Papers and one of the probable Supreme Court nominee's personal heroes.

Holds Students' Attention

"He kept it up for the entire class. He was pretending he was Madison at the Constitutional Convention, and it was like he'd read the daily record," one student said. "You could have heard a pin drop."

That incident in September stands in dramatic contrast to the portrait of a cautious and less-than-colorful federal judge drawn by Kennedy's colleagues on the 9th Circuit as well as others in reaction to the announcement of his selection.

"He's not a jokester," said Chief Circuit Judge James R. Browning. "I've certainly never seen him do anything like that. I've never heard of such a thing before. He has a love for the law. You have to put it in the context of trying to reach out to his students."

Amid wide praise from both liberals and conservatives on the nation's largest federal appeals court, there was a consensus that Kennedy's 12 years on the federal bench have been marked by a lack of controversy extending from his work as a judge to his private life.

"I say with confidence that it is the unanimous view of the judges on this court that, if confirmed, Judge Kennedy will be an outstanding justice," said Browning, a Democrat appointed to the 9th Circuit in 1961. "On this court, he is certainly not controversial on either end of the spectrum. We know from personal experience that he is an objective, thoughtful and balanced judge."

Los Angeles Times

In contrast to several 9th Circuit conservatives, including some briefly considered for the nomination, Kennedy's legal opinions since his appointment by President Gerald R. Ford in 1975 have avoided sharp ideological clashes with the court's liberal wing, which constituted a majority until a flood of appointments to the 28-judge court by President Reagan in the last two years.

Doesn't 'Pick a Fight'

"He is a very cautious person, almost prissy," said one liberal Democratic judge appointed by President Jimmy Carter. "His opinions are very cautiously written. He's not in any way abrasive. He's a good strong, solid conservative, but he doesn't go out of his way to pick a fight. He doesn't go anywhere he doesn't have to go in writing an opinion."

Although some Democrats on the 9th Circuit withheld judgment on whether Kennedy can survive the confirmation process, saying it has become too unpredictable in the wake of the unsuccessful Robert H. Bork and Douglas H. Ginsburg nominations, several leading conservative judges predicted that the Senate would find little in Kennedy's record that could cause him serious trouble.

"It's fair to call him a moderate conservative. Whereas he's a bit to the left of me, that's probably to his advantage," said Senior Judge Joseph T. Sneed, viewed by some as the 9th Circuit's leading conservative spokesman.

"I think he's almost ideal for the job," added Sneed, a 1973 appointee of President Richard M. Nixon. "He's the right age. Right background. Right attitude. He's a good judge and his personal life is impeccable."

First Senate Page

Kennedy, 51, was born in Sacramento and was the California Senate's first page at the age of 10. His father, Anthony J. Kennedy, was a prominent attorney and lobbyist who worked as a sole practitioner. His mother, Gladys M. (Sis) Kennedy, was viewed as a "grande dame" in Sacramento society during President Reagan's tenure as California governor from 1967 to 1974. Kennedy's father died in 1963, his mother in 1981.

Kennedy was graduated from Stanford University in 1958 and Harvard Law School in 1961, studied for a year at the London School of Economics and taught a seminar there on U.S. government. He first practiced law in San Francisco

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with the firm of Thelen, Marrin, Johnson & Bridges, now a 282-lawyer firm. However, he returned to Sacramento when his father died in November, 1963, intending to settle family business affairs and then return to San Francisco.

"We were associates together for two years," said Donald D. Roberts, former managing partner of Thelen, Marrin, Johnson & Bridges. "He was very bright, very hard working. No bad habits. Disgustingly so. If he knew any swear words, he never used them in my presence."

"He took a leave of absence when his father died, intending to return," Roberts added. "The story I heard was that his father's clients were so happy with him they persuaded him to stay. He built his father's practice into one of the finer firms in Sacramento—Evans, Jackson & Kennedy, with a dozen lawyers or so."

In Sacramento, Kennedy was a lobbyist for the California Assn. of Dispensing Opticians as early as 1964 and also engaged in lobbying activities for a liquor company, Schenley Industries Inc., until his appointment to the 9th Circuit in

1975. State records say that his lobbying clients included Capitol Records and disclose that Kennedy estimated that 10% of his time was spent as a lobbyist and the remainder as a lawyer.

"I would not classify him as a lobbyist; I would classify him as a lawyer," said James D. Garibaldi, a Sacramento lobbyist for more than 40 years. "I never knew of him working on any liquor bill as a lobbyist. As far as I knew, he did legal work for them [Schenley]."

Two years after taking over his father's law practice, Kennedy, whose wife, Mary, is an elementary school teacher, began teaching a class in constitutional law at McGeorge School of Law in Sacramento. He continued his teaching after his appointment to the federal bench.

"He's regarded as a very good teacher," said Gerald F. Uelmen, the liberal dean of Santa Clara

Cont'd

University School of Law and a leading expert on the 9th Circuit. "The people up at McGeorge just love him. I like the idea of somebody who has kept his hand in legal education and actually maintained a classroom presence while he's been on the court."

Kennedy's first contact with officials of a Reagan administration occurred in 1967, when Paul Haerle, who had worked with Kennedy when he was a San Francisco lawyer, was named appointments secretary to then-Gov. Reagan. Haerle recalls Kennedy as a "strong Republican" but one who was inactive in politics.

Haerle introduced Kennedy to Edwin Meese III (then state clemency secretary, now U.S. attorney general) and others in the Reagan Administration and recalls that Meese later enlisted Kennedy to help draft Proposition 1, an unsuccessful 1973 initiative to curb state

spending.

"I don't think he had an intimate relationship with the Reagan Administration, but we were all fairly close up here," Haerle said. "We had families of a certain age and kids of a certain age. He was very friendly, but not a hail-fellow, go-to-Posey's-and-have-a-few-belts kind of guy." Posey's is a Sacramento restaurant favored by politicians.

On the 9th Circuit, Kennedy was involved at an administrative level in opening the court's new Southern California headquarters in Pasadena last year and has been a leader in campaigning for a judicial research center nearby.

If confirmed by the Senate, Kennedy would be the first 9th Circuit judge to sit on the high court since 1925 and only the third in history to be appointed from the nation's largest circuit, which covers California and eight other Western

states and U.S. territories stretching to Guam and American Samoa.

In a 1984 interview with The Times, Kennedy, one of the few 9th Circuit judges who has publicly advocated splitting the circuit into smaller units, spoke with a mix of caution and mild humor about his work as a judge and problems facing the courts.

"We're essentially a negative body," he said. "The functions of an appellate court are two. The first is a corrective function and the second, and more important, more creative, is the law declaration. I am somewhat concerned the function is becoming somewhat blurred.

"When I first got on the court, I thought this is going to be very exciting," Kennedy added. "But I find that, in a great number of cases, I'm thinking of future cases. It seems to me we have to write stuff pretty quick. Just the press of business makes it difficult to assess our own role."

In addition to his work on the court and as a law professor, Kennedy, who has three children, is described by friends as "a very active Catholic." The judge, who is clearly comfortable with his life style in Sacramento, told friends and colleagues that he was relieved when he was first passed over for the nomination in October.

"I think everybody on the court was disappointed," Judge Browning recalled. "Tony called me and he told me: 'Jim, I didn't make it.' I expressed dismay. He said: 'Frankly, I'm glad to be coming home.'"

Officials at McGeorge School of Law said Wednesday that they have not decided what to do about replacing Kennedy. Professors and students joined in praising him and predicting no problems in the Senate confirmation process.

"I think he's a very intelligent guy," said student Steve Hanson. "You can't really tell from his classroom discussion what his politics on the issues are.

"He's an honorable man. He's never smoked pot in class once," Hanson added.

Staff writers Richard C. Paddock and Jerry Gillam contributed to this story.

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Experts Think Kennedy May Be New Swing Vote

Californian Seen as Deciding Each Case on Its Merits

By DAVID G. SAVAGE,
Times Staff Writer

WASHINGTON—In 12 years as a federal appeals court judge, Anthony M. Kennedy has developed a reputation as a moderate conservative very much like the man whose Supreme Court seat he could fill—Justice Lewis F. Powell Jr.

Powell frequently served as a swing vote on an evenly divided court, and President Reagan had hoped to replace him with a reliable conservative who would tilt the court to the right on such issues as abortion, civil rights and religion.

Possible Swing Vote

But legal experts said Wednesday that Kennedy may be another unpredictable swing vote whose instincts are conservative but who is unlikely to be a faithful ally of the right.

"Kennedy decides each case on its merits," said Santa Clara University law dean Gerald F. Uelmen. "He doesn't bring an agenda to the bench. He has the reputation of being a judge who is reliable, who doesn't venture very far and who has a solid respect for precedent."

Lawyers find Kennedy to be more of a judicial technician than a conservative ideologue, one who usually seeks to balance competing principles.

"With Kennedy, you always think you have a chance," said Peter Davis, an Oakland attorney and president of the California Academy of Appellate Lawyers. "He listens to the arguments and he can be persuaded. He doesn't have a fixed preconception or a philosophy that will dictate the result in the case, and you can't say that about a lot of judges."

However, liberals and civil rights activists were not ready to pronounce Kennedy acceptable.

"After the first two they sent up, there is a temptation to rush to judgment in favor of this one," American University law professor Herman Schwartz said. "But you have to wonder: Why is Jesse Helms mollified? What does he know that we don't?" Helms is the conservative Republican senator from North Carolina who had opposed Kennedy two weeks ago.

Civil rights lawyer William H. Rehnquist said that several of Kennedy's rulings "seem rather troubling" but that they do not show a "pattern of hostility to civil rights claims."

At the other end of the spectrum, some conservatives declared "themselves somewhat disappointed with Kennedy's selection."

"I think he will largely echo Powell," said Bruce Fein, a legal scholar at the Heritage Foundation. "Kennedy seems to be a judge who is satisfied with the conventional wisdom."

Lawyers who have examined Kennedy's rulings as a judge since 1975 on the San Francisco-based 9th Circuit Court of Appeals believe that he can be counted on to uphold criminal convictions except in egregious cases of police misconduct.

His record indicates also that, although he approaches new civil rights claims with a skeptical eye, he demonstrates a clear willingness to follow established law in favor of existing civil rights and civil liberties.

On abortion, lawyers say that they have heard conflicting rumors about his views but that they can find nothing in his record to suggest whether or not he favors a legal right to abortion.

Kennedy's key opinions include:

—In 1980, in upholding the Navy's discharge of three servicemen for homosexuality, he indicated that he was not strongly in favor of such a policy. In a lengthy opinion, he held that "private consensual homosexual behavior" may be off-limits to government interference but that the military has special authority to set strict rules for its personnel.

Last year, the Supreme Court went even further than Kennedy's court by upholding a Georgia law imposing criminal penalties for homosexual conduct. Powell cast the key vote for the majority.

—In 1983, an appeals court threw out the conviction of a cocaine seller in Los Angeles after it concluded that the search warrant issued by a magistrate was improperly vague. Kennedy dissented, saying that the evidence should be used as long as the police operated in "good faith." The next year, the Supreme Court sided with Kennedy and created a new "good-faith exception" to the rule excluding tainted evidence from court.

—In 1980 Kennedy strongly dissented when the full appeals court upheld the conviction of a Seattle woman on charges of possessing heroin. Police officers had obtained the evidence from her 5-year-old son after giving him a \$5 bribe. "Indifference to personal liberty is but the precursor of the state's hostility to it," Kennedy wrote.

—In 1985, in the first appeals court ruling on the "comparable worth" issue, Kennedy came down against guaranteeing equal pay for work deemed to be of equal value.

A district court had found that the state of Washington had discriminated against its female employees because jobs typically held by women paid 20% less than jobs usually held by men. But Kennedy said that this reflected the workings of the job market and held that the state had no responsibility to interfere.

—In 1976, Kennedy dismissed a civil rights suit against Los Angeles realtors who were steering black couples to neighborhoods occupied only by blacks. He found that those who brought the suit were not actual victims of discrimination.

The Supreme Court later disagreed. In an opinion by Powell, it said that the Fair Housing Act often must be enforced by "third parties."

—In 1978, Kennedy threw out a district judge's order seeking to inspect a television movie for inaccuracies before it was aired. "It is a fundamental principle of the First Amendment," Kennedy wrote, "that the press may not be required to justify or defend what it prints or says until after the expression has taken place."

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rious, major racial injustices that gave rise to the need for civil rights laws and give rise to the question of whether Kennedy is willing to give real relief to victims of discrimination," said William Taylor, a civil rights attorney in Washington, D.C.

"I don't think we know the answers yet," Taylor added.

Much of Kennedy's personal life suggests a cautious and conservative style. He lives with his wife of 23 years, who was his college sweetheart, in the same two-story white colonial house where he grew up.

Besides his investment in the house, which he inherited from his parents, he keeps from \$100,000 to \$250,000 in bank accounts and does not own any stocks, according to his federal financial disclosure statements.

Friends from his childhood say he was a shy, bookish boy whom they razzed for preferring to read rather than play baseball. They recall that Kennedy's father—a gregarious man who liked to chew on unlit cigars and who was known as "Big Tony" for his 250-pound, 6-foot-plus frame—once jokingly offered his son \$100 if he would do something to get arrested by police. Young Kennedy declined the offer.

Kennedy attended grammar and high schools here, earned a bachelor's degree in history at Stanford University, spent one year at the London School of Economics and graduated from Harvard Law School in 1961.

He began work with a large law firm in San Francisco, but returned here after his father died in 1963 to take over his lobbying and law practice, which represented liquor and optical firms.

State records show that from 1967 through 1974, the younger Kennedy handed out to politicians at least 84 donations totaling at least \$47,000. He made several of the contributions to California state legislators shortly after they introduced legislation favored by his clients, the records show. But no formal questions were raised about his state lobbying methods.

Kennedy got to know Reagan, then California governor, and Meese during this period. Former state officials said Meese, chief counsel for Gov. Reagan, asked Kennedy to draft an intricate plan to limit state spending. The state's voters defeated it in a referendum.

"Tony Kennedy knew exactly how to write a piece of legislation that could withstand a court test," one former state official said. "But it was so complicated that people couldn't understand it."



The New York Times/Paul Hosefro

Judge Anthony M. Kennedy getting a kiss from his wife, Mary, after President Reagan nominated him to the Supreme Court. With the Kennedys were their children, from left, Justin, Kristin and Gregory.

Restrained Pragmatist Anthony M. Kennedy

By ROBERT REINHOLD
Special to The New York Times

SAN FRANCISCO, Nov. 11 — In the modern world of family turmoil, the life of Judge Anthony McLeod Kennedy seems almost like a living Norman Rockwell portrait of provincial constancy and familial loyalty.

Man in the News He has been married to the same woman for 24 years, has sent all three of his children to his alma mater, Stanford University, and lives in the same white colonial-style house in Sacramento, behind a camelia bush and a neat row of gardenias, where he was born 51 years ago.

Such restraint and respect for precedent find an echo in the legal opinions of the man President Reagan has picked as his third choice to fill the vacant seat on the Supreme Court. And if the President had originally hoped to fill the seat with a doctrinaire conservative, he will not find that in Judge Kennedy, an energetic, self-effacing and immensely polite man who likes to read history, complain about his deteriorated golf game and taste fine California wines.

While Tony Kennedy, as friends call him, is clearly a political and legal conservative, he strikes those who know him as a quiet pragmatic one, open to persuasion. His 500 or so written opinions in 12 years on the Court of Appeals for the Ninth Circuit in San Francisco are cautiously and

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Restrained Judicial Pragmatist

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newly crafted, sticking close to precedent and avoiding sweeping generalizations on social issues.

Judge Kennedy sits well to the right center of the 36 regular and senior judges of the Ninth Circuit, which has been badly divided on such issues as immigration and criminal rights. But he is by no means on the extreme.

It is very hard to read Tony's opinions and see his personal philosophy come through, but if you add up results you can tell he is a conservative," said a fellow appellate judge, a man who often disagrees with Judge Kennedy and who requested anonymity. "But he is thoughtful and you can talk to and reason with him. He may come back with the conservative, but he'll go and think it through. He doesn't say it was a waste of time. His history does not hang all over him."

Another fellow judge, Alex Kozmin, a conservative who was once a clerk to Judge Kennedy, said, "He has a very broad theory of

A conservative bent to persuasion.

the law that he tries to fit every case into. He added that the judge was, above all, a lawyer."

Judge Kennedy is an active member of the Roman Catholic Church, and his opposition to abortion and homosexual behavior, but his views on those issues could not be determined. And while some court opinions have of late been seen as homophobic, colleagues say he has no rigid positions on these issues.

Does Not Get Off on Tangents

"He reaches opinions only to the extent you need to," said another former clerk, J. Clark Kelsö. "He does not go off on tangents about social policy." Mr. Kelsö cited the case in which Judge Kennedy upheld the right of the Navy to discharge a sailor for homosexual conduct but avoided the broader question of the legality of sexual relations between consenting adults.

Lawyers describe Judge Kennedy as extremely bright but not brilliant in the way that Judge Robert H. Bork is. While they have not all liked his decisions, liberal and conservative lawyers alike praise Judge Kennedy's temperament.

"If you picture a Federal judge, he does not fit it," said Ronald Zumbun, director of the conservative Pacific Legal Foundation in Sacramento.

"He has a low ego threshold, he has no airs about him. He is a normal person."

Although he seldom prevails with Judge Kennedy, Barry Portman, the former public defender in San Francisco, concurs, calling him "one of the most pleasant judges to argue before." He added, "I never found he had a private agenda or ideology. He is conservative but never tried to force some holding not justified by the facts. If he has a consistent criminal judicial philosophy, I am not pre-

pared to say what it is."

The 1987 edition of The Almanac of the Federal Judiciary gives this distillation of lawyers' views of him: "Courteous, stern on the bench, somewhat conservative, bright, well prepared, filled with nervous energy, asks many questions, good analytical mind, not afraid to break new ground, open minded, good business lawyer, hard to peg, an enigma, tends to agonize over opinions."

'He's More Provincial'

Colleagues say his style, marked by boyish enthusiasm, contrasts markedly with the apparently more worldly Judges Robert H. Bork and Douglas H. Ginsburg, who were chosen ahead of him for the job.

"Nobody will find anything in his opinions or personal life that will raise any problems," said the liberal Federal judge who asked anonymity. "You won't find anything very dramatic, very provocative or very controversial. He is not a big liver. He's more provincial. I wouldn't think Tony goes to the opera."

Judge Kennedy was born into Republican politics on July 23, 1936. His mother, Gladys, was a prominent civic booster, and his father, Anthony J. Kennedy, was a politically connected lawyer and lobbyist in Sacramento who was associated with Artie Samish, a powerful lobbyist and fixer who ultimately went to jail for tax evasion. At the age of 10 the youth took a year off from school to serve as a page in the State Senate.

He was graduated, Phi Beta Kappa in political science, from Stanford University in 1958. Prof. Robert A. Horn, now emeritus, who taught the young Mr. Kennedy constitutional law, remembers him as "extremely intelligent" and scholarly even as an undergraduate. "He was conservative but not a right-wing ideologue," Professor Horn said. "His personality is such that I cannot imagine his being a peacock or a fanatic." The professor said he was struck by how "courteous" the student was.

After Stanford, Mr. Kennedy went to the Harvard Law School, graduating in 1961. His roommate at Harvard, R. Doble Langenkamp, now in the oil business in Tulsa, recalls that his friend "wanted to be a judge virtually all the time I knew him." Mr. Langenkamp said his roommate was deeply influenced by his parents' Republicanism. He recalls Mr. Kennedy as the hardest-working and most purposeful of his classmates, saying he was impressed with his breadth of reading "and he wrote so exceedingly well."

Turning Point for Lawyer

After graduation, Mr. Kennedy joined a law firm in San Francisco, and in 1963 married Mary Jeanne Davis, who now teaches elementary school in Sacramento. That year was a turning point in the young lawyer's life. His father died of a heart attack, leaving his personal financial affairs in extraordinary disarray. The son returned to Sacramento, sacrificing a potentially lucrative practice in San Francisco, to take over his father's solo practice and help the family.

In his confirmation hearings for the Federal appeals court in 1975 Mr. Kennedy characterized his law practice as "widely diversified," including "people with individual legal problems, divorce, minor criminal, probate matters, my acquaintances

from my many years in Sacramento" and "some very major companies." But the bulk of his practice, he told the committee, was representing businesses in the "middle of the spectrum."

His cases were mostly garden variety disputes, such as a condemnation case involving a development company whose owners included family friends and his mother.

He also worked as a lobbyist at the Capitol, representing Schenley Industries Inc., the liquor distillers; the California Association of Dispensing Opticians and Capitol Records Inc. A state audit in 1975 indicated that he devoted about 10 percent of his time to lobbying.

Ties to Reagan and Meese

Meanwhile, Mr. Kennedy also developed working ties to Ronald Reagan, when he was Governor of California and to his executive secretary, Edwin Meese 3d, now the Attorney General. As a private lawyer, he was asked to draw up a tax-cutting referendum that failed to win passage in 1973. He was appointed to the appeals court in 1975 by President Ford.

Judge Kennedy does not appear to have accumulated much wealth. His Federal financial disclosure statements show he has no more than \$200,000 in assets, not including his residence.

An issue that may arise in confirmation hearings is his membership in the all-male Olympic Club, a private social group in San Francisco since 1962. According to press reports here, he resigned from the club last month when he was under consideration for the nomination before Judge Ginsburg was chosen. Such exclusionary clubs have come under increasingly wide criticism, particularly from women's groups.

His life in recent years has been



Students at the McGeorge School of Law at the University of the Pacific in Sacramento, Calif., applauding as they watched on TV as President Reagan nominated Judge Anthony M. Kennedy to the Supreme Court. Judge Kennedy teaches a course in constitutional law at the school.

marked by sorrow. His only brother died in a surfing accident in Hawaii, his only sister died of cancer and his mother died shortly thereafter. "The death of his brother, sister and mother coming so soon after each other was an awful lot to bear," said Robert M. Wheatley, a former law partner.

The Kennedys have two sons, Justin A., who was graduated from Stanford last year, and Gregory D., a senior at Stanford, and a daughter, Kristin M., a sophomore at the same school.

Off the bench, the judge is an avid reader of history and classic literature, such as Shakespeare, and occa-

sionally plays golf at a local country club. His approach to life suggests a small-town innocence. When his local gas station closed down after 24 years, he lamented to The Sacramento Bee, "It is the kind of place where I can get my car serviced and talk about politics and law and life all at the same time."

For the last 22 years, Judge Kennedy has taught constitutional law once a week at the McGeorge School of Law at the University of the Pacific in Sacramento. He is a hard grader, but much admired by his students. "They are stunned to see this man walk in and give a three-hour dissertation and Socratic dialogue

without ever looking at a note," said the dean, Gordon D. Schaber, who called the energetic judge "a human hydroelectric project."

It was a way of life Judge Kennedy appeared fated to continue when he was passed over in favor of Judge Ginsburg, commuting from Sacramento to the court's seat in San Francisco and traveling the circuit of nine states, Guam and Northern Mariana Island. But then, with the disclosure of Judge Ginsburg's marijuana use, the fates twisted again and Anthony Kennedy was called to Washington to be offered the post he was refused just two weeks ago.



Reagan, Calling for 'Bipartisan' Effort, Picks Judge Kennedy for Supreme Court

By STEPHEN WERMIEL
And GERALD F. SEIB

Staff Reporters of THE WALL STREET JOURNAL

WASHINGTON — President Reagan, sounding conciliatory rather than confrontational, selected Anthony M. Kennedy, a federal appeals court judge from Sacramento, Calif., in his third attempt to fill a vacant seat on the Supreme Court.

In an appearance in the White House press room, President Reagan called for "a bipartisan effort" to confirm the 51-year-old Judge Kennedy and urged "prompt hearings" by the Senate Judiciary Committee.

Judge Kennedy is a traditional conservative, friends and associates say, who respects legal precedents and believes in a limited role for the courts, but who has no strong ideological agenda or record of involvement with conservative causes such as abortion or school prayer. A graduate of Harvard Law School, he has been a federal appeals court judge for 12 years and, since 1965, a highly popular, part-time teacher of constitutional law at McGeorge School of Law in Sacramento.

Unlike President Reagan's attempts to fill the Supreme Court seat with Judges Robert Bork and Douglas Ginsburg, the announcement yesterday—which was expected—evoked no sharp criticism from liberal Democratic senators and expressions of moderate concern, rather than alarm, from civil rights groups.

Senators and civil rights leaders said they want to study Judge Kennedy's extensive judicial record—he has written more than 400 appeals court opinions—and listen to his answers in confirmation hearings.

There was no immediate decision about when the Senate Judiciary Committee will hold hearings, but some senators doubt they will begin before January.

Committee Chairman Joseph Biden (D., Del.) said, "We will . . . move as rapidly as is prudent." Sen. Edward Kennedy (D., Mass.), who blasted the last two nominees, said the judge "has written a large number of opinions that the . . . committee will want to examine to determine his judicial philosophy and his commitment to the principles of the Constitution."

In an attempt to sound a harmonious tone, President Reagan stressed that Judge Kennedy is "popular" with colleagues and with senators "of varying political persuasions." Judge Kennedy, in brief remarks, added that he is "looking forward to the scrutiny that the Senate should give any nominee . . ."

Threatened opposition from some con-

servatives, who fear that Judge Kennedy is too moderate, has been "muted," according to White House officials. Two weeks ago those threats led President Reagan to select Judge Ginsburg over Judge Kennedy. Yesterday, however, one conservative, Sen. Orrin Hatch (R., Utah), said, "I doubt that any conservatives are going to oppose him . . . He does appear to be a conservative judge."

White House officials said Sen. Jesse Helms (R., N.C.), leader of the anti-Kennedy effort two weeks ago, is "reserving judgment" until he has a chance to meet the nominee and discuss his record.

The big question for the White House, now that it has made its choice, isn't conservative reaction. Officials expect conservative groups to support the nomination, although without real enthusiasm.

Unknown, however, are the attitudes of the coalition that helped to defeat Judge Bork. Initial concern in civil rights groups, said Ralph Neas, director of the Leadership Conference on Civil Rights, focuses on "problems in . . . fair housing, voting rights, wage discrimination and school desegregation cases" in which Judge Kennedy wrote opinions.

But the wait-and-see attitude by liberal senators and civil rights leaders suggests that those who successfully opposed Judge Bork are attaching considerable importance to the confirmation hearings for Judge Kennedy. "It's very important that people take their time to study the whole record," said Washington civil rights lawyer William Taylor. "I don't see how there can be well-prepared hearings before January."

Some opponents of Judge Bork had positive initial reactions. "Those opinions I've read, even those I disagree with," said Harvard Law School Professor Laurence Tribe, a constitutional expert, "show

Please Turn to Page 28, Column 1



Anthony M. Kennedy

Federal Judge Anthony Kennedy Selected for Supreme Court Seat

Continued From Page 3

(Judge Kennedy) to be a thoughtful, moderate, conservative, not a zealous ideologue, but someone who is respectful of constitutional principles." He, too, said it is "premature to draw any final conclusions."

A Sacramento native, Judge Kennedy received a degree from Stanford University and studied at the London School of Economics before graduating from Harvard Law School with honors in 1961.

After a brief stint with a San Francisco law firm, he returned to Sacramento in 1963 to pick up the law practice of his father, who died that year. The practice, later merged with those of two other lawyers, involved a range of legal advice and litigation for a variety of clients and included some lobbying for corporations, including Capitol Records Inc., now a unit of Thorn EMI PLC, and Schenley Industries Inc., now a unit of Rapid-American Corp.

White House officials say that they and the Federal Bureau of Investigation have looked extensively at Judge Kennedy's record as a lobbyist and have turned up nothing controversial.

Mr. Kennedy first came to the attention of then-Gov. Reagan when he helped draft a constitutional amendment limiting California state taxes and spending. Voters rejected the plan in 1973, but two years later Gov. Reagan urged President Ford to appoint Mr. Kennedy to the federal appeals court based in San Francisco.

Friends say Judge Kennedy is an intense, soft-spoken man with a wry sense of humor who is dedicated to his family. He and his wife, Mary, a third-grade teacher, have a son Justin, 23, a Stanford graduate now working in real estate; a son Gregory, 22, and daughter Kristin, 19, both Stanford students. His friends say he is a practicing Catholic, an avid reader, and a sometime golfer and tennis player. Judge Kennedy dresses conservatively, is trim and stands more than six feet tall.

Despite a serious manner in the courtroom, he is best known at McGeorge Law School for occasional theatrical flourishes at his Monday night classes. To celebrate the Constitution's bicentennial, he arrived a few weeks ago in powdered wig, ruffled shirt and Colonial coat to portray James Madison and lecture on the problems of drafting the Constitution. In other years, he has received ovations from standing-room only classes for his portrayal of President Franklin Roosevelt urging support for packing the Supreme Court. Students say he has a limitless memory for constitutional law and rarely uses notes or a textbook in class.

When he was passed over by President Reagan in favor of Judge Ginsburg, Judge Kennedy's students planned last Monday to hang a banner in the classroom saying, "You'll always be supreme to us." But they never got to display the message; Judge Kennedy was called to Washington again.

On the bench, Judge Kennedy "adheres

to precedents; he's not a judicial activist," says a former partner, state court Judge Hugh Evans. Also, in his reluctance to expand the rights of criminal defendants and suspects, he fits the definition of what President Reagan wants—a Supreme Court nominee committed to law and order.

Some of his more important decisions may become a focus of controversy. In 1985, he rejected women's claims that Washington state must give male and female workers equal pay for jobs that are different but have "comparable worth." He wrote a 1983 dissent, which the Supreme Court followed to a degree, urging relaxation of the constitutional rule that illegally obtained evidence must be excluded from criminal trials. In 1979, he wrote that the Pasadena, Calif., school system had satisfied a desegregation order and wasn't required to continue efforts to keep racial balance.

In a 1980 case with which the Supreme Court agreed, he struck down the "legislative veto" by which either house of Congress could disapprove by a simple majority an action by the executive branch. And conservatives want to ask Judge Kennedy about a 1980 ruling that, although it upheld the Navy's discharge of homosexuals, suggested that some homosexual conduct is entitled to constitutional protection.

LARS ERIK
NELSON

ON THE 200th anniversary of the signing of the Constitution last September, Judge Anthony Kennedy showed up at the law class he teach-

es in Sacramento, wearing pantaloons, long coat, ponytail wig and a three-cornered hat—and pretended for a full 2½ hours to be James Madison.

"It was a magnificent performance," Dean Gordon Schaber of the McGeorge Law School recalled yesterday, as he pondered President Reagan's selection of Kennedy for the Supreme Court.

"The students were enthralled," Schaber said. "The class played the role of citizens of the era, asking Madison what exactly was in this new document he had signed, and Kennedy explained it to them—through Madison's eyes. It was astonishing how much work he had done in preparation."

Sounds like fun. More important, Ken-

At last, no telling what Kennedy will do

neddy sounds both scholarly and communicative. Poor Robert Bork, Reagan's first nominee, was also scholarly but never could quite make it clear what precisely he believed. He kept complaining that the Senate Judiciary Committee, the press and even his right-wing supporters had misinterpreted his views.

Douglas Ginsburg, the second nominee, never got a chance to explain his views to the Senate. He withdrew because of a confession that he had smoked marijuana.

The most important aspect of Reagan's reluctant, third-try nomination of Kennedy is that it ends the administration's effort to short-circuit Congress and enact its social agenda—on abortion, school prayer and criminal rights—by putting a right-wing judge on the court.

What Reagan has been trying to do, up to now, is the very thing he has complained about: He has objected to decisions made by "activist" liberal judges—and wanted to undo them by installing an activist conservative.

"Kennedy clearly lacks a strongly reactionary judicial philosophy and therefore seems prepared to accept the legacy of

judicial activism that we have inherited," Prof. Stephen Macedo of Harvard University said yesterday.

Schaber agrees: "The trouble with a preordained philosophy is often you try to fit facts into your philosophy. Kennedy decides on a case-by-case basis. He is a man of professionalism and honor."

Reagan's three attempts to fill the vacant seat have highlighted a confusion over what a conservative really is.

When he introduced Kennedy on Wednesday, Reagan said: "Judge Kennedy is what 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."

But Bork, Reagan's first "conservative" nominee, believed just the opposite. Bork strenuously argued that if legislatures don't specifically grant people certain rights—like the right to privacy—they don't have any. As Macedo, a libertarian conservative, put it: "Do we have rights as individuals or are we only free

as members of a collective majority?"

REAGAN'S SECOND "conservative" nominee, Ginsburg, was an advocate of the "cost-benefit" or "law and economics" philosophy: People have rights, but some of them, like the right to life in a pollution-free environment, must be measured against the economic costs of that right. In its most cold-blooded calculation, Ginsburg figured the value of a human life lost to asbestos-caused cancer at \$22,000. He then calculated that the cost of a ban on asbestos was greater than the value of the \$22,000 lives it would save—and blocked the ban.

There's no way to predict how Kennedy will rule on Supreme Court issues. Rep. Bill Green (R-Manhattan) is apprehensive that he might in fact vote to limit or outlaw abortion, but acknowledges, "I'm a little more comfortable with him than I was with the first two."

The most striking difference between Kennedy and his predecessors is his apparent absence of ideology. Bork and Ginsburg were believers in philosophies of law. Kennedy seems to be guided by a basic sense of right and wrong.

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Kennedy depicted as tough but fair in criminal cases

By George Archibald
THE WASHINGTON TIMES

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.

Probably not

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 loan-sharking 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.

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

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

On the death sentences:
"There is no valid constitutional or federal objection to the imposition of the capital sentence."
— Decision in *Neuschafer vs. Whitley*, May 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 *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."

X

X



HIGH COURT NOMINEE KENNEDY: AGAINST COMPARABLE WORTH, SOMETIMES PRO-CONSUMER

BUSINESS CAN'T BANK ON JUDGE KENNEDY'S VOTE

'He looks like a conservative but could flow over to the liberal side'

Liberals seem mollified—and hard-right conservatives have little choice. Judge Anthony M. Kennedy seems destined to win confirmation to the U.S. Supreme Court. Yet for business, the appointment of a conservative former business lobbyist may not prove the expected boon.

Despite Kennedy's corporate-law background, his rulings on the U.S. Court of Appeals in Sacramento show that he is remarkably eclectic. Friends say he's a conservative with a heart, and that makes it hard to predict how he'll rule in a given case. Kennedy "is capable of being a Justice Blackmun," says Bruce Fein, a conservative legal analyst. "He looks like a conservative but could flow over to the liberal side."

The 51-year-old Kennedy's background seems to qualify him to step into the shoes of retired Justice Lewis F. Powell Jr. as the high court's business expert. Kennedy spent 13 years as a lawyer in Sacramento, preparing securities documents, drawing up employee compensation plans, and representing clients in real estate transactions. His rulings during his 12 years as an appellate judge show that he usually favors the free market over government regulation. Yet his decisions aren't those of an unyielding laissez-faire economist.

Kennedy's best-known business deci-

sion was his 1985 ruling that derailed comparable worth. A federal district judge had ruled that Washington State illegally discriminated against female employees by paying them 20% less than men in jobs of similar skill levels. Kennedy rejected the argument that differing pay scales violate civil-rights laws. He wrote that the wages were based on those in the prevailing labor market, which was ruled by the laws of supply and demand. Since then, other courts have adopted his reasoning.

While business hailed the ruling, it upset women's groups and labor unions, who may oppose the nomination. "We have some concerns, since that ruling adversely affected our membership," says Philip L. Sparks, a spokesman for the American Federation of State, County & Municipal Employees, which brought the case.

FINE PRINT. Other decisions show just how hard it is to pigeonhole Kennedy. In 1982 he voted to let consumers collect damages when an Idaho bank failed to print finance charges and annual percentage rates in boldface in its loan documents, a seemingly technical violation of the Truth in Lending Act.

Four years earlier, Kennedy ruled that Batten, Barton, Durstine & Osborn Inc. (now BBDO International Inc.) had an obligation to assure the accuracy of

advertising claims made by its client, Standard Oil Co. of California. But as he often does, he sought a middle ground. Citing the companies' free-speech rights, Kennedy refused to require them to submit all future ads for prior Federal Trade Commission approval as the agency had wanted. Lawrence G. Meyer, who argued the case for BBDO, points out that the oil giant's enormous influence in California didn't sway Kennedy. "If ever there was a case that would bring out his bias, this was it," he says.

In antitrust, Kennedy seems to toe the Administration's permissive line. In one dissent, he said it was not automatically illegal for medical groups to set maximum prices that member physicians can charge, contending that it was not clear the practice resulted in higher consumer costs. He is likely to agree with conservative economists that retail price-fixing is not always illegal, an issue in an antitrust case now pending before the court.

Kennedy's views on antitrust were shaped by his many years in business. From 1963 until his 1975 appointment to the bench by President Ford, he sat on the boards of three companies: Capitol Oil Corp., an oil and gas exploration outfit; A. DeWied Casing Co., a San Antonio manufacturer of sausage casings; and Nicolaus Optical Co., an 11-store retail eyeglass company. His former clients include Schenley Industries Inc., Capitol Records Inc., and a California trade association of opticians. Kennedy, who lobbied in Sacramento for both Schenley and the opticians in the '60s and '70s, may be the only justice in recent memory to have spent time as a state-registered corporate lobbyist.

'SQUEAKY CLEAN.' White House officials at first feared that someone might find a skeleton in Kennedy's closet from his lobbying days. But federal investigators say they have not found any irregularities. Says Gordon D. Schaber, dean of the McGeorge School of Law at the University of The Pacific, where Kennedy has taught night students for 22 years: "He's squeaky-clean."

As a result, the President is unlikely to face anything like the bruising battle he had over the nomination of Judge Robert H. Bork or the embarrassing withdrawal of Douglas H. Ginsburg. Kennedy is a devoted family man, a pillar of the Sacramento community, and a devout Catholic. In contrast to Bork, he has no overarching philosophy that opponents can attack. "He doesn't try to fit every case into a grand scheme," says Judge Alex Kozinski, a colleague on the Ninth Circuit Court of Appeals. That will smooth the confirmation process. But it could also mean increased uncertainty for business.

By Paula Droyer in Washington, with Jonathan B. Levine in San Francisco

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KENNEDY FROM PAGE 11

lawyers by the early 1970s, a mid-sized firm for Sacramento in those days.

At varying points during the late 1960s and early 1970s, Kennedy represented Capitol Records, the GRT Corp., a cassette-tape manufacturer; the city of Thousand Oaks, Calif.; and the National Association of Alcoholic Beverage Importers, as well as Schenley and the opticians' association.

Links to the Liquor Lobby

Kennedy's work for Schenley may become an issue in his confirmation. Schenley, a major manufacturer of gin, vodka, and other hard liquors, was involved in illegal marketing practices during the mid-

Kennedy, once the debating partner of Meese, seems like an obvious choice, rather than the dark horse.

1970s that cost the company thousands of dollars in fines in California and New York.

Questions about Kennedy's relationship with the liquor maker were first raised in a Nov. 12 article in *The Los Angeles Times*.

Shortly before Kennedy joined the 9th Circuit, he was the distiller's representative in negotiations before the California Department of Alcoholic Beverage Control, which regulates the liquor industry, says Kenneth Byers, chief counsel to the agency.

Agency records show that on several occasions during the mid-1970s, Schenley violated state laws regulating the liquor industry's marketing practices.

There are no indications that Kennedy was involved in any of Schenley's wrongdoing, although the agency's records show that Schenley's violations occurred while

Kennedy was representing the company.

In one state proceeding against Schenley, which was resolved in January 1974, the distiller was fined for illegally furnishing several liquor retailers with a "display consisting in part of a knitted hat and knitted scarf, and such display did have intrinsic value other than advertising," according to the state liquor authority's records.

Byers says Kennedy represented Schenley in negotiations with the state to resolve this violation, but declines to elaborate on Kennedy's role.

During the mid-1970s, when Kennedy was still representing Schenley, the company was fined on several other counts of improperly influencing retailers to carry its brands. But these matters were settled in 1978, after Kennedy had assumed the federal bench.

Kennedy declines to be interviewed while his confirmation is pending.

Members of the Senate Judiciary Committee, including its chairman, Sen. Joseph Biden Jr. (D-Del.), have said they will investigate Kennedy's representation of Schenley.

Judge Evans, Kennedy's former law partner, calls the recent flap over Kennedy's Schenley representation "so much heifer dust."

Because of his ties to the liquor lobby, Kennedy's father also was indirectly touched by a scandal in the industry, although neither Kennedy Sr. nor Schenley was ever linked to the episode. The scandal has become something of a legend in California political history.

Artie Samish, a powerful lobbyist in post-war Sacramento known as the "Liquor Lobby King," was jailed in the wake of a bribery scheme in the 1950s that brought down several legislators and state regulators. Anthony Kennedy Sr. and Samish were known as professional and social acquaintances.

'Not a Backslapper'

One of the lobbyists the younger Kennedy came to know in the corridors of the State Capitol was a young deputy district attorney from Alameda County, Ed Meese, who represented the California District Attorneys' Association in the early 1960s.

"Tony and Meese, as I understand it, were very good friends and close in age," says family friend Judge Wilkins.

Meese and Kennedy, although fast becoming established in Sacramento's legal and political community, were not typical



Edwin Meese III tapped Anthony Kennedy to work on Gov. Reagan's anti-tax crusade. Kennedy helped write a referendum.

of the "smoke-filled back room, bourbon-slugging lobbyist," says William Bagley, a former state assemblyman who later became the first chairman of the Commodity Futures Trading Commission under President Ford.

"Tony is not a backslapper," says Wilkins. "He's a very independent character."

Kennedy continued to lobby, to practice law, and to teach constitutional law at McGeorge School of Law in Sacramento. Meese went on to work for Ronald Reagan, who was elected governor in 1966.

It was Meese who in 1973 helped tap Kennedy when then-Gov. Reagan was looking for a team to help develop a plan to slash taxes and limit government spending.

Kennedy was actually recruited for the anti-tax campaign through a law partner, Herbert Jackson, says Lewis Uhler, who chaired Reagan's Tax Reduction Task Force.

Jackson was then serving on the task force's advisory board and was the more "visibly political" of Kennedy's law partners, according to one former Kennedy colleague.

"Tony Kennedy was brought into the picture because he was a brainy guy and knew the legislative scene," recalls Alan Post, who served from 1949 to 1977 as a special legislative analyst to the California Assembly and who was a major force in opposing Reagan's tax measure.

"He knew the structure of government well enough and he had the technical legal skills to handle a very difficult task," adds Post.

Recalls Uhler, now chairman of the Roseville, Calif.-based National Tax Limitation Committee: "The mission was to develop and design a true limitation on the growth of government, both on taxing and spending. The proposal would have put

an enforced ceiling on state spending, based on a percentage of state and local tax revenues.

Many of the country's top conservative economists were involved in formulating the concepts behind the initiative, including Stanford University's Martin Anderson, the University of Chicago's Milton Friedman, and George Mason University's James Buchanan, says Uhler.

"But we needed to translate the concepts into legal language, and that's what Kennedy did," Uhler explains.

Kennedy not only drafted the proposal, but he campaigned for it across the state, according to several former Reagan and Kennedy associates.

Suddenly, Kennedy had gone from "your quintessential general practitioner in a small town," in the words of one senior Justice Department official, to a key player in a major political battle with national overtones.

Meese and Kennedy remained close after their work on the failed Proposition 1, say several Kennedy intimates.

"Their wives would socialize at meetings of the [9th Circuit] judicial conference," says Hamlyn, Kennedy's friend since boyhood.

And although Meese has been widely criticized for his advocacy of Judge Ginsburg over Kennedy in the wake of the Bork defeat, Meese has maintained all along that he is a firm supporter of Kennedy.

Indeed, in the administration's long and frustrating search for a Supreme Court nominee who will be a loyal keeper of the Reaganite flame, Kennedy, once Meese's debating partner on Proposition 1, seems like an obvious choice, rather than the dark horse. "I think there certainly were some divisions in the administration caused by Ginsburg," says one senior Justice Department official. "Kennedy is virtually a unanimous choice."

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A Jurist to Fit Powell's Shoes

His Conservatism Is Sound, So Is His Adherence to Precedent

By GERALD F. UELMEN

The Supreme Court nomination of Judge Anthony Kennedy will focus attention on the published opinions he has authored during 12 years as a judge of the U.S. 9th Circuit Court of Appeals. Unlike the District of Columbia Circuit, where Judges Robert H. Bork and Douglas Ginsburg both sit, the 9th Circuit handles a broad array of criminal and civil litigation. It is the largest of the federal circuit courts and includes nine Far Western states.

Special interest groups of every stripe will find something to praise and something to condemn among the 335 majority opinions written by Kennedy. That fact alone is encouraging. The results of his opinions are not predictable.

One of the complaints voiced about Bork was that results could be predicted by identifying the parties in cases he heard. Where the government was a party, the government invariably won—unless business was on the other side. No such patterns emerge from Kennedy's decisions. He shows no reluctance to overrule the decision of the lower court, even when that decision was in favor of the government. About 40% of all of his majority opinions during the past 12 years have, in whole or part, reversed or vacated the ruling being reviewed. In comparison, the national average for all U.S. Circuit Court judges is a 16% reversal rate. Even in criminal appeals, Kennedy's reversal rate is much higher than average: 30%, compared to a national average of 12%. How does a judge who reversed so many lower court decisions maintain a reputation as a "conservative"?

A review of his published opinions confirms the legitimacy of his claim to be a disciple of "judicial restraint." Many of his "reversals" do not require a lower court to "do it over," but simply limit the breadth of a lower court ruling or require more precise findings. His opinions are remarkable in their attention to detail and insistence upon procedural regularity. He rarely invokes the doctrine of "harmless error," the refuge of too many judges who seek vaporous excuses to avoid reversals. Invariably, he pursues the narrowest ground for a ruling, eschewing ringing statements of broad principles.

Certainly, part of the explanation for Kennedy's judicial approach can be found in the nature of the court on which he sits. The 9th Circuit has gone through two remarkable transitions in the past decade. During his single term, President Jimmy Carter appointed 15 of the then 23 judges sitting on the 9th Circuit. The court achieved a reputation as one of the most liberal in the country, and matched that reputation with the highest rate of reversal by the U.S. Supreme Court.

To a great extent, the 9th Circuit's reputation as a "liberal" court packed with

Carter appointees was overblown. The high reversal rate was manipulated by the Solicitor General's selection of cases for U.S. Supreme Court review. Recent appointments to the court have profoundly shifted the balance. President Reagan has now made nine appointments to the court, with two more pending. The volatile mixture produces a high rate of dissenting opinions.

Kennedy, an appointee of President Gerald R. Ford, has never assumed a confrontational posture. He adheres to precedent, and even those who dissent from his opinions frequently remark upon how "well-crafted" they are. In 90% of his opinions, there is no dissent, a higher rate of unanimity than most of his colleagues. He also writes fewer dissenting or concurring opinions than many of his judicial colleagues.

The "law and order" rhetoric served up by the Administration in nominating Judges Bork and Ginsburg fit them like a suit that was four sizes too small.

Kennedy's fit is even tighter. He applies the same even hand in reviewing the convictions of mobsters and drug dealers that he applies to the claims of bankers and labor unions.

In *United States vs. Spilotro*, Kennedy rejected a government appeal from a court order suppressing evidence seized from an alleged Chicago Mafioso because the warrant was not particular enough in describing the evidence to be seized.

He rejected the government's urging to apply the "good faith" exception to the exclusionary rule recognized by the U.S. Supreme Court in 1984, concluding

that 9th Circuit precedent precluded such a course.

Although the logjam of California death penalty cases has not yet hit the federal courts in the 9th Circuit, Kennedy has had occasion to write opinions in at least two death penalty cases. He affirmed the judgment of death against Jimmy Neuschaefer, a Nevada prisoner convicted of murdering a fellow prison inmate by strangulation, but only after insisting on a remand hearing to resolve a factual dispute over the admissibility of a confession. In another case, he reversed a death penalty judgment the Arizona Supreme Court had upheld, finding that a failure to instruct the jury on the possibility of a lesser verdict of second-degree murder was a violation of the federal constitutional right to due process of law.

Kennedy has been assailed as a "vanilla conservative" by the far right, whose shrill demands for a conservative ideologue led to disaster in the Senate.

But the brand of Kennedy's conservatism bears a remarkable resemblance to that of Justice Lewis Powell, whom he would replace on the high court. His experience on the volatile 9th Circuit has given Kennedy excellent preparation to fill Powell's shoes. He will take each case as it comes, and avoid sweeping pronouncements in deciding it. He brings no agenda to the court. At the center of a sharply divided court, he appears to be precisely what we need.

Gerald F. Uelmen is dean of Santa Clara University School of Law.

Judge Kennedy Called Front-Runner for Court

Californian Flies to Washington, Meets With Baker; Announcement Could Come This Week

By DAVID G. SAVAGE, Times Staff Writer

WASHINGTON—White House and Justice Department officials said Sunday that a new nominee for the Supreme Court vacancy will be named soon and one senior White House official said that federal appeals court Judge Anthony M. Kennedy of Sacramento—who just missed being named 10 days ago—is now the front-runner.

Just hours after Judge Douglas H. Ginsburg withdrew his name from consideration Saturday afternoon, the 51-year-old Kennedy boarded a plane at McClellan Air Force Base near his home and was flown to Washington.

But Kennedy had made the same hurried trip to Washington on Oct. 28, only to have President Reagan decide after a 20-minute meeting that Ginsburg would be the nominee.

Choice Not Confirmed

After Kennedy's arrival in Washington, he met privately at an undisclosed location with White House Chief of Staff Howard H. Baker Jr., who, with Atty. Gen. Edwin Meese III has played a central role in interviewing potential nominees for presentation to the President.

"It's fair to say he's the leading candidate," the senior White House official said. But he added: "We'll be talking to others this week."

Another senior White House official, who refused to be identified, said the Administration wants to have an announcement by mid-week, possibly as early as Tuesday.

"Time is the overwhelming consideration," said one Administration official. "If we wait until January, there is no more than a 50-50 chance of getting someone confirmed in Reagan's term."

Unlike Kennedy, two of the judges who were finalists two weeks ago—Ralph K. Winter Jr. and William W. Wilkens Jr.—were not in Washington Sunday.

Winter, a former Yale University law professor and a judge on the U.S. 2nd Circuit Court of Appeals,

was here Saturday to speak at a conference of the conservative Federalist Society, but he checked out of his hotel Sunday morning and a friend said he was driving back home to New Haven, Conn.

Wilkens of Greenville, S.C., who sits on the U.S. 4th Circuit Court of Appeals, has been boosted as a candidate by his former boss, Sen. Strom Thurmond (R-S.C.). He was on weekend National Guard duty Sunday, a reporter who called his home was told.

Before Ginsburg was named two weeks ago, Justice Department attorneys and conservative legal experts were concerned by a historical precedent, the nomination of Justice Harry A. Blackmun.

Nominated by Nixon

An obscure Republican appeals court judge, Blackmun was nominated by President Richard M. Nixon in 1970 after two previous nominees—Clement F. Haynsworth Jr. and G. Harrold Carswell—failed to win Senate confirmation. But Blackmun went on to become one of the more liberal members of the Supreme Court, and in 1973 authored its opinion giving women the right to abortion.

Some conservatives who helped to push the choice of Ginsburg rather than Kennedy said they worried that Kennedy could turn out to be "another Blackmun."

But another precedent now worries Reagan's aides. In June, 1968, Justice Abe Fortas was nominated to become chief justice by lame-duck President Lyndon B. Johnson. Senate Republicans—including Thurmond—filibustered the nomination so that the soon-to-be-elected President Nixon could nominate the person who would fill the seat.

With the Fortas precedent in mind, some Republicans are urging the White House to move quickly so that work on the nomination can be completed before presidential election politics dominates the nation's agenda.

"I think March or April may well be too late. I believe you're going to see a very different political tone on this issue if we go into March or April," Sen. Arlen Specter (R-Pa.), a member of the Senate Judiciary Committee, said Sunday on ABC's "This Week With David Brinkley."

By then, a front-runner may emerge from the early Democratic primaries and the Democratic majority in the Senate could choose to delay a Supreme Court nomination.

"If President Reagan is going to make this nomination, it had better come to fruition before April," Specter said.

Senate Judiciary Committee aides said over the weekend that hearings on a third nominee could be begun before the end of December if the White House submits a name soon. But they said they doubt the Senate could complete

action before the new year.

Two weeks ago, when the White House submitted a list of possible court nominees to key senators, Judge Kennedy was one of the few who did not generate immediate opposition. However, when it became clear that he was among the front-runners, he encountered strong opposition from conservatives in the Justice Department and on Capitol Hill because, as one put it, he is "not one of us." As an appeals court judge, Kennedy frequently has sided with the police and against criminals, but his opinions were not predictably conservative.

Dissented in Heroin Case

In a 1980 case, he dissented from the conviction of a woman for selling heroin when police obtained the evidence by offering her 5-year-old son a \$5 bribe. "I view the police practice here as both pernicious in itself and dangerous as a precedent," Kennedy wrote.

In another 1980 opinion, he ruled that the Navy acted legally in dismissing three homosexuals, but added: "Upholding the challenged regulations as constitutional is distinct from a statement that they are wise."

Cont'd.

This line, when read by Sen. Jesse Helms (R-N.C.), provoked him to call the White House two weeks ago and tell Reagan he would fight a Kennedy nomination.

Helms was away from Washington and not available for comment Sunday, but an aide to another conservative Republican senator said: "Some people are going to be very disappointed if it is Kennedy."

In 1975, Kennedy was strongly supported by then-California Gov. Ronald Reagan and his aide, Meese, when President Gerald R. Ford named him to the U.S. 9th Circuit Court of Appeals. He has written more than 400 court opinions since then and is viewed by colleagues and attorneys as a moderate conservative. Some lawyers in Califor-

nia compared Kennedy's rulings to those of another moderate conservative, former Justice Lewis F. Powell Jr., who created the current vacancy on the high court by retiring in June.

Kennedy is best known in legal circles for a 1980 opinion which concluded that a "legislative veto" by one house of Congress is unconstitutional, a ruling later upheld by the Supreme Court.

In the first appeals court ruling on "comparable worth," Kennedy concluded that women could not sue a state because female-dominated jobs pay lower salaries than jobs typically held by men. "The state did not create the market disparity," Kennedy wrote, and it has no legal obligation to pay women more than the salaries paid in the private sector.

Kennedy has degrees from Stanford University and Harvard Law School and studied for a year at the London School of Economics.

"He is a wonderful, decent, modest man," said his former law clerk, Richard K. Willard, who is now an assistant attorney general. "He is a true practitioner of judicial restraint in that his opinions are narrowly drawn and decide only the case that is before him. He doesn't write sweeping pronouncements."

Unlike Judge Robert H. Bork, who was voted down by the Senate in October, Kennedy has not written extensively or made a host of provocative speeches.

Willard refused to comment on whether Kennedy would be chosen, but he said he doubts that his personal life would cause him the problems that surfaced with Judge Ginsburg.

"He is the original Mr. Clean. A family man, unassuming. I think it will be fairly hard for them to find anything there," Willard said.

Staff writers Ronald J. Ostrow, David Lauter and James Gerstenganz contributed to this story.

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Far More Judicious

In Round 3, Anthony Kennedy offers pragmatic conservatism



eral Edwin Meese, architect of the disastrous Bork and Ginsburg nominations, and Chief of Staff Howard Baker, who had fought all along for a Kennedy-style moderate, made a point of posing together wreathed in grins. The President appealed for "cooperation and bipartisanship" in Kennedy's confirmation hearings and pledged to do his part. "The experience of the last several months has made

powers. In a 1983 dissent, Kennedy argued that a court should admit evidence gathered by police under a search warrant that they believed in "good faith" to be properly executed but that was later found invalid. The Supreme Court eventually ruled his way on both subjects.

Kennedy is conservative enough to have written opinions displeasing some feminists, gay-rights activists and civil libertarians. But students of his career agree that his hallmark is conservatism in a quite different sense: he avoids propounding sweeping doctrines of how to interpret the Constitution. Instead, he often decides cases on the narrowest possible grounds. Says Atex Kozinski, a former Kennedy clerk and now a colleague on the Ninth Circuit bench: "Judge Bork is an academi-

On his third swing at trying to nominate a Supreme Court Justice, Ronald Reagan adopted the strategy followed by many a batter on the verge of striking out: he stopped going for the home run and tried for the political equivalent of a clean single. Rather than again choosing a hard-line ideologue to replace the moderate Lewis Powell, the President last week selected the kind of jurist many of his pragmatic supporters felt he should have chosen at the start. Indeed, he picked the very man they had been urging from the beginning: Anthony Kennedy, a thoroughly experienced appeals-court judge noted both for his mainstream conservative principles and for the open-minded way he applies those principles on a case-by-case basis.



WALKER

After the bruising battles that led to the rejection of Robert Bork and the unexpected withdrawal of Douglas Ginsburg, few liberals or conservatives were in any mood for another knockdown brawl. And, at least at first glance, one seems unlikely. No one could find anything in either Kennedy's Norman Rockwell personal background or his twelve-year record on the Ninth Circuit Court of Appeals in Sacramento that would prevent him from being confirmed as the nation's 104th Supreme Court Justice, and potentially a long-serving one. At 51, Kennedy is young enough to be shaping court decisions well into the 21st century, long after some aging present Justices are gone.

Announcing Kennedy's selection Wednesday, Reagan and his aides put on a show of sweet harmony. Attorney Gen-

all of us a bit wiser," he said. Reminded by reporters of his pledge after Bork's rejection to give the Senate a nominee they would "object to just as much," Reagan shrugged it off as a "facetious remark" made at a partisan gathering.

Kennedy was brief and smooth. Was he "upset" about being Reagan's third choice? "I am delighted with this nomination," he deadpanned, to laughter. Was he concerned about the "intense scrutiny" he would face? Said the judge diplomatically: "I'm looking forward to this scrutiny that the Senate should give any nominee in the discharge of its constitutional duty."

Unlike the hapless Ginsburg, Kennedy offers an extensive record for the Senators to study; as an appellate judge he participated in 1,400 decisions and personally wrote more than 400 opinions. At least two have made legal history. In 1980 he ruled against the so-called legislative veto, a once common practice under which Congress would grant certain authority to the Executive Branch but reserve to itself the right to disapprove particular actions exercising that authority. Kennedy declared that the practice violated the constitutional separation of



DIRCK HALSTEAD

Quiet man from the Coast

By FRANK JACKMAN

Daily News Staff Writer

WASHINGTON—Anthony M. Kennedy is a low-profile judge who has stirred little controversy during his 12 years on the 9th U.S. Circuit Court of Appeals.

President Reagan's nominee for the Supreme Court has participated in more than 1,400 decisions and written more than 400 opinions.

But Kennedy's record is in sharp contrast to Reagan's first recent nominee, Federal Appeals Court Judge Robert Bork, who is a highly visible conservative and an outspoken critic of major Supreme Court rulings of the last several years.

Kennedy is "a Reagan kind of guy,"

said one liberal California colleague, but "he cares about the integrity of the law and...doesn't automatically start by looking at who the parties are and looking to what the outcome of the case (should be)."

A native of Sacramento and the son of a lawyer and legislative lobbyist, Kennedy grew up in the shadow of the California State Capitol, but has never been active in Republican Party politics.

He graduated from Stanford and Harvard Law School and was in his second year with a San Francisco law firm when his father died in 1963. He subsequently took over his father's practice and some of his lobbying clients, including the state's liquor distillers and opticians.

He helmed then-Gov. Ronald Reagan

and aide Edwin Meese to draft a tax-reduction initiative. The Reagan initiative failed at the polls, but it was the model for another tax-cut proposal, known as Proposition 13, which swept the state in 1978.

The successful legal practice led to his appointment by President Ford to the appeals court in 1975.

Senators who must vote on his nomination pointed favorably to Kennedy's years of experience on the bench.

"He seems on the surface like a mainstream conservative justice whom I can support," said Senate Judiciary Committee Chairman Joseph Biden (D-Del.), "but I'm going to withhold final judgment until I know a lot more about him. Obviously, we have learned it's not wise to be hasty in these nominations."

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