ANTHONY KENNEDY

Like all the candidates, Judge Kennedy's opinions generally reflect judicial restraint, classically defined. Unlike some other candidates, Judge Kennedy has published few legal articles and has never expressed any general judicial philosophy. Moreover, Kennedy has had the misfortune to serve in the Ninth Circuit, probably the worst court of appeals in the country. Accordingly, he has had to deal with bad precedent and was probably deterred from writing bold, conservative opinions for fear of losing his panel majority or being reversed en banc. Further, his natural tendency is to narrow the scope of issues presented by a case and to avoid constitutional questions. Accordingly, his philosophical moorings remain an unknown quantity to a large extent.

Although the large bulk of Kennedy's work during his eleven years on the Ninth Circuit has been quite good, he has had few real gems and an occasional significant misstep. In a case involving the Navy's regulation of homosexual conduct, Kennedy, although grudgingly upholding the regulations, spoke very favorably of constitutional "privacy rights" and formulated the rationale for validity very narrowly, thus giving the most limited possible effect to the Supreme Court precedent that had upheld a state's criminalization of homosexual conduct. Kennedy also stretched to expand the Supreme Court's "one-man, one-vote" decisions in the face of inconsistent precedent and argued that such constitutional rights of participation might ebb and flow with changed material circumstances. Further, Judge Kennedy has strongly suggested that there is a substantial limitation on Congress' substantive authority over the appellate jurisdiction of the Supreme Court. Finally, Kennedy joined an opinion which upheld employment goals imposed under Executive Order 11246 and accepted unquestioningly the theory of "underutilization".

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Judge Kennedy is 49 years old. Before being appointed to the Ninth Circuit in 1975, he had pursued a general litigation practice in a small firm in California and taught part-time at the McGeorge School of Law. He received his law degree from Harvard in 1961.

U.S. Department of Justice

Office of Legal Policy

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Washington, D.C. 20530

MEMORANDUM

May 23, 1986

TO: Special Project Committee

FROM: Steve A. Matthews

SUBJECT: Judge Anthony M. Kennedy */

This memorandum discusses the body of work of Judge Anthony M. Kennedy since his appointment to the United States Court of Appeals for the Ninth Circuit in 1975. The discussion is based on a complete reading of all opinions authored by Judge Kennedy in the last eleven years (through about March 15, 1986) and a reading of selected cases in which Judge Kennedy was a member of the panel but did not write. (Those cases were selected on the basis of a review of the electronic database headnotes for each case in which Judge Kennedy participated.)

Judge Kennedy is recognized as one of the more conservative members of the Ninth Circuit. The fairly high percentage of his opinions that enjoy unanimous support from the panel would indicate that he is an effective leader and politician on the court as well. Since the Ninth Circuit is a predominantly liberal court, Judge Kennedy may have been required to restrict some of his opinions in order to gain a majority or to insulate his decisions from en banc review. Statements made below about weakness or confusion in some of his opinions should be taken with that grain of salt. Judge Kennedy is now 49 years old.

Judge Kennedy is generally very careful to confine his opinions to a discussion of those points necessary for deciding the case at hand. Moreover, those discussions are generally tailored fairly narrowly to the facts of the case. Consequently, it is not possible to provide, in his own voice, any explication of basic principles that Judge Kennedy has followed or would follow. Instead, one can speak only of tendencies discernible in his opinions. Even so, those tendencies are not monotonic.

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*/ This memorandum does not yet reflect Richard Willard's comments. He is reviewing a substantially identical earlier draft.

Rather, for any general trend, there are usually several counter-examples. The foregoing observations, in combination, make it difficult to say whether the tendencies described below accurately reflect Judge Kennedy's jurisprudence or whether they simply reflect the luck of the draw in his having participated in certain cases rather than in others for which the counter-examples might be more symptomatic. With that caveat, Judge Kennedy's opinions may be described as follows.

One tendency that manifests itself in several particular aspects is toward judicial restraint, classically defined. Judge Kennedy usually will narrow the scope of the issues involved, will narrow the announced rule, will avoid constitutional issues, will circumscribe the scope of review of lower court or administrative decisions, will follow precedent, and will be careful to avoid intruding on other centers of authority such as administrative bodies or states.

Take, for example, the avoidance of usurping the legislative/administrative role. In Arizona Socialist Workers v. Culbertson (10 */), Judge Kennedy was part of the unanimous panel which held that a district court could not reformulate an unconstitutional law so as to make it constitutional. Likewise, in United States v. Bell (68), Judge Kennedy noted that a poorly drafted jurisdictional exception would have to be revised by Congress rather than by the court. On the other hand, in NLRB v. Circle A&W (192), Judge Kennedy ruled that the administrative agency should have performed a balancing test before reaching its decision but then went ahead and upheld the agency's decision after himself performing the balancing test. A dissent in that case would have remanded so that the agency could investigate the facts and perform the balancing test.

Or consider the examples with respect to deference to state law. On the one hand, Judge Kennedy was able to write the following strong paragraphs in his dissent in Ostrofe v. Crocker (11):

> This sensitive development in the [state] law of employer-employee relations should not be pretermitted by heavy-handed interference from the federal courts in the name of enforcing laws designed only for protecting the nation's competitive economic system.
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> I do not believe federalism is destined to fail, but neither is its continuance

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*/ Cases are identified in this memorandum by the number of the document where they appear in the notebooks on Judge Kennedy.

> necessarily assured. If it does disappear, it will be primarily because those charged with enforcement of federal laws cannot resist the temptation to expand their jurisdiction to the outermost limits of abstract logic, even where history and common sense tell us the independent processes of our state systems are sufficiently vital to afford all the protection needed against certain evils. The decision of the court here illustrates that failing, and I dissent from the opinion and the judgment.

On the other hand, in Vanelli v. Reynolds School District (5), Judge Kennedy incorrectly ignored the decision of the highest state court to have ruled on an issue in concluding that there was a property interest involved under Oregon state law in the context of a teacher dismissal. He also ignored the Oregon statutory rules for dealing with that "right", even though those rules would have established the perimeter of the right. Also, in Usery v. Lacy (187) Judge Kennedy upheld the applicability of OSHA regulations to what should have been a state law matter. Here, again, there was a very effective dissent that would have been a majority had Judge Kennedy supported it.

Darbin v. Nourse (301) is a good example of an appropriately narrowed rule. On the other hand, in United States v. Alpine (357) Judge Kennedy incorporated into the rule a dynamic concept. Having any judicially reviewable standard depend on a dynamic factor will, of course, allow for continuing judicial influence or control over what should, in the context of that case, have been a primarily administrative or legislative matter -- the allocation of scarce resources in a non-free market environment. See also, with respect to the use of a dynamic concept in describing a judicially reviewable standard, James v. Ball (4), discussed more fully below.

On another aspect of classical judicial restraint, Judge Kennedy several times avoided reaching a constitutional issue. See Gutierrez v. INS (29), Topic v. Circle Realty (50) and Robbins v. Cardwell (94).

One last aspect of classical judicial restraint is the meticulous observance of the rules of litigation, particularly with respect to standing, jurisdiction and statutes of limitations. Judge Kennedy, in the the several cases where the issue was presented, was careful to distinguish subject matter jurisdiction from either personal jurisdiction or standing. While there were one or two instances in which standing may have been doubtful, Judge Kennedy usually discussed these issues very ably. Particularly with respect to statutes of limitations, Judge Kennedy was quite firm. See, for example, Amella v. United States (42), Owens v. United States (43) and EEOC v. Alioto (52). Indeed, in once instance, Judge Kennedy quite properly held to a

rigid enforcement of the Speedy Trial Act, even though the very unfortunate result was the certain escape of the leading figure in a major international drug smuggling ring, United States v. Tirasso (131). On the other hand, Judge Kennedy ignored what seemed to be a very clear statutory provision to extend the period for filing an employment discrimination action to six or seven times the statutory period. See Lynn v. Western Gillette (51).

There is also some tension within Judge Kennedy's opinions in the context of another one of the classic terms of the debate over the appropriate judicial role -- "result-oriented jurisprudence." For example, in two cases, despite the presence of very sympathetic plaintiffs, Judge Kennedy enforced the somewhat harsh rule required by law. See Aitken v. Retirement Fund (183) and Riplinger v. United States (343). On the other hand, in two cases that were probably correctly decided on the basis of law, Judge Kennedy insisted that the decision reached was necessary because a contrary decision would simply have been unfair. See NLRB v. Apollo (207) and Allen v. Greyhound (236).

Another important criterion for evaluating Judge Kennedy's jurisprudence concerns the sources of authority to which he looks in deciding a case. Two of Judge Kennedy's opinions are noteworthy specifically for the fact that, in hard cases, they looked to precisely the right kinds of sources. In Chadha v. INS (1) Judge Kennedy examined the structural relationships among the various branches of the federal government to determine a separation of powers issue and in Oliphant v. Schlie (344; Judge Kennedy dissented in this case and the holding was subsequently reversed by the Supreme Court) he looked to historical sources to determine the jurisdiction of an Indian tribe over a non-Indian. On the other hand, Judge Kennedy sometimes gives entirely too much weight to statements of legislative history, including in some instances subsequent legislative history. See FTC v. Simeon (215) and United States Stewart (329). Indeed, in one instance, Judge Kennedy held that legislative history had the force of statutory law and was binding on the implementing administrative agency. See NLRB v. HMO (196).

A large part of Judge Kennedy's jurisprudence is a reliance on precedent. These instances are, of course, of little interest except when the facts of a case are such as to allow for the expansion or contraction of a precedential rule and in such instances, Judge Kennedy has a mixed record. First, the good news. In Topic v. Circle Realty (50), Judge Kennedy correctly ruled that an unincorporated association and three individuals did not have standing to bring an action under a particular provision of the Fair Housing Act for an injunction against racial "steering" by real estate brokers, even though the Supreme Court had allowed an action for a similar injury by residents of an apartment complex against their landlord based on another section of the Fair Housing Act. And in Fisher v. Reiser (359), he declined to expand the right-to-travel cases to require a

state to provide benefits to former residents. See also United States v. Shreve (76), United States v. Gallegos-Curiel (77) and United States v. Gardner (90).

The entries on the other side of this particular ledger are, however, more serious. In Beller v. Middendorf (2), a case involving the validity of naval regulations prohibiting homosexual conduct -- the same issue subsequently decided by Judge Bork in Dronenburg v. Zech -- Judge Kennedy somewhat grudgingly upheld the validity of the regulations. He spoke very favorably of "privacy rights" and formulated the rationale for validity very narrowly, thus giving very narrow scope to Supreme Court precedent that upheld a state's criminalization of homosexual conduct. Also, in California Medical v. FEC (3), Judge Kennedy wrote the majority opinion in a 5-4 en banc decision (Judge Wallace, inter alios, dissenting) which expanded the Buckley v. Valeo distinction between direct expenditures and contributions to candidates by analogizing contributions to political committees more closely to contributions to candidates (non-speech) than to direct expenditures (speech). (The Supreme Court subsequently affirmed the Ninth Circuit's decision, also in a 5-4 vote. The breakdown was Marshall, Brennan, Stevens, Blackmun and White in the majority to affirm Judge Kennedy's opinion; Burger, Rehnquist, Powell and Stewart in the minority, arguing that the case had not been appropriately before the court of appeals and not reaching the merits.) It is worth noting that, had Judge Kennedy voted with the dissent, he could have established a majority for the highly defensible proposition that contributions to political action committees involve speech so that regulation of such contributions would require strict scrutiny. (That part of the ruling could have survived the Supreme Court's decision since Justice Blackmun, part of the Supreme Court majority, based his decision on a finding that the regulatory lines were drawn with sufficient narrowness.) Instead, Judge Kennedy read the Supreme Court precedents so as to avoid challenging the congressional decisions embodied in the Federal Election Campaign Act. Again, in James v. Ball (4) Judge Kennedy expanded the "one-man, one-vote" rule of Reynolds v. Sims by writing the majority opinion for a split panel that distinguished a Supreme Court precedent which had recognized an exception to that rule on facts very similar to the ones in the case before Judge Kennedy. This is a very troubling decision in a number of ways. (Judge Kennedy also indicated an uncritical acceptance of Reynolds v. Sims in McMichael v. County of Napa (302). But see Aranda v. Van Sickle (54), in which Judge Kennedy, after some hesitation, concluded that the particular plaintiffs were not entitled to an electoral system that assured the election of persons who shared the plaintiffs' ethnic background.) Judge Kennedy also expanded bad precedent or contracted good precedent in Western Waste v. Universal Waste (18) and United States v. Rubalcava-Montoya (107).

The discussion so far has centered on the appropriate role and activity of a judge. The remainder of this memorandum will

deal with two broad substantive areas of law, the first being the law of intergovernmental relations and the second being the law of government-citizen relations.

On separation of powers questions, Judge Kennedy's record is again somewhat mixed. Generally, he seems to favor the judiciary in any contest between the judiciary and another branch. See, for example, Pacemaker v. Instromedix (6), G.I. Trucking v. United States (239) and Agana Bay v. Supreme Court (305). Judge Kennedy's opinion in each of those three cases has one or more substantial weaknesses. Agana Bay, in particular, is troubling insofar as Judge Kennedy there suggested a substantial limitation on any substantive congressional authority over the appellate jurisdiction of the Supreme Court. On the other hand, see Topic v. Circle Realty (50) in which Judge Kennedy, in an aside, refers to some undefined constitutional limits on the authority of federal courts. In the only major case involving a legislative-executive conflict Chadha v. INS (1), Judge Kennedy looked to the right sources and reached the right result although his discussion in this admittedly very difficult case was weak in some respects.

With respect to structural tensions between the federal government and the states, Judge Kennedy usually came down on the side of the federal government. In United States v. Helsley (8), Western Waste v. Universal Waste (18) and Usery v. Lacy (187), mentioned above, Judge Kennedy took a practically unlimited view of congressional authority under the commerce clause. And in United States v. Oregon (285), Judge Kennedy upheld a district court's injunction against an allegation that it improperly interfered with Indian treaty fishing rights by stating, "if states can regulate treaty fishing in the interest of conservation, then, a fortiori, a federal court with jurisdiction over all parties may do the same." Of course, it simply is not the case that federal courts can do anything states can do. On the other hand, see Ostrofe v. Crocker (11), discussed above.

With respect to government-citizen relations, there are three substantive areas: civil rights, criminal rights, and novel claims of constitutional protection. Before turning to those, there is one analytical issue that should be mentioned. Judge Kennedy is usually very careful to consider the important question of who enjoys a right or who has the ability to assert it. See Pacemaker v. Instromedix (6), Ostrofe v. Crocker (11), Fine v. Barry and Enright (19), Topic v. Circle Realty (50), United States v. Medina-Verdugo (88), United States v. Peele (120) and United States v. Humphrey (127). In only one case did Judge Kennedy fail to spot the importance of this issue, United States v. Hodge and Zweig (256).

On the first substantive issue -- civil rights -- Judge Kennedy is generally quite good. He frequently emphasizes the importance of intent in discrimination. See, e.g. Topic v. Circle Realty (50), Flores v. Pierve (53) and Fadhl v. San

Francisco (58). In Spangler v. Pasadena (49) Judge Kennedy wrote that a court should relinquish jurisdiction when the effects of a prior constitutional violation have been remedied and there is no continuing violation. He wrote further (anticipating the decision in Norfolk by seven years) that there is no constitutional obligation to maintain a particular racial mix in schools; the obligation is only to refrain from segregating schools according to race. And in AFSCME v. Washington (308), Judge Kennedy wrote a strong opinion rejecting the doctrine of comparable worth.

There are only two debits on the books here. In Bates v. Pacific Maritime (57), Judge Kennedy wrote for a unanimous panel imposing quotas on an employer. In that case, however, the only issue was whether the employer was a successor corporation bound by a prior consent decree. The validity of the quotas were not before the court. Less easily dismissed is the panel decision in Legal Aid v. Brennan (322; Judge Kennedy participating but not writing) in which employment goals imposed under Executive Order 11246 were upheld as not discriminatory and in which the theory of underutilization was accepted.

Judge Kennedy's track record in the field of criminal rights is also generally quite good with an occasional exception. Judge Kennedy's usual rule here seems to be that the constitutional standard requires that law enforcement activity be reasonable and that a defendant receive a fair trial rather than an error-free trial (see, e.g., United States v. Shreve (76), United States v. Hillyard (79) and United States v. Sledge (87). As counter examples, however, see United States v. Jones (78), United States v. Rubalcava-Montoya (107), United States v. Rettig (111) and United States v. Penn (165).

The final category involves novel claims of constitutional protection and this category presents some of the most disturbing aspects of Judge Kennedy's jurisprudence. Judge Kennedy's best effort in this context was Fisher v. Reiser (359) in which he held that a workers compensation beneficiary, who moved outside of the state providing the benefits, was not entitled to cost-of-living increases provided to instate beneficiaries. This was despite a claim that the denial of those increases restricted the right to travel. On the other side are decisions such as James v. Ball (4), in which Judge Kennedy not only applied the "one-man, one-vote" rule in a context where the Supreme Court had found it inapplicable but argued that such constitutional rights of participation might ebb and flow with changed material circumstances, thus providing a rhetorical background for the recognition of other new rights later on; Vanelli v. Reynolds (5), in which Judge Kennedy recognized a due process right based on a probationary employee school teacher's "property interest" in the job from which he had been dismissed for sexual misconduct with students; and Beller v. Middendorf (2) in which Judge Kennedy very grudgingly upheld the validity of naval regulations prohibiting homosexual conduct. In Beller Judge Kennedy not only stated the rule much more narrowly than either the Constitution

or precedent required, he cited Roe v. Wade and other "privacy right" cases very favorably and indicated fairly strongly that he would not uphold the validity of laws prohibiting homosexual conduct outside of the context of the military. This easy acceptance of privacy rights as something guaranteed by the Constitution is really very distressing.